

REGIONAL FOCUS & CONTROVERSIES

The Whaling Dispute in the South Pacific: An Australian Perspective

Ruth Davis*

In May 2010 Australia commenced litigation against Japan in the International Court of Justice over the legality of Japanese scientific whaling in the Southern Ocean. This article considers the background to the litigation, the basis of Australia's opposition to whaling, and the grounds upon which Australia is mounting its challenge. The interpretation of the 1946 International Convention for the Regulation of Whaling and the operation of the International Whaling Commission are considered in light of the precautionary principle. The article concludes that Australia's success depends upon a broad reading of the Convention that takes into account its objects and purposes, as well as wider developments in international law. Any guidance that the International Court of Justice can provide on the modern interpretation of this now dated Convention is to be welcomed.

Keywords

International Convention for the Regulation of Whaling, Scientific Whaling, Japanese whaling, Southern Ocean, International Whaling Commission, Whaling Litigation

1. Introduction

On May 31, 2010, Australia instituted legal proceedings against Japan before the

* Member of Australian National Centre for Ocean Resources and Security ("ANCORS"); lecturer in the Faculty of Law at University of Wollongong. BEc/LL.B./LL.M.(Sydney). The author would like to thank Quentin Hanich for comments on an earlier draft of this paper. The views expressed, and any errors or omissions, are those of the author. The author may be contacted at: rdavis@uow.edu.au /Address: University of Wollongong, Faculty of Law, Wollongong, NSW 2522, Australia.

International Court of Justice (“ICJ”) on the question of Whaling in the Antarctic.¹ The litigation concerns the second phase of Japan’s Whale Research Program under Special Permit in the Antarctic (“JARPA II”).² Since Australia ended commercial whaling in the late 1970s, it has actively campaigned to put an end to the practice internationally. Australia opposes whaling on a number of grounds and has been dismayed by the escalation of whaling under scientific permit since the introduction of the moratorium in 1982. Australia has worked extensively through the International Whaling Commission (“IWC”) to pursue its conservation agenda and in particular to promote the use of non-lethal techniques for scientific research while seeking an end to lethal scientific research. As diplomatic efforts have so far failed to have any impact on the conduct of JARPA,³ Australia has instituted proceedings in the ICJ to enforce various international legal obligations which, in Australia’s view, are not being met by the continuance of the research program.

The Australian arguments may broadly be divided into two: those based on the 1946 International Convention for the Regulation of Whaling (“ICRW”),⁴ and those based upon other international environmental law agreements. This paper will focus upon the former of these two lines of argument. In relation to the ICRW, the application argues as follows. First, Japan is in breach of its obligation under Paragraph 10(e) of the ICRW Schedule “to observe in good faith the zero catch limit in relation to the killing of whales for commercial purposes.” Second, Japan is in breach of its obligation under Paragraph 7(b) of the ICRW Schedule “to act in good faith to refrain from undertaking commercial whaling of humpback and fin whales in the Southern Ocean Sanctuary.” Third, the JARPA II program “cannot be justified” under the scientific whaling provision in Article VIII of the ICRW.⁵ In addition, the application argues that Japan is in breach of multiple obligations under the Convention on International Trade in Endangered

¹ See Application Instituting Proceedings (hereinafter Australian Application), available at http://www.haguejusticeportal.net/Docs/Court%20Documents/ICJ/Australia%20against%20Japan_Applications%20instituting%20proceedings.pdf (last visited on Oct. 1, 2011).

² See JARPA II Research Plan, available at http://www.icrwhale.org/JARPA_IIResearchPlan.htm (last visited on Oct. 1, 2011). The case concerns JARPA II, Japan’s Antarctic research program, although the application notes that in Australia’s opinion, the northern hemisphere JARPA II program raises similar concerns and is also in breach of Japan’s international obligations. See Australian Application, para. 34.

³ Within the IWC, both Japan and Australia have participated in the discussions of the Small Working Group on the Future of the IWC in 2008. See IWC, Future of the IWC: Meeting of the Small Working Group on the Future of the IWC and associated documents, available at <http://www.iwcoffice.org/commission/future.htm> (last visited on Oct. 1, 2011). Australia has also appointed a “Special Envoy on Whale Conservation whose role is to engage with Japan ... with a view to progressing Australia’s position on Japan’s special permit whaling programs.” See Australian Application, para. 33.

⁴ The International Convention for the Regulation of Whaling of 1946, entered into force on Nov. 10, 1948.

⁵ See Australian Application paras. 36-37.

Species of Wild Fauna and Flora (“CITES”), and the Convention on Biological Diversity (“CBD”).⁶ Australia was required to submit its Memorial by May 9, 2011; March 9, 2012 has been set as the date for submission by Japan of its Counter-Memorial.⁷ A time for oral hearings will then be set. However, it could be several years before a result in the case is handed down.

The ICJ proceedings are the latest phase in an ongoing dispute between Australia and Japan concerning scientific whaling in the Southern Ocean. This paper will attempt to place the litigation in context, providing some background on Australia’s position, an overview of international law as it pertains to cetaceans, and the circumstances that have brought the two parties before the Court.

2. History of Australian Opposition to Whaling

The international litigation must be seen in the context of Australia’s long-standing interest in Antarctica and the Southern Ocean. Whaling and Antarctic exploration were closely linked from the beginning and historically Australia was an important centre for both.⁸ The need for authority to regulate the whaling industry was one factor leading to Australia’s 1933 Antarctic territorial claim.⁹

Australia has had regulations dealing with Antarctic whaling in place since the Australian Antarctic Territory was established in 1933. Both the Whaling Act 1935 (Cth)¹⁰ and Whaling Act 1960 (Cth) had some operation in relation to waters offshore the Australian Antarctic Territory. Prior to the 1978 Frost Report,¹¹ Australia was one of a dozen or so countries still whaling commercially.¹² In 1980, following a change in government policy, whaling regulation was replaced by whale conservation legislation - the Whale Protection Act 1980 (Cth).

⁶ *Id.* para 38.

⁷ Whaling in the Antarctic (Austl. v Japan), Order, 2010 I.C.J. 1 (July 13), available at <http://www.icj-cij.org/docket/files/148/15985.pdf> (last visited on Oct. 1, 2011).

⁸ R.A. SWAN, AUSTRALIANS IN THE ANTARCTIC: INTEREST, ACTIVITY AND ENDEAVOUR chs. 8, 11-15 (1961).

⁹ *Id.* at 208-209.

¹⁰ ‘Cth,’ an abbreviation of ‘Commonwealth,’ denotes legislation passed by the Australian Federal Government.

¹¹ *Infra* note 13.

¹² See generally A Universal Metaphor: Australia’s Opposition to Commercial Whaling: Report of the National Task Force on Whaling (May 1997) (“National Task Force Report”), available at <http://www.environment.gov.au/coasts/publications/whaling/pubs/whaling.pdf> (last visited on Oct. 1, 2011). The National Task Force Report notes that the UK and New Zealand fleets ceased operating around 1963; The US ended commercial whaling in 1972; Canada ceased commercial whaling in 1973 and South Africa ended in 1976. See National Task Force Report, at 60.

Australia's formal policy of opposition to commercial whaling grew out of the 1978 Inquiry into Whales and Whaling ("Frost Report"),¹³ which recommended that Australian whaling should end and that Australia should, furthermore, seek a global ban on whaling. The Australian Government accepted the recommendations of the Frost Report:

The Government upholds the central conclusion of the Inquiry into Whales and Whaling namely, that Australia should pursue a policy of opposition to whaling and that this policy would be pursued both domestically and internationally through the International Whaling Commission and other organisations The Government's decision represents a change in policy from one of conservative utilisation of whale stocks controlled by international agreement to one committed to a vigorous and active policy of protection of whales...¹⁴

By the time the Frost Report was issued, Australia's last whaling station at Cheynes Beach, Western Australia, had already closed. The passage of the Whale Protection Act 1980 (Cth) completed the formal legal arrangements. Since that time, the Australian Government has consistently maintained a policy of opposition to whaling, both nationally and internationally.

