Short reflections on the ICJ's whaling case and the review by International Courts and Tribunals of 'Discretionary Powers'

KOLB, Robert


Available at: http://archive-ouverte.unige.ch/unige:92921

Disclaimer: layout of this document may differ from the published version.
Short Reflections on the ICJ’s Whaling Case and the Review by International Courts and Tribunals of ‘Discretionary Powers’

Robert Kolb

Roughly speaking, judicial review of legal determinations made by judicial bodies is of two types. The first is the review of the correct interpretation to be given in a particular case to ensure the law’s full and proper application. Such scrutiny occurs in all cases where the point at issue is the correct interpretation and application of a point of law, such as the construction of a legal term contained in a statute or in a treaty. The tribunal seized will ascertain what the correct meaning of the word was meant to be and will make its own determination unfettered by any other body’s determination on the same point. Second, there are some situations where the law accords to an entity, be it an administrative body or a state, a certain measure of discretion in the determination and characterisation of elements of fact or law. This arises notably in relation to decisions as to a proper course of action in complex and changing circumstances. The degree of scrutiny by a tribunal will in such cases be restricted, so that the autonomy which the law affords the original decision-maker is not undermined. The key notion here is that of restricted or limited oversight. The extent to which it is, or ought to be, limited varies significantly from one legal system to another and from one legal subject matter to another. It stands to reason that the degree of judicial scrutiny is not necessarily the same in different contexts. For instance, internationally, review of administrative acts concerning a staff member of an international organization (reviewed by an international administrative tribunal), will differ from the oversight of UN Security Council resolutions, to the extent that review of the latter is possible under current international law.

In developed systems of municipal law, review of a public administration’s exercise of discretionary powers normally turns on the following points, which, because of the essential unity of legal reasoning, are also to be found in international law, albeit to a varying degree and in different complexions. First, if a remedy is applied to an administrative act within the hierarchy of administrative organs, by seizing the higher one in regard to a legal act of a lower one, the review’s reach over the discretionary power is generally quite broad. The scrutiny will here encompass essentially two aspects. The first relates to the excess or to the abuse of power (see

---

* Professor of International Law at the University of Geneva.
1 That such scrutiny may indeed occur has been shown by the case Prosecutor v Tadic (Jurisdiction) (1995) 105 ILR 420 (‘Tadic Case’).
the second relates to the propriety of the chosen action: was the most appropriate course of conduct chosen considering the circumstances? Was the solution retained the most appropriate one? Second, if a tribunal can issue a remedy, the scrutiny of the exercise of discretion is limited. The judge will focus only on the first point mentioned above; namely, the excess or abuse of power, and will normally not venture into questions of propriety of action, which are left entirely to the oversight of the administration, which is better able to appreciate questions that are more of fact than of law.

‘Excess of powers’ can be of different types. First, there is an excess of power if the organ has claimed a discretion where the law accorded it none. Second, it bears on measures which go beyond an accorded discretion: there would be an excess of power if the organ decides on a basis which the legislator has not allowed. This question turns on the correct interpretation of the law and may therefore be fully scrutinised by a court of law. The same is true if the decision-maker has taken into account factors in the decision-making process which it ought not to have considered, since such factors are not allowed to influence the assessment pursuant to the habilitating norm found in the law. Another form of ‘excess’ is the failure to exercise a discretion when it is accorded, or not exercising it to the extent that the law requires. This is a negative excess of power, but it is still an excess, and it can be reviewed.

Further, there is the concept of ‘abuse of power’. Its main component is the so-called détournement de pouvoir (akin to improper purpose) or the exercise of a discretion contrary to the aim of the law. If a discretionary power is used in order to achieve a result that is compatible with the letter of the law but not compatible with its aim, there is a censurable abuse of power. This principle may not be accepted as such in the common law system but might nonetheless play a role through the process of interpretation. The abuse can also consist in the breach of principles of constitutional law or of justice. Thus, the exercise of a discretionary power can be flawed if the principle of equality of the law is adversely affected, by for instance, exercising the discretion in contradictory ways in the absence of reasonable grounds for doing so. The same would be true of the exercise of a discretion in a way that produces disproportionate results or is arbitrary (that is, based on reasons which are materially unsustainable). Finally, there is also an abuse of power when certain procedural principles have been breached. Thus, if all the relevant factual circumstances have not been taken into account and weighed up; if the decision is insufficiently reasoned; if the parties affected by the decision have not all been heard; then the exercise of the discretionary power will be legally defective and the term abuse of power may be used to characterise the defect at issue. It is not suggested here that all these aspects apply in all areas of international law. This legal order is still in some measure underdeveloped as regards judicial scrutiny of state acts or those of international organisations. The suggestion is only that this is the palette from which lawyers can draw when such issues are discussed under international law.