In 1996, the newly elected Liberal-National Party Government convened the National Task Force on Whaling to establish if further progress could be made on the international front. The Task Force was to "present options the Federal Government might pursue to end commercial whaling worldwide ... [and] to recommend the strategy most likely to achieve this end."¹⁵ The Task Force made thirteen recommendations in total. While some recommendations relate to bilateral negotiations and to other relevant international fora (including CITES and UNCLOS), the Task Force recognised the primacy of the IWC in relation to whaling and recommended that Australia "continue its membership of and participation in the IWC and its subsidiary bodies, and support the IWC as the primary international mechanism for the conservation of whales."¹⁶ Recognising that "an effective, permanent international ban on whaling" would have to be "considered a long-term goal,"¹⁷ the Task Force recommended that in the interim, among other things, Australia should do as follows:

¹³ Whales and Whaling: Report of the Independent Inquiry Conducted by the Hon. Sir Sydney Frost (2 volumes) (1978) ("Frost Report").

¹⁴ See National Task Force Report, at 2.

¹⁵ *Id.* at 1.

¹⁶ *Id.* at ix. (Recommendation 3).

¹⁷ *Id.* at x.

- strongly support the continuance of the commercial whaling moratorium in paragraph 10(e) to the Schedule;
- work towards establishing a global whale sanctuary through amendment to the Schedule;
- seek to minimise whaling under scientific permit, and ultimately to amend the Convention to prohibit it; and
- resist any attempts to expand permissible aboriginal subsistence whaling activities or to create new categories of permissible whaling.¹⁸

A further recommendation related to leadership in relation to cetacean conservation, “through continued support and encouragement for non-lethal research to address effectively the threats posed to Australian and Southern Ocean whale populations by marine resource exploitation, habitat degradation and environmental change.”¹⁹ Consistent with this recommendation, Australia has been actively supporting non-lethal research techniques. In December 2008, the Federal Government announced an AU\$32 million, six year International Whaling and Marine Mammal Conservation Initiatives Program.²⁰ Important aspects of the program include the Southern Ocean Research Partnership and setting up the Australian Marine Mammal Centre (“AMMC”). The IWC has endorsed the Partnership, which held a planning workshop in Sydney in early 2009 to draft the first five-year Research Plan. The first official research expedition was jointly launched by both the Australian and New Zealand Governments on January 29, 2010, completing six weeks of research in the Antarctic waters to the south of Australia and New Zealand.²¹

3. Unilateral Enforcement of Anti-Whaling Laws?

Australia has in place domestic laws which prima facie apply to Japanese scientific whaling under permit in certain Antarctic waters. Two years after the National Task Force reported, the Commonwealth Government reformed federal environmental law and brought its whale protection legislation within the scope of its new Environment Protection and Biodiversity Conservation Act 1999 (Cth) (“EPBC Act”). The new law

¹⁸ *Id.* at x. (Recommendation 5).

¹⁹ *Id.* at xii. (Recommendation 11).

²⁰ For details, see Australian Department of Sustainability, Environment, Water, Population and Communities International protection of whales, available at <http://www.environment.gov.au/coasts/species/cetaceans/international/index.html> (last visited on Oct. 1, 2011).

²¹ *Id.*

established the Australian Whale Sanctuary, “in order to give formal recognition of the high level of protection and management afforded to cetaceans in Commonwealth marine areas.”²² Among other areas, the Australian Whale Sanctuary applies to the exclusive economic zone (“EEZ”)²³ claimed by Australia in the waters adjacent to the Australian Antarctic Territory.²⁴

The EPBC Act specifies various offences, including killing, injuring, taking, possessing, treating or interfering with a cetacean.²⁵ The application of these prohibitions varies depending upon the location of the relevant offence. Within the Australian Whale Sanctuary, including waters out to 200 nautical miles offshore the Australian Antarctic Territory, they apply both to Australians and to nationals of other countries.²⁶

However, the enforcement of Australian anti-whaling laws in the Australian Antarctic Territory has taken a circumspect approach.²⁷ Although the broadly drafted laws clearly apply, in practice they are not enforced against foreign nationals. This approach to enforcement has been adopted in order to balance the somewhat conflicting goals of preserving Australia’s sovereignty claim over the Australian Antarctic Territory, while acting in a co-operative and collaborative manner within the Antarctic Treaty System.²⁸ In 2004, contrary to this standard practice and taking advantage of third-party standing rules, the Humane Society International took action in the Federal Court of Australia against the Japanese research whalers to enforce the Australian Whale Sanctuary.²⁹ In January 2008, the Humane Society was successful in obtaining a declaration that the whalers were in breach of the relevant law and an injunction against further breaches.³⁰ There has been no opportunity to enforce the decision against the Japanese whaling vessels; it is unlikely that such an opportunity will arise soon.³¹

In proceedings against Japan in the ICJ, however, Australia is not seeking to enforce its own laws against whaling. Japan recognises neither Australia’s claim to sovereignty

²² EPBC Act s 225(1).

²³ *Id.* s 225(2).

²⁴ Proclamation of 26 July 1994 under the Seas and Submerged Lands Act 1973 (Cth) in Commonwealth Gazette No S290, 29 July 1994.

²⁵ EPBC Act ss 229, 229A, 229B, 229C, 229D and 230.

²⁶ *Id.* s 5(4).

²⁷ For details, see R. Davis, *Enforcing Australian Law in Antarctica: The HSI Litigation*, 8 MELBOURNE J. INT’L L. 142 (2007).

²⁸ Humane Society International Inc v. Kyodo Senpaku Kaisha Ltd (2004) Federal Court of Australia, Doc NSD 1519 of 2004, Outline of Submissions of the Attorney-General of the Commonwealth as Amicus Curie.

²⁹ Humane Society International Inc v. Kyodo Senpaku Kaisha Ltd (2004) 292 ALR 551.

³⁰ Humane Society International Inc v. Kyodo Senpaku Kaisha Ltd (2008) FCA 3.

³¹ N. Klein & N. Hughes, *National Litigation and International Law: Repercussions for Australia’s Protection of Marine Resources*, 33 MELBOURNE U. L. REV. 163, 200 (2009).

in the Australian Antarctic Territory, nor its claim to an Antarctic EEZ upon which the Australian Whale Sanctuary there is based.³² Instead, Australia has based its complaint upon alleged breaches of mutually accepted obligations under international law, principally under the ICRW.³³ Before examining the position at international law and details of the alleged breaches, however, it is helpful to consider the basis for Australia's strong anti-whaling position.

4. Bases of Opposition to Whaling

Australia's policy of opposing commercial whaling is based upon several considerations which are discussed at length in the 1997 Task Force Report. Although now over thirteen years old, the arguments outlined in the Report remain as valid today as they did in 1997.

The first argument for opposing commercial whaling is based upon the 'precautionary principle,' a now widely recognised principle of international environmental law. The precautionary principle is found in Principle 15 of the 1992 Rio Declaration³⁴ which requires States to apply a 'precautionary approach' and "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."³⁵ Both the FAO's Code of Conduct for Responsible Fisheries³⁶ and the United Nations Fish Stocks Agreement³⁷ adopt a precautionary approach.

³² *Humane Society International Inc v. Kyodo Senpaku Kaisha Ltd* (2006) FCAFC 116; (2006) 154 FCR 425 (Full Federal Court, at 427 per Black CJ and Finkelstein J). See also Diplomatic Note from the Permanent Mission of Japan to the UN, to the UN Secretary General, regarding Australia's Submission to the Commission on the Limits of the Continental Shelf (Jan.19, 2005), available at http://www.un.org/Depts/los/clcs_new/submissions_files/aus04/clcs_03_2004_los_jap.pdf (last visited on Oct. 24, 2011).

³³ See Australian Application, para. 36.

³⁴ Declaration of the United Nations Conference on Environment and Development, U.N. Doc A/Conf.151/26/Rev.1.

³⁵ See The Bergen Ministerial Declaration on Sustainable Development in the ECE Region, May 16, 1991, reproduced in 20 EPL 100 (1990). Article 7 of the EPL states that: "In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."

³⁶ Code of Conduct for Responsible Fishing, adopted by the FAO Penman-Monteith ("pm"), Oct. 31 1995, available at <http://www.fao.org/fishery/ccrf/en> (last visited on Oct. 1, 2011).

³⁷ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 1995, entered into force Dec. 11, 2001, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N95/274/67/PDF/N9527467.pdf?OpenElement> (last visited on Oct. 1, 2011).