Some aspects of the International Court of Justice’s (ICJ’s) Whaling Case (2014) bear on the review of discretionary powers; the decision representing in this respect a culmination of the Court’s prior case law on the topic. The facts of the case are known. The point at issue here is treated in paragraph 51ff of the judgment.
concerning the interpretation of Article VIII(1) of the 1946 International Convention for the Regulation of Whaling. The Court considered that Article VIII confers on the state parties a discretionary power to accord or to refuse a permit to capture or kill. However, there is one element in which the concerned state’s appreciation cannot on its own be decisive; namely, whether a particular request is for scientific purposes, which is an objective condition for the delivery of a permit under the Convention (para 61). In order to review the exercise of that power, the Court adopted an objective standard; it did not confine itself to verifying subjective aspects: the absence of bad faith. In other words, it considered whether the measures taken were reasonable with regard to the declared objectives (para 67). This had a consequence for the burden of proof. For the ICJ, it is incumbent on the state having delivered the permit to show to the Court’s satisfaction the objective elements on which it could found its conclusion on the scientific nature of the enterprise (para 68). The Court then engaged in its review and found that several elements demonstrated that the scientific character of the campaign had not been established with the required degree of care. First, there was apparently an insufficient verification as to whether non-lethal measures might be adequate for the scientific purposes pursued (para 137). This amounted to a review of the necessity of the measures, in other words, of their overall proportionality. The verification should have all the more taken place when considering the recommendations of the Commission created under the Convention. Second, the Court found that there was a considerable extension in the number of lethal captures of certain species, whereas the scientific objectives had not seemed to have changed (para 147ff). It was therefore unclear how these additional captures could have been justified under the concept of scientific research. Third, the reasonableness of the captures was cast into doubt by different factors (para 177ff); namely, the highly varying time frames of the capture programs, which was hardly compatible with scientific rationalisation; the low figures of capture of certain species, which would not allow scientifically valid conclusions; the lack of transparency as to the catch quota; the fact that the most important captures occur on the species most in demand for commercial purposes; the absence of any limitation in time for the programs, which is unusual for scientific research; the scientific outcome of the programs in terms of articles or publications were more than modest to date; the program had not given rise to national and international scientific cooperation, as would have been expected for a scientific program. Many of these aspects relate to questions of ‘abuse of power’ as defined above: the gist of the matter being the use of a discretionary power in order to pursue an aim not allowed by the law (commercial capture rather than scientific research). The issue of détournement de pouvoir was the key element in the Court’s finding. There was also the breach of procedural principles, notably the lack of transparency or the insufficient taking into account of all relevant factors.

The treatment of the matter by the Court allows for the following short comments. First, in paragraph 61, the Court seems to distinguish between two limbs: a discretionary power relative to whether whaling is or is not allowed; but at the same time a non-discretionary power as to the element of ‘scientific research purposes’, which amounts to a legal requirement under Article VIII to be fully verified by the Court (see above, p 135 [at paragraph 1]). Overall, the formulation of the key
paragraph, paragraph 61, is somewhat ambiguous. It suggests that Article VIII confers on Japan a discretionary power as to the licensing of captures (lethal or not), but that its unilateral characterisation cannot prevail in relation to the question of whether the particular program really pursues scientific purposes. This formulation suggests erroneously that legal scrutiny by the ICJ can only occur with regard to the second question, which is a question of the correct interpretation of a legal element contained in the Convention, and not on the first aspect, because it would be a discretionary question. It stands to reason however, that a discretionary power can be scrutinised by a Court of Justice, even if in a limited way. Overall, the Court’s conclusion need nonetheless not be wrong. Article VIII could well leave the question as to whether to allow such catches (besides the crucial question of scientific research) to the sole determination of Japan, this being a simple question of appropriateness, which tribunals do not review (on which see the developments at p 135 [in paragraph 2] above). The suggestion would thus be that review of the exercise of powers is limited to questions of law and does not venture into questions of propriety or appropriateness. Another way to reach the same result would be to consider that the Convention has left the first limb of the question to the internal law of the states parties, and that internationally, it has limited the power of the states only with regard to the question of scientific purpose. In such a case, the scrutiny would be limited to the sole element available under international law, which is the legal order over which the ICJ has jurisdiction (Article 38 of the ICJ Statute). Nonetheless, the somewhat uneasy formulation of paragraph 61 remains.