In the context of resolving the dispute between Japan and Australia concerning Southern Bluefin Tuna, the International Tribunal for the Law of the Sea took a precautionary approach when ordering interim protection measures:

77. Considering that, in the view of the Tribunal, the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna;
79. Considering that there is scientific uncertainty regarding measures to be taken to conserve the stock of southern bluefin tuna and that there is no agreement among the parties as to whether the conservation measures taken have led to the improvement in the stock of southern bluefin tuna;
80. Considering that, although the Tribunal cannot conclusively assess the scientific evidence presented by the parties, it finds that measures should be taken as a matter of urgency to preserve the rights of the parties and to avert further deterioration of the southern bluefin tuna stock.³⁸

Applying the precautionary principle to the whaling context, the National Task Force argued that: “Our knowledge of whale stocks, and the inherent weakness of models developed to predict the effects of exploitative activities on those stocks, must lead the world community to adopt the philosophy and practice of the precautionary principle and oppose any commercial whaling activity.”³⁹

The ICRW recognised in its preamble that the history of whaling has been one of repeated overfishing, in one area after another. Even after its inception, however, the IWC was unable to sustainably regulate the industry. The National Task force comments that: “The history of the Commission’s early years was quite dismal from a conservation viewpoint, particularly for whale stocks in the Antarctic. Despite the obvious decline in whale stocks, catch limits, based on Blue Whale Units rather than on individual species, were maintained at far too high a level at the insistence of whaling nations, which simply reflected the demands of their whaling companies.”⁴⁰ The problem was so urgent that in 1972 the United Nations Conference on the Human Environment passed a resolution asking the IWC to impose an immediate ten year moratorium on commercial whaling; however it was another ten years before the IWC was able to achieve that goal.⁴¹

In addition to regulated whaling, the National Task Force was very concerned with

³⁸ Southern Bluefin Tuna Cases (N.Z. v. Japan; Austria v. Japan) ITLOS, Aug. 27, 1999 (Provisional Measures), 38 I.L.M. 1624, 1634.

³⁹ See National Task Force Report, at 7.

⁴⁰ *Id.* at 18.

⁴¹ *Id.* at 19.

the extent of illegal and unreported whaling activity that was taking place. It referred, among other instances, to the significant and systematic underreporting of catches by the former Soviet Union,⁴² before concluding that:

The precautionary principle, these figures and the inability of international regimes to monitor and control even authorised behaviour all add weight to the compelling argument for a total ban on commercial whaling.⁴³

The Australian policy is also based in part upon ethical considerations. The National Task Force Report discussed the dynamic nature of ethics, the growth of the animal rights and animal liberation movements, and the widespread acceptance of regulations preventing cruelty to animals, limiting their exploitation, controlling their treatment in zoos or for experimentation, and promoting their conservation. Even putting to one side the arguments made by some ethicists in favour of the special status of whales, the National Task Force argued that the cruelty of killing methods alone was a sufficient ethical consideration to justify an end to whaling.

One of the marks of our maturing levels of ethical concerns for other living creatures has been our sensitivity to the way in which animals are killed when they must be. After examining all the evidence to it the Task Force has concluded that there is simply no humane (and thus potentially acceptable) way of killing whales. All forms of whale killing involve unacceptable cruelty and barbarity. They involve a form and degree of pain, anguish, agony and suffering which, in the opinion of the Task Force, should not be tolerated or accepted by anyone.⁴⁴

A third basis for Australia's opposition to commercial whaling is that it is no longer necessary for the provision of food or other resources. Modern substitutes have been found for whale oil, whalebone and ambergris so that these once-valuable commodities are no longer required.⁴⁵ The only requirement that whaling could now satisfy is in the production of whale meat for food. While acknowledging international debates concerning food security, and the important role of sustainable fisheries in the provision of food, there is little evidence to suggest that whale meat is necessary for human consumption. For example, although the Task Force's statistics are outdated, they show a dramatic decline in the consumption of whale meat in the Japanese market.⁴⁶ In 1985,

⁴² See also Phil Clapham & Yulia Ivashchenko, *A Whale of a Deception*, 71(1) MARINE FISHERIES REVIEW 44 (2009).

⁴³ See National Task Force Report at 8.

⁴⁴ *Id.* at 11.

⁴⁵ *Id.* at 12.

⁴⁶ *Id.* at 14 & app. 4.

consumption of whale meat was a tiny 0.017% of the total fish products consumed by the Japanese domestic market.⁴⁷ The National Task Force concluded that, even among whaling nations, the “the consumption of whale meat is negligible and in each of the whaling nations this limited consumption can easily be replaced by some alternative.”⁴⁸

5. International Legal Framework for Anti-Whaling

A. *The ICRW and the IWC*

At the centre of international law dealing with cetaceans is the 1946 International Convention for the Regulation of Whaling.⁴⁹ The League of Nations had made various unsuccessful efforts to regulate whaling, including the 1931 Convention for the Regulation of Whaling and the 1937 International Agreement for the Regulation of Whaling. Pelagic whaling had largely stopped during the Second World War, but resumed soon afterwards. The ICRW was drafted at a conference convened by the United States in November 1946 with 15 original signatories, including Australia.⁵⁰ Japan joined the Convention in 1951. There are currently 89 parties;⁵¹ a number of States were formerly signatories to the ICRW and have withdrawn.⁵²

The Convention commences by “[r]ecognizing the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks ...”⁵³ Poor management practices of the past are acknowledged, as the Convention points out that “the history of whaling has seen over-fishing of one area after another and of one species of whale after another to such a degree that it is essential to protect all species of whale from further over-fishing...”⁵⁴ The parties therefore decide to “conclude a convention for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry.”⁵⁵

⁴⁷ *Id.* at 14.

⁴⁸ *Id.* at 13.

⁴⁹ *Supra* note 4.

⁵⁰ The fifteen original signatories were as follows: Argentina, Australia, Brazil, Canada, Chile, Denmark, France, the Netherlands, New Zealand, Norway, Peru, South Africa, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.

⁵¹ See Status of International Convention for the Regulation of Whaling, available at http://www.iwcoffice.org/_documents/commission/convention_status.pdf (last visited on Oct. 1, 2011).

⁵² *E.g.*, Canada, Egypt, Jamaica, Mauritius, Philippines, Seychelles, Venezuela.

⁵³ ICRW, pmb1.

⁵⁴ *Id.*

⁵⁵ *Id.*

The Convention applies broadly, to all “factory ships, land stations and whale catchers” under the jurisdiction of Contracting Governments, and to all waters in which they conduct whaling.⁵⁶ The regime is to be administered by the International Whaling Commission, established under Article III(1) of the ICRW, with each Contracting Government allocated one vote. Substantive measures for the conservation of whales and management of whaling are found in the Schedule to the ICRW, which forms an integral part of the Convention.⁵⁷

Article V of the ICRW governs the manner in which the Schedule is amended, by allowing the Commission to adopt regulations “with respect to the conservation and utilization of whale resources,” including the designation of protected species, open and closed areas, open and closed seasons, sanctuaries, catch and size limits, permissible gear, collection of data and other matters.⁵⁸ Any change to the Schedule requires a three-quarters majority of members voting and, unless objected to, will come into effect 90 days after the amendment is notified by the Commission to the Contracting Governments. The objection procedure, if validly invoked, will prevent the amendment from becoming effective against the objecting country until such point as the objection is withdrawn.⁵⁹

In addition to amending the Schedule, the IWC has powers under Articles IV and VI of the ICRW relating to scientific investigations, the collection and analysis of data, the dissemination and publication of information, and the making of recommendations to Contracting Governments. Such recommendations can be “on any matters which relate to whales or whaling and to the objectives and purposes of this Convention.”⁶⁰ The IWC routinely passes resolutions on matters of current concern. Such resolutions require only a simple majority to be passed and are of no binding effect.⁶¹ However, they do represent the views of the majority of the IWC members on the particular subject matter and should be considered in that light.

In relation to scientific research, Article VIII of the ICRW is particularly important. Article VIII(1) of the ICRW states that:

Any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions

⁵⁶ *Id.* art. I (2).

⁵⁷ *Id.* art. I (1).

⁵⁸ *Id.* art. V(1).

⁵⁹ *Id.* art. V(3).

⁶⁰ *Id.* art. VI.

⁶¹ IWC, Resolutions, available at <http://www.iwcoffice.org/meetings/resolutions/resolutionmain.htm> (last visited on Oct. 1, 2011).

as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention ...⁶²

Interpretation of this very broadly-worded article is at the heart of the current legal dispute between Australia and Japan.