Second, it will be noted that the Court does not exclude the subjective standard of review (bad faith) but rather concentrates on the objective one (reasonableness, probably to the exclusion of appropriateness). The subjective standard would indeed be too narrow. It would require the Court to enter into delicate questions as to the state of mind of the State officials, where moreover no clear evidence could be obtained. The result would be a severe curtailing of the power of review, to the point of rendering it nugatory altogether. This statement by the ICJ is in line with international case law on the oversight of powers exercised by states or other entities (see below). It has however to be noted that certain judges were in favour of narrow, subjective oversight. This was the case of the Japanese Judge Owada, in his dissenting opinion (para 19ff). He argued that the Court’s scrutiny should be limited to bad faith or manifest abuse. Since in international law the good faith of states is presumed, the burden of proof would lie exclusively on the claimant to show that Japan used its powers in a way that crossed the threshold of bad faith. This was certainly a skilful way of avoiding any negative consequences for his own national state.

Third, the Court insisted on the burden of proof resting with the state allowing the catches. This state is to show that decision to grant permits was based on objective elements, thereby buttressing the necessary link to the scientific purpose. As much as the ‘bad faith’ standard implies essentially a reversal of the burden of proof on the claimant, so does the objective standard cast the burden on the acting state, which will normally be the defendant. Since this latter state has to claim that the measures taken were a reasonable exercise of its powers, it bears the burden to prove this contention. But this is only half of the story. In the concrete circumstances, both states, the claimant and the defendant, will advance contentions as to the subject matter. The
licensing state will insist on the reasonable exercise of its powers and the anti-licensing state will cast this into doubt. Each one of the states confronting each other will thus bear the burden of proof for the concrete contention it advances. However, and this has to be keenly noted, according to the formulation of the Court, the ultimate risk lies on the state delivering the permits. If it does not satisfy the Court of the reasonable nature of its action, the Court will find against it. This may seem to be an excessive limitation of what is in essence a sovereign power of the state, even if it is limited by an international convention. But apart from the fact that a conventional limitation is to be taken seriously, there remains the forensically essential aspect that only this state knows its own practice with the requisite detail to be able to administer the proof required. It may be expected from a well-organised state that it keep records in such a way as to be able to lay out in a satisfactory way the reasons for its action if it is challenged by another state.

Not all judges shared this approach of the Court. As already pointed out, Judge Owada favoured a narrow and subjective approach, centred on bad faith, garnished with the reverse presumption of good faith and a quite exacting burden of proof to be overcome. As he emphasised, the good faith of a state cannot be lightly impugned (see para 19ff). This approach was further buttressed by the fact that according to Judge Owada the Court has to exercise self-restraint also with regard to the definition of scientific matters, which are not of its ordinary competence (para 37). Overall, for Judge Owada, the Court erred in adopting an objective standard, which allowed it to make a de novo assessment of the Respondent’s activities. It thereby ignored the basic rule under the 1946 Convention, endowing the state with the power of primary and discretionary appreciation (para 38). Judge Abraham, for his part, thought that Australia’s pleas culminated in the idea that Japan acted in bad faith and that it was dissimulating its true purposes. For such a plea, the burden of proof should lie on the alleging party; the presumption in favour of the defendant being quite strong (para 28). In his view, there were no particularly solid grounds for rebutting that presumption, but only weak arguments, mere doubts, suppositions or approximations (para 29). The present writer has a diametrically opposite view of the facts. The commercial outcomes of the Japanese campaigns are notorious. Judge Yusuf doubted the legal solidity of the ‘objective and reasonable’ test (para 15). The Court should have focused on the lawful use by Japan of its discretionary power under Article VIII, limiting itself to the interpretation of the treaty (para 17). Judge Xue, in her Separate Opinion, considered that Japan should benefit from a presumption as to the scientific nature of its program and Australia should bear the burden of proof for rebuttal (para 15). But she agreed that the Court might have to ascertain whether the special permits for the program of catch genuinely serve purposes of scientific research (para 17). Some Judges expressly agreed with the objective standard, such as Judge Keith in his Declaration (para 8). Summing up, it may be said that the differences between the Judges concerned mainly two points: (i) should the test be objective (reasonableness) and should the Court venture into ascertaining what is meant by scientific research under the Convention?; (ii) how must the burden of proof be distributed?