Special Permits are also dealt with under the Schedule to the ICRW, alongside other conservation measures and whaling regulations agreed to by the Commission. Paragraph 30 of the Schedule requires contracting governments who are issuing scientific permits to provide them to the Secretary of the IWC, “before they are issued and in sufficient time to allow the Scientific Committee to review and comment on them.” This requirement caused controversy among Commission members at the commencement of the JARPA II, because the Scientific Committee had not yet had time to properly review the results of its predecessor, the JARPA I.⁶³

Article IX of the ICRW places responsibility for enforcement of the Convention with each Contracting Government in relation to persons or vessels under its jurisdiction.⁶⁴ Article X deals with entry into force of the Convention,⁶⁵ while Article XI provides a mechanism for Contracting Governments to withdraw from the Convention.

The IWC has adopted its own Rules of Procedure (“ROP”) under Article III(2) of the ICRW.⁶⁶ The ROP states that: “The Commission shall make every effort to reach its decisions by consensus. If all efforts to reach consensus have been exhausted and no agreement reached, the following Rules of Procedure shall apply.”⁶⁷ Each Commissioner has one vote and decisions, apart from those amending the Schedule under Article V(2) of the ICRW, are taken by simple majority.⁶⁸

Under the current ROP, the Commission is required to establish a Scientific Committee, a Technical Committee and a Finance and Administration Committee.⁶⁹ Of particular interest to the dispute is the Scientific Committee, because of its role in

⁶² ICRW art. VIII(1).

⁶³ The Report of the International Panel of Independent Legal Experts on: Special Permit (“scientific”) Whaling under International Law, 2006 (“Paris Report”), para. 61, available at http://www.ifaw.org/Publications/Program_Publications/Whales/asset_upload_file235_14636.pdf. A summary of the Paris Report is available at http://www.ifaw.org/Publications/Program_Publications/Whales/asset_upload_file929_60558.pdf (all last visited on Oct. 1, 2011).

⁶⁴ ICRW art. IV(1).

⁶⁵ *Id.* art. X(2).

⁶⁶ See The Rules of Procedure, available at <http://www.iwcoffice.org/commission/procedure.htm> (last visited on Oct. 1, 2011).

⁶⁷ ROP, Pt. E.

⁶⁸ *Id.* Rule E.3.

⁶⁹ *Id.* Rule M.1.

overseeing whale and whaling research. The ROP describes the duties of the Scientific Committee as:

a progression from the scientific investigation of whales and their environment, leading to assessment of the status of whale stocks and the impact of catches upon them, and then to provision of management advice on the regulation of whaling.⁷⁰

Clearly this is a key function in the overall operation of the IWC.

B. The Schedule

In addition to the conditions surrounding the grant of permits for scientific research, the Schedule to the Convention contains all of the substantive regulations concerning the conservation and management of whales. Paragraph 7(a) of the Schedule establishes the Indian Ocean Sanctuary which prohibits all commercial whaling in the designated area. Paragraph 7(b) prohibits commercial whaling in the area designated as the Southern Ocean Whale Sanctuary. Japan lodged an objection to this provision with respect to Antarctic minke whale stocks.

In 1982, the Schedule was amended to include Paragraph 10(e), commonly known as “the commercial whaling moratorium.” The moratorium takes effect by setting commercial whaling catch limits at zero for all whale stocks, commencing with the 1985-86 pelagic and 1986 coastal seasons. Japan, Norway, Peru and the former USSR lodged objections to this amendment within the prescribed time limit. Peru and Japan subsequently withdrew their objections.⁷¹

C. Other International Law for Cetaceans

The ICRW operates within a network of international agreements concerning the marine environment. The United Nations Convention on the Law of the Sea (“UNCLOS”),⁷² which has been regarded as the “Constitution for the Oceans,”⁷³ contains numerous obligations relating to cetaceans and to the issue of permit whaling. Article 65 of the UNCLOS, as part of the regulations concerning the exclusive economic zone, states that:

⁷⁰ *Id.* at 15.

⁷¹ Iceland’s 2002 instrument of adherence to the ICRW contains a reservation as to Paragraph 10(e) of the Schedule.

⁷² The United Nations Convention on the Law of the Sea, (Dec. 10, 1982), available at http://www.un.org/depts/los/convention_agreements/texts/unclos/closindx.htm (last visited on Oct. 1, 2011).

⁷³ Tommy B. Koh, *A Constitution for the Oceans*, in 1 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 11 (M.H. Nordquist ed. 1985).

Nothing in this Part restricts the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study.⁷⁴

Article 120 of the UNCLOS extends the application of Article 65 of the Convention to the conservation and management of marine mammals in high seas. Articles 117 and 118 apply with respect to the living resources of the high seas and impose an obligation on all States to “take, or to cooperate ... in taking, such measures ... as may be necessary for the conservation of the living resources of the high seas” and to cooperate with other States “in the conservation and management of living resources in the areas of the high seas.” Certain duties arise under the UNCLOS with respect to the conduct of marine scientific research, including that it be “conducted in compliance with all relevant regulations adopted in conformity with this Convention including those for the protection and preservation of the marine environment.”⁷⁵

The Convention on Biological Diversity,⁷⁶ while recognizing the “sovereign right [of States] to exploit their own resources pursuant to their own environmental policies,” also recognizes a corresponding duty “to ensure that activities within their own jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”⁷⁷ Like the UNCLOS, the CBD imposes a clear obligation on parties to co-operate in areas beyond national jurisdiction “for the conservation and sustainable use of biological diversity.”⁷⁸

The 1972 Convention on International Trade in Endangered Species of Wild Fauna and Flora⁷⁹ is also relevant to whale conservation and management. A 2006 report of international legal experts⁸⁰ notes that there has been “a history of close cooperation between the parties to the CITES and the members of the IWC.”⁸¹ The Report comments that: “The main focus of the CITES activity on whales has been to address illegal international trade in whale meat and to support the conservation decisions of the IWC

⁷⁴ UNCLOS art. 65.

⁷⁵ *Id.* art. 240.

⁷⁶ Convention on Biological Diversity (June 5, 1992), entered into force Dec. 29, 1993, available at <http://www.cbd.int/doc/legal/cbd-en.pdf> (last visited on Oct. 1, 2011).

⁷⁷ CBD art 3.

⁷⁸ *Id.* art 5.

⁷⁹ Convention on International Trade in Endangered Species of Wild Fauna and Flora (March 3, 1973), entered into force July 1, 1975, available at <http://www.cites.org/eng/disc/text.php#texttop> (last visited on Oct. 1, 2011).

⁸⁰ See Paris Report, *supra* note 63.

⁸¹ *Id.* para. 120.

through listing whale species on Appendix I to the CITES.”⁸² Listing on Appendix 1 has the effect of generally prohibiting commercial trade on such species. Japan, along with certain other countries, has entered a reservation regarding the listing of certain whale species in Appendix I.⁸³

The Antarctic Treaty System⁸⁴ is also of relevance to the conservation of whales in the Southern Ocean, particularly the Convention for the Conservation of Antarctic Marine Living Resources (“CCAMLR”).⁸⁵ Although Article VI of the CCAMLR specifically provides that: “Nothing in this Convention shall derogate from the rights and obligations of Contracting parties under the International Convention for the Regulation of Whaling,” there is clearly some overlap in the operation of the two agreements. The objective of the CCAMLR is the “conservation of Antarctic marine living resources,”⁸⁶ based upon an ecosystems approach.⁸⁷ With whales comprising an important part of the Antarctic marine ecosystem, the effect of lethal scientific research within the Convention area⁸⁸ must be of concern.

6. Operation of the ICRW

In the early years of its operation, the ICRW was not particularly successful in conserving whales. Whaling quotas were set too high based on the generic “blue whale unit,” rather than setting catch limits for individual species. Because the ICRW prohibits the allocation of national quotas,⁸⁹ moreover, each year there would be a race among whaling nations to take the largest share of the total allowable catch. Following the 1972 United Nations Conference on the Human Environment (Stockholm Conference),

⁸² *Id.*

⁸³ See generally Peter H. Sand, *Japan’s ‘Research Whaling’ in the Antarctic Southern Ocean and the North Pacific Ocean in the Face of the Endangered Species Convention*, 17 RECEIL 56(2008); Alberto Szekely et al, *The Taking of Sei and Humpback Whales by Japan: Legal Issues Arising Under the Convention on International Trade in Endangered Species of Wild Fauna and Flora: Report of the International Panel of Independent Legal Experts (“London Report”)* (Nov. 1, 2007), available at http://www.ifaw.org/Publications/Program_Publications/Whales/asset_upload_file779_12136.pdf (last visited on Oct. 1, 2011).

⁸⁴ The Antarctic Treaty System comprises the Antarctic Treaty 1959 and related agreements, including the 1972 Convention on the Conservation of Antarctic Seals, the 1980 Convention on the Conservation of Antarctic Marine Living Resources, and the 1991 Protocol on Environmental Protection to the Antarctic Treaty (“Madrid Protocol”).

⁸⁵ The Convention on the Conservation of Antarctic Marine Living Resources (May 20, 1980), entered into force 1982.

⁸⁶ CCAMLR art. II.

⁸⁷ *Id.* art. II(3).

⁸⁸ *Id.* art. I. The area in which the CCAMLR applies is south of 60 degrees south, and between that latitude and the Antarctic Convergence.

⁸⁹ ICRW art. V(2).

which resolved, almost unanimously, to call for a ten-year moratorium on commercial whaling, the IWC was at least able to adopt a management procedure designed to regulate individual stocks based upon the advice of the Scientific Committee.⁹⁰ Based upon estimates of abundance and maximum sustainable yield, the management procedure required whale stocks to be divided into three categories: (1) Initial Management Stocks, (2) Sustained Management Stocks (both able to be harvested to the level of Maximum Sustainable Yield), and (3) Protection Stocks (currently below the sustainable management level and therefore in need of complete protection).⁹¹ Unfortunately, the procedure proved to be difficult to implement and generated significant disagreements among scientists. “By the early 1980s the Scientific Committee found it almost impossible to agree on any recommendations for classification or catch limits of stocks subject to commercial whaling, other than those for protection stocks. This was an important factor in the Commission’s 1982 decision to implement the zero limit (moratorium) from the 1986 season.”⁹²

The 1982 moratorium resolution set 1990 as the year by which a “comprehensive assessment of ... whale stocks” was to be undertaken, thus allowing the IWC to consider the establishment of other catch limits.⁹³ However, this deadline passed without the comprehensive assessment having been completed. Assessment of whale stocks is ongoing.⁹⁴ In the meantime, the Scientific Committee has been able to develop a ‘conservative’ and ‘rigorously tested’ procedure for setting allowable catch limits, the Revised Management Procedure (“RMP”).⁹⁵ Following the Scientific Committee’s recommendation, the Commission adopted the scientific aspects of the RMP in 1994. However, the IWC has agreed that before the moratorium is lifted and the RMP implemented, there must be a Revised Management Scheme (“RMS”) in place that includes inspection and observation procedures to ensure that any agreed catch limits are enforced.⁹⁶ Agreement upon the form and content of the RMS has so far proven elusive.

The RMS Working Group was established in 1994. The Working Group’s mandate was to develop an inspection and observation scheme, to devise other arrangements for

⁹⁰ See National Task Force Report at 19.

⁹¹ R. Gambell, *International Management of Whale and Whaling: An Historical Review of the Regulation of Commercial and Aboriginal Subsistence Whaling*, 46 *ARCTIC* 97-100(1993).

⁹² *Supra* note 90, at 19. See also IWC, *The Moratorium*, available at <http://www.iwcoffice.org/conservation/rms.htm> (last visited on Oct. 1, 2011).

⁹³ ICRW Schedule para. 10(e).

⁹⁴ IWC, *The Comprehensive Assessment*, available at <http://www.iwcoffice.org/conservation/estimate.htm#assessment> (last visited on Oct. 1, 2011)

⁹⁵ *Id.*

⁹⁶ *Supra* note 92.

ensuring that agreed catch limits are enforced, and to manage the incorporation of the RMP and the RMS into the Schedule of the ICRW. After numerous meetings over an extended period of time, the RMS Working Group was forced to concede that discussions were at an impasse.⁹⁷

The impasse prompted more general discussion on the future of the IWC and so, in 2008, the Small Working Group on the Future of the IWC was established.⁹⁸ Both Australia and Japan have been active members of this group.⁹⁹ Various improvements to the IWC procedures have arisen from this process, including changes to its ROP to promote consensus-decision-making and improvements in the dissemination of information among parties.¹⁰⁰ However, the Commission members maintain polarised views on a range of important issues, including the moratorium, non-lethal research programs, the role and functioning of the Scientific Committee, and research under special permit.¹⁰¹

The Small Working Group was unable to deliver its original goal of an agreed package on the future of the IWC by the time the Commission met in 2009. A draft “Consensus Decision to Improve the Conservation of Whales” was circulated in March 2010, but failed to address Australia’s concerns over the need to end unilateral permit whaling under Article VIII of the ICRW. The IWC’s Chair and Vice-Chair then drafted a compromise text¹⁰² for the IWC meeting of June 2010. That proposal would have seen a ten-year moratorium on scientific permit whaling while a Working Group considered various issues, including the question of scientific permits. However, a consensus resolution could not be reached and the Commission “agreed to a pause in its work on this topic to allow time for reflection until the 2011 Annual Meeting.”¹⁰³

⁹⁷ *Id.*

⁹⁸ IWC, The Future of IWC: The Small Working Group – 2008/2009, available at <http://iwcoffice.org/commission/future.htm#swg0809> (last visited on Oct. 1, 2011).

⁹⁹ *Supra* note 1, para. 23.

¹⁰⁰ *Supra* note 98.

¹⁰¹ See Future of the IWC, *supra* note 3, Table 1.

¹⁰² *Supra* note 1, para. 27. For the text of the compromise, see Proposed Consensus Decision1 to Improve the Conservation of Whales from the Chair and Vice-Chair of the Commission available at http://iwcoffice.org/_documents/commission/IWC62docs/62-7rev.pdf (last visited on Oct.1, 2011).

¹⁰³ IWC, 2000 Meeting: Final press release from The International Whaling Commission’s 52nd annual meeting in Adelaide, Australia 2000, available at <http://www.iwcoffice.org/meetings/meeting2000.htm> (last visited on Oct.1, 2011).

7. Japanese Research Whaling

A. Moratorium of Commercial Whaling

After the commencement of the moratorium, Japan ceased commercial whaling and began whaling under the ostensible authority of Article VIII of the ICRW. The first program, the “Japanese Whale Research Program under Special Permit in the Antarctic,” is known commonly as the JARPA, or the JARPA I. It commenced in the southern summer of 1987-1988 and ran through to 2004-2005. During that time, approximately 6,800 Antarctic minke whales were taken pursuant to the program in Antarctic waters, a massive increase over previous efforts. The Australian application notes that this figure “compares with a total of 840 whales killed globally by Japan for scientific research in the 31-year period prior to the moratorium.”¹⁰⁴

The JARPA II doubled the rate of lethal sampling. It started with a two-year feasibility study over the 2005-2006 and 2006-2007 seasons, and went full-scale in 2007-2008. In addition to approximately 850 Antarctic minke whales per annum, the JARPA II proposes annual takes of 50 fin whales and 50 humpback whales.¹⁰⁵

B. Particular Concerns over Scientific Whaling

At the fundamental level, Australian concern over Japan’s scientific whaling program, and, in particular, the Antarctic component generally referred to as the JARPA II, is based on the premise that any research is being conducted with a view to hastening the resumption of commercial whaling.¹⁰⁶ In addition, there are particular concerns with the way in which the JARPA, and now the JARPA II, have been conducted.

First, Australia is concerned about the sheer scale of the program, especially that of the JARPA II. When compared with pre-moratorium levels of scientific whaling, the program is inevitably viewed with great suspicion. The scale of the lethal take raises concerns about its impact upon vulnerable Southern Ocean whale stocks. In relation to the three target species, Australia’s Application notes that: “There appears to have been a substantial decrease in the abundance estimates of Antarctic minke stocks ... The population structure of the Antarctic minke whales remains unknown, so there is a risk

¹⁰⁴ *Supra* note 1, para. 10.

¹⁰⁵ JARPA II, *supra* note 2 (SC/57/O1) at 1.

¹⁰⁶ The Institute for Cetacean Research states that: “Japan’s objective is to resume commercial whaling for abundant species on a sustainable basis under international control.” See The Institute of Cetacean Research of Japan (“ICR”), Questions and Answers, available at <http://www.icrwhale.org/QandAResearch.htm> (last visited on Oct. 24, 2011).

of depletion of small stocks.”¹⁰⁷ In relation to fin whales, “[v]irtually nothing is known”, and the species has been classified as ‘endangered’ by the International Union for Conservation of Nature.¹⁰⁸ Moreover, while there are some indications of recovery in some humpback breeding stocks, some depleted populations in Oceania “show little signs of recovery ... [D]ue to the mixing of highly depleted and less depleted breeding stocks on the [Antarctic] feeding grounds, it is impossible to target only whales from less depleted breeding stocks ...”¹⁰⁹ A precautionary approach would tell against any lethal research involving any of these species, but in particular fin whales and humpbacks.