It has already been stated that the present commentator believes that the test is two-tier, subjective at its minimum (and if bad faith elements appear to exist), but also objective for the rest. In fulfilling his or her task of interpreting the Convention, the
judge must exercise the full extent of his or her jurisdiction in order to decide if the measures taken by a state conform with Article VIII. This task cannot be fulfilled by the judge limiting him or herself to a subjective test. Moreover, as has already been said, the burden of proof must be shared, but the ultimate risk must lie on the state delivering the permits, since it alone can show how it proceeded. Other states do not have access to the files. *Ad impossibile nemo tenetur.* It must finally be added that contrary to what has been suggested in some opinions, the task of the Court is not to venture into defining what ‘scientific research’ means in general terms. This is indeed not part of its remit. However, since the term ‘scientific research’ is contained in Article VIII of the 1946 Convention, this has become a legal term (or juridical fact). And the Court must interpret this legal term for the purposes of the Convention. It must ascertain what legal meaning the term has in this context, not what is scientific in general terms. There is no way to escape this task, lest the Court not exercise its jurisdiction to its full and proper extent.

International law knows of different systems of review of discretionary powers. There is no space here to give a full account of each of them, but one can at least pinpoint what appears politically to be the two extremes. On the one hand, there is a system based on fully-fledged scrutiny of administrative action, much as in municipal legal systems. This is the case within international organizations, when a staff member contests a decision before an international administrative tribunal. The tribunal will here scrutinize the administrative action and any exercise of discretion as set out above at page 135, paragraph 2, and thus in a way similar to what is done in municipal law by administrative courts and tribunals.3 The analogies with internal law are here more than striking and show once more the fundamental unity of legal phenomena (notwithstanding differences and adaptations). At the other end of the spectrum – at least politically speaking – there is the scrutiny of resolutions of the United Nations (UN) Security Council. This is an organ to which the drafters of the UN Charter intended to give the greatest and most unconstrained freedom in order for it to be able to act swiftly to maintain or restore international peace and security. To the extent that judicial review of Security Council activity takes place, it is common ground that the judge would have to exercise some degree of self-restraint. In legal doctrine, several standards of review have been proposed:4 verification of only manifest irregularity (namely, the proper nexus between the decision and the purposes, and manifest abuse of power); alternatively, more robust scrutiny in advisory proceedings which do not lead to a binding decision, with more deferential scrutiny being exercised in contentious cases; review to spell out areas of non-revisable political discretion, such as the characterisation of a situation as a ‘threat to international peace’; or review to oversee somewhat more closely the breach of fundamental principles of international law; or to define different standards of review for different issues; etc.

---

Short Reflections on the ICJ’s Whaling Case

As is known, two approaches have essentially been adopted in international practice. In the Tadic case (ICTY, 1995), the Appeals Chamber of the Tribunal reviewed directly and incidentally a Security Council Resolution. It scrutinised the Council’s proper application of the Charter law in creating the ICTY. It even mentioned and verified the ‘appropriateness’ of the measures taken, but at the same time emphasised the Council’s very broad discretionary powers, especially in relation to the question of propriety. The substantive law to be applied is here so flexible and gives the Council such wide powers, that the Tribunal’s oversight was overall quite limited. But this was the case not because the Tribunal devised such a low standard of review of the legal issues at stake (interpretation of the Charter); it was the case by reason of the nature of the primary law, which is substantively broad and permissive. The other approach, which was one of indirect and incidental oversight, occurred in the European Union Tribunals (or European Community (EC), at the time) in relation to the Kadi case. While the Tribunal of First Instance limited itself to the review of whether the Security Council had violated jus cogens norms, the European Court of Justice (ECJ) undertook a full review of compatibility with applicable European human rights standards. It has to be noted, however, that the object of review were the legal acts of the EC, adopted in application of the Security Council resolution, not the resolution itself. However, since the legal acts of the EC flowed directly from the resolution, review of those acts implied an indirect review of the resolution itself.