The inclusion of humpback whales in the JARPA II was particularly likely to raise Australia’s ire. The Sydney Panel,¹¹⁰ convened in 2007 to canvas options for international legal action that Australia and New Zealand could pursue, noted that “the extension of the JARPA II program to humpback whales was especially significant to Australia given the annual migration of that species along the Australian coastline. The potential economic impact of the killing of humpback whales was also noted given the growth of whale-watching as a tourist and recreational activity.”¹¹¹ Humpback whales are the focus of public attention in Australia, being the most commonly sighted whale during their annual migration. Many whales are known to repeatedly visit the same areas, year after year. Some are named and followed by local communities.¹¹²

Also of concern is Japan’s apparent lack of regard for the wishes and concerns of a majority of members of the IWC. In its Application, Australia notes that:

The IWC has made numerous recommendations to Japan that it not proceed with JARPA II. It has done so against the background of earlier recommendations that special permit whaling must meet critically important research needs (1987); that it only be permitted in exceptional circumstances (1995, 1998, 1999); that it be conducted using non-lethal techniques (1995-1999); and that it ensure the conservation of whales in sanctuaries (1995-1998).¹¹³

Resolution 2003-3 referred to the IWC’s concerns over the unexplained decline in

¹⁰⁷ *Supra* note 1, para. 14.

¹⁰⁸ *Id.* para. 15.

¹⁰⁹ *Id.* para. 16.

¹¹⁰ Sydney Panel of Independent International Experts on Japan’s Special Permit (“Scientific”) Whaling under International Law: Summary of Findings (May 2007), available at http://www.ifaw.org/Publications/Program_Publications/Whales/asset_upload_file431_50328.pdf (last visited on Oct. 1, 2011).

¹¹¹ *Id.* at 1.

¹¹² The White Whale Research Center, Migaloo Research Facts, available at <http://www.migaloo.com.au> (last visited on Oct. 1, 2011).

¹¹³ *Supra* note 1, para. 18.

abundance estimates for Southern Hemisphere minke whales, and the “emerging importance of alternative non-lethal research methodologies.” It therefore called on “the Government of Japan to halt the JARPA program, or to revise it in order to restrict the non-lethal research methodologies.”¹¹⁴

In Resolution 2003-2, the IWC expressed “deep concern that the provision permitting special permit whaling enables countries to conduct whaling for commercial purposes despite the moratorium on commercial whaling.” It went on to characterise the special permit whaling operations of both Japan and Iceland as “contrary to the spirit of the moratorium on commercial whaling and to the will of the Commission.” It also noted that “non-lethal techniques available today will usually provide better data at less cost to both animals and budget.”¹¹⁵

Resolution 2005-1 concerned Japan’s proposal to move onto the JARPA II before the Scientific Committee had chance to evaluate the results from the JARPA I. The Commission was concerned about the dramatic increase in the scale of special permit whaling and the effect of the proposed takes on endangered fin whale populations. In relation to humpbacks, the IWC noted that “some humpback whales which will be targeted by the JARPA II belong to small, vulnerable breeding populations around small island States in the South Pacific and that even small takes could have a detrimental effect on the recovery and survival of such populations.” The Commission therefore “STRONGLY URGE[D] the Government of Japan to withdraw the JARPA II proposal or to revise it so that any information needed to meet the stated objectives of the proposal is obtained using non-lethal means.”¹¹⁶

Resolution 2007-1 recalls the Commission’s strong opposition to lethal research in the Southern Ocean Sanctuary and its recommendation that lethal research should only be resorted to “where critically important research needs are addressed.” It noted that the workshop convened to review the results of the JARPA I had concluded that none of the program’s goals had been achieved and that the results “are not required for management under the RMP.” The Commission expressed the view that the JARPA II does “not address critically important research needs,” and again called upon Japan to suspend the lethal aspects of the research conducted within the Southern Ocean Sanctuary.¹¹⁷

¹¹⁴ IWC, Resolution 2003-3, available at <http://www.iwcoffice.org/meetings/resolutions/resolution2003.htm> (last visited on Oct. 1, 2011).

¹¹⁵ *Id.*

¹¹⁶ IWC, Resolution 2005-1, available at <http://www.iwcoffice.org/meetings/resolutions/resolution2005.htm> (last visited on Oct. 1, 2011).

¹¹⁷ IWC, Resolution 2007-1, available at <http://www.iwcoffice.org/meetings/resolutions/resolution2007.htm> (last visited on Oct. 1, 2011).

It is the continuance of JARPA II in the face of repeated criticism within the IWC, and the failure of diplomacy to make any headway in the dispute, that has finally led Australia to the path of international litigation.

8. The Proceedings before the ICJ

A. Outline

As outlined earlier, the Australian application to the ICJ is based first upon alleged breaches by Japan of obligations under the ICRW, and second upon breaches of other international law instruments, namely the CITES and the CBD.¹¹⁸ In relation to the ICRW, the application alleges that Japan has failed to observe “in good faith” the commercial whaling moratorium under Paragraph 10(e) of the Schedule, and the Southern Ocean Sanctuary (in relation to fin and humpback whales) under Paragraph 7(b) of the Schedule.¹¹⁹ Further, the application maintains that: “The JARPA II program cannot be justified under Article VIII of the ICRW.”¹²⁰ The arguments on each of these grounds are likely to be interrelated and based upon taking a broad view of the Convention, incorporating into it the majority views of the IWC members as expressed in the IWC Resolutions.¹²¹

While the details of the Australian case will not be known until the case is officially heard, some indication of the likely arguments to be raised by Australia in its submission can be gleaned from reports prepared by international legal experts on various aspects of international law as it applies to special permit whaling. In 2006, a panel of independent legal experts was commissioned by the International Fund for Animal Welfare (“IFAW”) to consider options for challenging the legality of special permit whaling. This panel produced the Report of the International Panel of Independent Legal Experts on Special Permit (scientific) Whaling under International Law (“Paris Report”) in 2006.¹²² The Paris Report concluded that Japan’s ‘scientific whaling’ did not meet the requirements to be valid under the ICRW; there were strong arguments that it violates the commercial whaling moratorium, and that it amounts to an “abuse of rights” under that Convention.¹²³ The Report also concluded that

¹¹⁸ *Supra* note 1. paras. 36-38.

¹¹⁹ *Id.* para. 36.

¹²⁰ *Id.* para. 37.

¹²¹ *Id.* paras. 23-27.

¹²² *Supra* note 63.

¹²³ *Id.*

'scientific whaling' raises issues of compliance under the UNCLOS, the CBD, the CITES, and the CCAMLR.¹²⁴ In 2007, a second Panel was convened in London to report on issues arising under the CITES.¹²⁵

B. Jurisdiction

Before examining the merits of the case, however, the procedural hurdle of jurisdiction will need to be overcome. It is usual for a State defending an action before the ICJ to first contest the jurisdiction of the Court to hear the matter.¹²⁶ However, it seems unlikely that the ICJ would find itself without jurisdiction in this case because both States have accepted the compulsory jurisdiction of the ICJ pursuant to Article 36(2) of the Statute of the International Court of Justice. There is no dispute-resolution mechanism under the ICRW and therefore no basis for holding that the parties have agreed to settle their disputes under the Convention by some other means.¹²⁷ Although there are substantial scientific aspects to the dispute, it is fundamentally a dispute over the interpretation of a treaty and thus squarely within the Court's competence.¹²⁸

As the dispute relates to activities in a region which Japan regards as high seas, there is some possibility that it will argue that Australia has no particular legal interest in Japan's whaling under special permit. Frans Nelissen and Steffen van der Velde¹²⁹ note that under the Draft Articles on the Responsibility of States for Intentional Wrongful Acts,¹³⁰ a State may take action where "the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group."¹³¹ This would appear to cover the collective interest of the IWC signatories in the proper execution of the ICRW.¹³²

¹²⁴ See the Sydney Panel Report and the Canberra Panel Report, available at http://www.ifaw.org/ifaw_asia_pacific/join_campaigns/whales/index.php (last visited on Oct. 1, 2011).

¹²⁵ *Supra* note 83.

¹²⁶ ICJ Rules art. 79. See also H. Thirway, *Preliminary Objections*, 1 ENCYCLOPEDIA OF PUB. INT'L L. 179-183 (R. Bernhardt ed., 1981).

¹²⁷ *Cf.* the Southern Bluefin Tuna Litigation. See Natalie Klein, *Whales and Tuna: The Past and Future of Litigation between Australia and Japan*, 21 GEO. INT'L ENVTL. L. REV. 143 (2009).

¹²⁸ ICJ Statute art. 36(2)(a).

¹²⁹ Frans A. Nelissen & Steffen van der Velde, *Australia Attempts to Harpoon Japanese Whaling*, THE HAGUE JUSTICE PORTAL, 2010, available at http://www.haguejusticeportal.net/Docs/Commentaries%20PDF/HJP_Nelissen_Aust_Japan_EN.pdf (last visited on Oct. 1, 2011).

¹³⁰ The International Law Commission, Draft Articles on the Responsibility of States for Intentional Wrongful Acts (2001), available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf (last visited on Oct. 1, 2011).

¹³¹ *Id.* art. 48(1)(a).

¹³² *Supra* note 129, at 4.

C. Interpretation of Article VIII of the ICRW

Japan has consistently maintained that it is permitted to conduct scientific whaling under Article VIII of the ICRW and thus the JARPA and the JARPA II are perfectly legal under international law.¹³³ It is true that the article is worded very broadly, and on a literal reading involves no restraints. Based on such a literal reading, the IWC has taken the position that: “It is the member nation that ultimately decides whether or not to issue a permit, and this right overrides any other Commission regulations including the moratorium and the sanctuaries.”¹³⁴

Nonetheless, Article VIII of the ICRW is merely one provision in an entire Convention that was drafted in recognition of the disastrous history of over-fishing and the need to protect all whale species from further over-exploitation. It would seem perverse, then, to allow an interpretation of Article VIII that could potentially undermine the entire Convention by allowing States to unilaterally decide to issue ‘special permits’ to their nationals with no regard to the consequences. At the heart of the Australian application is a view that Article VIII of the ICRW must be read in context with due regard to the objects and purposes of the ICRW.

Two important rules of interpretation apply when considering how to interpret and apply Article VIII of the ICRW. First, in accordance with Article 31(1) of the Vienna Convention on the Law of Treaties, “[A] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹³⁵ Second, Article VIII operates as an exception to the general provisions of the ICRW (by allowing parties to circumvent other measures agreed upon by the IWC) and should therefore be interpreted narrowly.¹³⁶

The ICRW was drafted with a dual function: conservation of whales and regulation of whaling. This is apparent from the preamble, which states that the purpose of the convention is “the proper conservation of whale stocks ... thus mak[ing] possible the orderly development of the whaling industry.” However, the Convention makes clear that whaling is not to take place at the expense of “proper and effective conservation.”

¹³³ Keiko Hirata, *Why Japan Supports Whaling*, 8 J. INT’L WILDLIFE L. & POL’Y 129 (2005); Letter from Seiji Ohsumi, Director of the Institute of Cetacean Research, to the New Zealand Ambassador to Japan (Jan. 26, 2000), available at <http://www.icrwhale.org/correcting.htm> (last visited on Oct. 24, 2011).

¹³⁴ IWC, The IWC and Scientific Permits, available at <http://www.iwcoffice.org/conservation/permits.htm> (last visited on Oct. 24, 2011).

¹³⁵ The Vienna Convention on the Law of Treaties (“VCLT”) art. 31(1), available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (last visited on Oct. 24, 2011).

¹³⁶ Refer to the Latin maxim, *exceptiones sunt strictissimae interpretationes* (exceptions to a rule should always be construed narrowly).

The first stated objective of the ICRW is in recognising the interest of the world in safeguarding whale stocks for future generations. The Paris Report states that: “In our view it is clear both from the wording of the Preamble and also from subsequent implementation of the ICRW by the parties as mentioned above, that conservation is the paramount consideration at least until stocks have fully recovered from the massacre of pre-Convention commercial whaling. It is in the light of this objective that Article VIII of the ICRW falls to be considered.”¹³⁷

This interpretation of the Convention is further supported by reference to developments in international law, in particular, the widespread acceptance of a ‘precautionary approach’ in the management of natural resources.¹³⁸ The Paris Report states that: “It is relevant in analysing the object and purpose of the ICRW to take into account developments in international law which have occurred since the adoption of the ICRW. This approach to treaty interpretation is confirmed in the judgment in the *Gabčíkovo-Nagymaros* case.”¹³⁹ The Report then proceeds to quote from the judgment of the ICJ in that case. There, the Court held that: “The Treaty is not static, but open to emerging norms of international law ... new environmental norms can be incorporated.”¹⁴⁰

Taking into account the importance of conservation under the ICRW and the need for a precautionary approach, it is open to conclude that the conduct of scientific whaling in a manner that undermines agreed conservation measures, such as the moratorium and the Southern Ocean Sanctuary, is in violation of Article VIII of the ICRW. The Australian application gives evidence of the uncertainty of stock levels of Antarctic minke whales, the endangered status of fin whales and the failure of certain humpback whale populations to show signs of recovery from commercial whaling. Scientific whaling which threatens the recovery of these stocks also undermines the effectiveness of the moratorium and the Sanctuary and is therefore in breach of the ICRW.

The Paris Report takes the view that in order for whaling under permit to be lawful under Article VIII, “such activity must genuinely constitute whaling for scientific purposes, on the basis of objective criteria.”¹⁴¹ In order to make that determination, the Paris Report argues that it is necessary to take into account the procedural requirements set out in Paragraph 30 of the Schedule, the IWC Guidelines for the Review of Scientific Permit Proposals, the factual determinations of the parties, and any other relevant

¹³⁷ Paris Report, para. 75.

¹³⁸ *Supra* note 35.

¹³⁹ Paris Report, para. 69.

¹⁴⁰ *Gabčíkovo-Nagymaros Project Case (Hung. v. Slov.)*, Judgment, 1997 I.C.J. 7 at para. 112, *quoted in* Paris Report para. 69.

¹⁴¹ Paris Report, para. 49.

material.¹⁴² Although the ICRW does not define the term ‘scientific research,’ the Paris Report argues that it could not include whaling that is conducted for commercial or economic purposes such as “the preservation of employment and infrastructure in the whaling sector, or to supply the domestic market for whale meat.”¹⁴³

The Japanese activities under special permit do not become commercial (as opposed to scientific) simply because the products are sold. In fact, Article VIII(2) of the ICRW mandates that, “so far as practicable,” any whales taken pursuant to special permit “be processed and the proceeds dealt with in accordance with directions issued by” the relevant government. It is reported that Japan uses the proceeds of sale of whale meat to partially offset its research costs.¹⁴⁴ At which point, however, could it be said that the recoupment of costs is driving the research, rather than the other way round?

In 2005, Nicholas Gales and his colleagues note that: “Japan’s scientific whaling programme yields considerable annual revenue from the commercial sale of whale meat, estimated at USD50 million earlier this decade; this will rise considerably as catches increase. The Japanese government provides annual subsidies of some further USD10 million for cetacean research. These revenues are invested in the maintenance of the catcher/processor vessels in addition to the Japanese Institute of Cetacean Research that conducts the science associated with scientific whaling. The risk for Japan is that dependence upon these revenues could drive its quotas for scientific whaling, yet leave the real scientific questions unaddressed.”¹⁴⁵

A similar point may be found in Ishii’s recent article arguing that Japan’s real interest lies not in reforming the IWC, but in maintaining the status quo.¹⁴⁶ Through a “counterfactual thought experiment” Atsushi Ishii raises the question of what would happen if the moratorium was lifted? He argues that the continuation of scientific whaling would become increasingly unjustifiable, subsidies and favourable financial treatment given to the scientific activities would cease, actual scientific whaling would be gradually scaled down and abandoned, the ICR and Kyodo Senpaku would find it increasingly difficult to survive, “and the Japanese Fisheries Agency would lose its jurisdiction related to ‘scientific’ whaling”¹⁴⁷ Is scientific whaling truly scientific if it is really for the maintenance of the scientific whaling ‘industry’?

¹⁴² *Id.*

¹⁴³ *Id.* para. 54.

¹⁴⁴ ICR, Japan’s Whale Research Programs: JARPEN and JARPEN II, available at <http://www.icrwhale.org/QandAJapanresearch.htm> (last visited on Oct. 1, 2011).

¹⁴⁵ Nicholas J. Gales, Toshio Kasuya, Phillip J. Clapham & Robert L. Brownell Jr., *Japan’s Whaling Plan under Scrutiny*, 435 NATURE 883-884 (2005).