Between these two extremes of international administrative law on the one hand and the Security Council on the other, there is a great area of other actors and discretionary powers, and their related standards of review.

What does the practice of international courts and tribunals reveal about the review of discretionary powers in such other areas? A brief analysis may be offered, but the matter is too broad to be canvassed in meaningful detail here. The overall point that may be elicited is that the various courts and tribunals have privileged objective standards of review over solely subjective ones, which are too narrow to be meaningful. Some examples from the case law may be given.

(a) PCIJ. In the Statute of the Memel Territory Case (Merits, 1932), the Court had to pronounce on the Governor’s right to dismiss the President of the Directorate of Memel, exercising the executive powers over that territory pursuant to an international agreement. The Court reviewed, in particular, whether a measure less severe than the wholesale dismissal of the President could have afforded the Lithuanian Government an ‘adequate protection’. This is an objective test of necessity and proportionality, taking account of all the circumstances. In the Danzig Legislative Decrees Opinion (1935), the PCIJ had to review the exercise of a legislative power, which is by nature

7 One of the leading monographs on the subject matter is still S Jovanovic, Restriction des compétences discrétionnaires des Etats en droit international, (1988).
8 Interpretation of the Statute of the Memel Territory (United Kingdom and ors v Lithuania) (Judgment) [1932] PCIJ (ser A/B) No 49, 326. (‘Statute of the Memel Territory Case’).
discretionary, with regard to principles guaranteed under the Danzig Constitution, which in turn was under the protection of the League of Nations. It engaged in a full review of compatibility and concluded that the local Nazi decrees were not compatible with the liberal principles of the Constitution. The review was by no means confined to bad faith or abuse of power. Conversely, where a particular Constitution has not been guaranteed by an international institution pursuant to an international commitment, the Court has declined to review the exercise of discretionary legislative power with regard to its compatibility with that state’s Constitution.

The issue is outside the Court’s competence pursuant to Article 38 of the Statute, as it concerns municipal law only.

(b) ICJ. In the Conditions of Admission Opinion of 1948, the Court was asked to consider how the exercise of voting (which is in principle discretionary) could be limited by the legal considerations applicable pursuant to Article 4 of the UN Charter. The Court concluded that the voting state could appreciate in a discretionary way the factual circumstances underlying the different criteria mentioned in Article 4 (peace-loving state, willingness to accept the obligations contained in the present Charter, etc). But it added that this exercise should be confined to elements that connect ‘reasonably and in good faith’ with the conditions laid down in Article 4. It has to be added that the good faith test is not necessarily subjective. The good faith principle has its subjective but also its objective layers. In the Norwegian Fisheries Case (1951), the Court expressed itself on whether the straight maritime baselines adopted by Norway were compatible with international law, inter alia on the basis of the criterion as to whether it was reasonable (in the words of the Court ‘moderate and reasonable’). In the Nottebohm Case (1955), a typically discretionary power was at stake: the grant of nationality by a state. In order to decide on the international opposability of the nationality, the Court reviewed the effective connection of the person to the state granting the nationality and the authenticity of the process of naturalisation. The Court did not, contrary to what had been pleaded by counsel for Guatemala, venture into subjective tests as to the bad faith of, or abuse of rights by, Liechtenstein. In the IMCO Committee Opinion (1960), the Court had again to express itself on voting in an international institution. It concluded that the criteria under Article 28 of the applicable Convention imposed an objective criterion on this discretionary activity.