¹⁴⁶ Atsushi Ishii, *Japan and the Whaling Issue: A Viewpoint Based on a Review of Whaling in Japan: Power, Politics and Diplomacy by Jun Morikawa*, 54 OCEAN & COASTAL MANAGEMENT 274-276 (2011).

¹⁴⁷ *Id.* at 276.

The Paris Report considers that complaints about Japan's failure to abide by agreed Guidelines and Procedures for reviewing scientific permits, and those about the validity and necessity of the science itself, are relevant to the issue of whether or not the research under special permit is lawful. These issues are also closely related to whether or not Japan is meeting its obligations concerning the moratorium and the Southern Ocean Sanctuary "in good faith."

The requirement of good faith derives from the principle of *Pacta Sunt Servanda* as laid down at Article 26 of the Vienna Convention on the Law of Treaties.¹⁴⁸ Lack of good faith could be regarded as being demonstrated by using the scientific exemption to achieve an ulterior goal, *e.g.*, the resumption of commercial whaling or the maintenance of whaling infrastructure. It could also be inferred from the failure to respond to criticisms of the necessity or the validity of the actual science. For example, Nicholas Gales et al states that: "The lethal sampling of whales for scientific research is extremely controversial. Many Scientific Committee members have consistently complained that such catches do not have sufficient scientific basis. The strongest scientific argument in favour of lethal sampling – the collection of genetic samples for determining population structure – could be conducted far more efficiently using non-lethal biopsy techniques."¹⁴⁹

The Paris Report argues that in order for scientific whaling to be lawful, the procedural requirements for review of the proposal by the Scientific Committee need to be met. In particular, Paragraph 30 of the Schedule states that "a Contracting Government shall provide the Secretary ... with proposed scientific permits before they are issued and in sufficient time to allow the Scientific Committee to review and comment on them." While there is no power on the part of the Scientific Committee to overrule or modify the proposal, the Paris Report argues that in general any comments should be taken into account when the permit is issued.¹⁵⁰ To hold otherwise would render the agreed review procedure pointless. The Report further states that a "consistent refusal to take views into account would in our view run counter to the requirement to operate the mandatory procedures in good faith."¹⁵¹ The repeated refusal by Japan to respond appropriately to the views of the IWC regarding the JARPA and the JARPA II has already been referred to.¹⁵²

Further issues are raised by the timing of such reviews. For example, a large number of scientists participating in the Scientific Committee review of the JARPA II were

¹⁴⁸ VCLT art. 26. It states that: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

¹⁴⁹ *Supra* note 145, at 883.

¹⁵⁰ Paris Report, para. 60.

¹⁵¹ *Id.*

¹⁵² See Ch. 7(A) of this text.

deeply concerned that the proposal was brought to them before the results of the original program had been reviewed. They argued that it was ‘scientifically invalid’ to review the JARPA II proposal at this time and “the Government of Japan has substantially compromised the capacity of the Scientific Committee to perform its task.”¹⁵³

Supporters of the JARPA II often selectively quote small parts of the Report of the Intersessional Working Group to Review Data and Results from Special Permit Research on Minke Whales in the Antarctic held in Tokyo on December 4-8, 2006,¹⁵⁴ as demonstrating the value of the program. However, this justification overlooks the strong criticism levelled at the program by a majority of the IWC following its review:

Noting that the [review] Workshop agreed that none of the goals of JARPA I had been reached, and that the results of the JARPA I programme are not required for management under the RMP ... Convinced that the aims of JARPA II do not address critically important research needs ... Calls upon the Government of Japan to suspend indefinitely the lethal aspects of JARPA II conducted within the Southern Ocean Whale Sanctuary.¹⁵⁵

In summation, it seems probable that Australia will base its arguments on a broad reading of the ICRW that takes into account the objects and purpose of the Convention and the requirements of modern international environmental law such as the precautionary principle. Further, it will probably argue against a narrow or literal reading of the ICRW on the basis that such an interpretation, if taken to its logical conclusion, could completely defeat the object and purpose of the Convention by allowing whaling to take place that could completely undermine all conservation and management efforts. In addition, evidence could be drawn from the nature and scale of the research program, along with Japan’s apparent disregard for the agreed IWC procedures and the repeated concerns of a majority of the IWC over the value and necessity of the program. Together, these arguments cast doubt on Japan’s ability to justify the JARPA II as ‘scientific research’ within Article VIII of the ICRW. In addition, they cast doubt on Japan’s ability to demonstrate that it is upholding its obligations with respect to the moratorium and the Southern Ocean Sanctuary “in good faith.”

¹⁵³ Comments on the Government of Japan’s JARPA II Proposal: Appendix 2 to the Report of the Standing Working Group on Scientific Permits, *quoted in* Paris Report, para. 61.

¹⁵⁴ IWC, Report of the Intersessional Workshop to Review Data and Results from Special Permit Research on Minke Whales in the Antarctic, *available at* http://www.iwcoffice.org/_documents/conservation/SC-59-Rep1.pdf (last visited on Oct. 1, 2011).

¹⁵⁵ Resolution 2007-1, *supra* note 117.

8. Conclusion

Legal action, particularly before the International Court of Justice, is not a step that is taken lightly. Rothwell recounts the numerous diplomatic measures that were taken before the Australian government resorted to litigation,¹⁵⁶ while the efforts of Australia within the IWC, and in particular within the Small Working Group on the Future of the IWC, have been referred to above. There are certain risks involved in handing settlement of the dispute over to a third party, not least of which is uncertainty over the potential outcome of the case.¹⁵⁷

Joanna Mossop considers that: “Australia has engaged in a high stakes endeavour,”¹⁵⁸ and canvasses the possible outcomes from the case. If the Court finds that Japan is conducting lawful scientific whaling within the authority of the ICRW, then a major argument for anti-whaling nations has been lost on the diplomatic front. If the Court finds in favor of Australia, either partially or fully, then the parties will have some clarification of how the ICRW should be applied. However, a loss for Japan raises the risk of Japan withdrawing from the ICRW, placing itself completely outside the Convention’s reach.¹⁵⁹

At the heart of the current dispute is a disagreement over the interpretation of the ICRW. The legitimacy of the JARPA II would appear to rest on a very literal interpretation of that agreement. If taken to its logical extreme, however, such an approach could completely undermine any other action taken by the parties to the ICRW. The Convention could easily be rendered pointless. The success of the current litigation would therefore seem to depend upon an interpretation of the Convention that seeks to give effect to the purpose of the agreement. Such an approach can be bolstered by reference to the substantial progress made in the development of widely recognised principles of international environmental law, including the precautionary approach, which are today so important in the international governance of resources.¹⁶⁰

The success or failure of the litigation, however, may not lie in the formal results. Any guidance that the ICJ can give on the interpretation of the ICRW and the

¹⁵⁶ Donald R. Rothwell, *Australia v. Japan: JARPA II Whaling Case before the International Court of Justice* 3 (2010), THE HAGUE JUSTICE PORTAL, available at http://www.haguejusticeportal.net/Docs/Commentaries%20PDF/Portal%20HJJ_Rothwell_Aust_Japan_EN.pdf (last visited on Oct. 1, 2011).

¹⁵⁷ *Supra* note 31.

¹⁵⁸ Joanna Mossop, *Australia v. Japan: Whaling in the International Court of Justice* 7 NEW ZEALAND Y.B. INT’L L. 176 (2009).

¹⁵⁹ *Id.* at 176.

¹⁶⁰ *Supra* note 35.

application of its provisions in the context of modern international environmental law would be most helpful. Further, if the court case could act as a catalyst for dialogue among the IWC members, and break the impasse that has shackled the IWC for so long now, that would be a significant achievement indeed. In 2010, the Chair and Vice-Chair of the IWC issued a proposal to break the deadlock within the Commission. They stated that:

Very different views exist among the members regarding whales and whaling. For example, some seek to eliminate all whaling other than indigenous subsistence whaling, and some support whaling provided it is sustainable. This difference has come to dominate the time and resources of the Commission at the expense of effective whale conservation and management.¹⁶¹

If the litigation can shift the focus away from the politics and back on to whales and to managing the myriad threats that they face, the case would have to be regarded as a success.

¹⁶¹ Proposed Consensus Decision to Improve the Conservation of Whales, IWC/62/7 Agenda Item 3, available at http://iwcoffice.org/_documents/commission/IWC62docs/62-7rev.pdf (last visited on Oct. 1, 2011).