---

9 Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City (Advisory Opinion) [1935] PCIJ (ser A/B) No 65 41 (‘Danzig Legislative Decrees Opinion’).
10 Lighthouses Case (France/Greece) (Judgment) [1934] PCIJ (ser A/B) No 62, 22.
11 Conditions of Admission of a State to Membership in the United Nations (Advisory Opinion) [1948] ICJ Rep 57, 63 (‘Conditions of Admission Opinion’).
12 R Kolb, La bonne foi en droit international public, (2000).
13 Fisheries Case (United Kingdom v Norway) (Judgment) [1951] ICJ Rep 116, 142 (‘Norwegian Fisheries Case’).
namely that the effective tonnage of the fleet should be considered in the election process. In the Elettronica Sicula Case (1989), the ICJ Chamber used a standard of reasonableness when reviewing potentially ‘unreasonable requisitions’ of foreign property. The applicable treaty required the Court to verify whether the requisition was ‘arbitrary’. Further, in the context of measures ‘necessary for the protection of essential security interests’, the ICJ has twice ruled that the taking of such measures, according to a treaty rule, was ‘not purely a question for the subjective judgment of that party’. Its determinations were open to international judicial scrutiny. In the Mutual Assistance Case (2008), the ICJ dealt with a state which had received a request for legal assistance. The Court noted that this state enjoyed a very considerable discretion and went on to recall that the exercise of that discretion is subject to the obligation of good faith understood in the objective sense (linked to pactum est servandum). The scrutiny was confined to whether the reasons for refusal of the assistance fell within those allowed by Article 2 of the applicable treaty. The point was thus reduced to the question of the correct interpretation of a treaty, as was the case in the Whaling Case. Finally, one can also recall the ICJ’s review of administrative tribunals’ proceedings. In the last of these proceedings, the Court affirmed clearly that its test for the review of the administrative decision would be the ‘objective and reasonable’ grounds for the decision.

(c) Arbitration. A few examples drawn from arbitral awards may be added. Some of the older cases concern the expulsion of foreigners, which is a discretionary power of the state. However, this power is limited by the purpose of securing public order – an issue which an international arbitrator may scrutinise. In the North Atlantic Coast Fisheries Case (1910), the Permanent Court of Arbitration tribunal ruled that the regulation of fisheries by the territorially sovereign state – a discretionary right – was limited by its obligation to execute the Treaty of 1818 in good faith with regard to rights of the United States. Thus, its power of regulation was limited to ‘reasonable regulation’. The Tribunal then examined the reasonableness

16 Elettronica Sicula Case (United States of America v Italy) (Judgment) [1989] ICJ Rep 15, 76-77.
18 Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France) (Judgment) [2008] ICJ Rep 177, 229. (‘Mutual Assistance Case’).
20 See Jovanovic, above n 7, 122.
21 North Atlantic Coast Fisheries (Great Britain/United States of America) (Awards) (1910) 11 RIAA 167, 187-188. (‘North Atlantic Coast Fisheries Case’).
of the regulation with regard to different objective criteria.22 The same structure of reasoning can be found in the Lake Lanoux Case (1957). The arbitrators took as a starting point the rule that limitations on territorial sovereignty (that is, limitations on the action of a state on its own territory) cannot be presumed. Thus, they rejected the idea that when undertaking a hydraulic project on one’s own territory the prior consent of another state must be obtained, at least absent a clear provision in the applicable treaty to that effect.23 But the Tribunal then found that the relevant treaty imposed a duty of cooperation with other riparian states. In this context, the Tribunal stressed that France would have to take ‘reasonably’ into account the interests of the other state; and the Tribunal checked that such a reasonable taking into account occurred in the case under consideration.24 In the Filleting within the Gulf of St. Lawrence Case (1986), the arbitral tribunal emphasised that the exercise of the discretionary power of regulation of fisheries (and protection of marine resources or of its local industry) was always limited by the rule of reasonableness. The state must thus calibrate its actions proportionately to the lawful aim pursued and take into due account the rights and liberties accorded by international law to other states.25

In conclusion, one can note that the Whaling Case is a further precedent relative to the judicial scrutiny of the exercise of (discretionary) powers by other entities. It reinforces the degree of such review when a Convention requires the fulfilment of certain objective conditions, especially in areas concerning the protection of certain common goods. The ICJ has shown that it will not simply defer to the sovereignty and to the claims by a state party to a legal regime, but that it will carefully scrutinise the subject matter to the same extent that an administrative tribunal in internal law would do. This is certainly a contribution to the exercise of judicial powers in international law. At the same time, the scope of the judicial scrutiny is still narrow: in the present case it concerned only the scientific purpose of the programs. It can therefore hardly be said that the ICJ has been surreptitiously transformed into an international government of judges. The point is rather that if an international regime has been adopted (and all the more so if it is protective of certain common goods), it should be able to function properly and not be undermined by vested interests under the guise of sovereign and broad discretionary powers.

22 Ibid 189ff.
23 Lake Lanoux (Spain/France) (Award) (1957) 12 RIAA 281, 306. (‘Lake Lanoux Case’).
24 Ibid 316-317.
25 Filleting within the Gulf of St Lawrence (Canada/France) (Awards) 19 RIAA 225, 258-259, para 54.