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'Scientific Whaling'
(Australia v Japan): A Backgrounder

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Dispute Concerning Japan’s JARPA II Program of “Scientific Whaling”
(Australia v. Japan): A Backgrounder

*By Donald K. Anton**

I. INTRODUCTION

The international legal story of whales has been a fascinating (and often disquieting) episode in the development of international law. For over 100 years the international community has struggled to reverse the decline of whale populations caused by over-exploitation and, more recently, to conserve whales for their own sake. The first 19th Century unilateral attempts at utilitarian conservation failed because of the migratory nature of whales and the doctrine of freedom of fishing and its “tragedy of the commons” consequences.¹ At the turn of the 20th Century, the economic interest of whalers generated the first attempt at “international regulation” of overproduction by private inter-company agreements, but these were largely unsuccessful because too many “free riders” stayed out.² The first multilateral whale treaty, the Convention for the Regulation of Whaling, was adopted in 1931.³ It did apply to “all waters of the world,” but was otherwise so limited in scope and weak in enforcement that the decline of whales continued and extinction of a number of the eleven species of baleen whales looked increasingly likely.⁴

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¹ The doctrine of freedom was on full view in the Bering Fur Seals Arbitration. See Award and Declarations of the Arbitral Tribunal, 15 August 1893, 1 INT’L ENVTL. L. REP. 67, 70 (1999). For the classic formulation of the tragedy of the commons see, of course, Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

² WRAY VAMPLEW, SALVESEN OF LEITH 198 (1975).

³ 155 L.N.T.S. 349, 49 Stat. 3079, TS No. 880.

⁴ PATRICIA BIRNIE, 1 INTERNATIONAL REGULATION OF WHALING 129-30 (1985).

As a result, the fourteen states then whaling (including Australia and Japan), desiring to ensure the continuing viability of commercial whaling, adopted the International Convention on the Regulation of Whaling (ICRW) in 1946.⁵ A number of important advances were made over the 1931 Convention, but the two most important new features were: a) the International Whaling Commission (IWC) as an institutional decision-making body (Art. III), and b) the “schedule” of regulations to limit and control whaling, treated as part of the Convention, but amendable on an annual basis by a three-fourths majority vote by the IWC on the basis of scientific “findings.” The amendments are binding unless a party opts out by objection. (Arts. I and V). Despite these and other improvements, so long as whaling was assumed to be a form of fishing and the primary object of the parties was “the orderly development of the whaling industry”⁶ – as opposed to the protection of whales – the decline of whale populations continued under the ICRW.⁷

In the late 1960s the object of the parties (or at least some of them) did, in fact, begin to shift from one of sustained exploitation to outright protection. One impetus was the 1972 U.N. Conference on the Human Environment in Stockholm, which called for a 10 year moratorium on commercial whaling in order to give decimated stocks breathing space.⁸ Ten years later, as the number of non-whaling states continued to accede to the ICRW, the IWC established a global moratorium on commercial whaling by amending the Schedule under Art. V, which came into force in the 1985-86 whaling season.⁹ The moratorium, however, did not appear to be a permanent ban.¹⁰ Rather,

⁵ 161 U.N.T.S. 72, 62 Stat. 1716, TIAS No. 1849.

⁶ *Id.*, Preamble.

⁷ Sebastian Oberthür, *The International Convention for the Regulation of Whaling: From Over Exploitation to Total Prohibition*, YB. INT’L CO-OP. ENV. & DEV. 29 (1998/99).

⁸ Recommendation 33, *Action Plan for the Human Environment*, Report of the United Nations Conference on the Human Environment at 12, U.N. Doc. A/CONF.48/14/Rev.1 (June 5-16, 1972).

⁹ International Convention for the Regulation of Whaling, Schedule (as amended June 2009), para. 10(e), <http://iwcoffice.org/documents/commission/schedule.pdf> (hereafter “Schedule”).

¹⁰ Indeed, there is no specific reference to a power to permanently end whaling in the ICRW and such action would appear to belie the state object of the Convention.

it seemed to be a cessation of whaling for an interim period to be kept under scientific review. Under the terms of the Schedule, by 1990 the IWC was “to undertake a comprehensive assessment of the effects of [the moratorium] on whale stocks and consider modification of this provision and the establishment of other catch limits.”¹¹

The long-running contest between whaling states and anti-whaling states over *limited* whaling versus *no* whaling has been a source of contention for the International Whaling Commission (IWC) for nearly twenty-five years. Most recently, at the 62nd meeting of the IWC (June 21-23, 2010) in Agadir, Morocco, negotiations failed over a Proposed Consensus Decision¹² that would have allowed the return of commercial whaling in return for greatly reduced catches and oversight by the IWC. Australia’s submission to the ICJ anticipated that outcome.¹³

II. THE WHALING DISPUTE BETWEEN AUSTRALIA AND JAPAN

The moratorium on commercial whaling also forms the crux of the dispute between Australian and Japan over Japan’s continued whaling in the Southern Ocean. When the moratorium was adopted by the IWC in 1982, Japan lodged a formal objection under Article V and so was not bound by its terms.¹⁴ In 1984, in response to the Japanese objection, the United States threatened to punish Japan by eliminating Japanese fishing in the U.S. exclusive economic zone. Japan, in turn, agreed to withdraw its objection and halt commercial whaling at the end of 1987 and did so. At the same time, however, Japan announced that it would continue to take hundreds of minke whales each season “for purposes of scientific research.”¹⁵ Scientific whaling is regulated under Article VIII of the ICRW. It provides that despite anything else in the Convention (including the Scheduled moratorium), a party may

¹¹ Schedule, para. 10(e).

¹² Proposed Consensus Decision to Improve the Conservation of Whales from the Chair and Vice-Chair of the Commission, IWC Doc. IWC/62/7rev (Agenda item 3)(28/04/10), <http://iwcoffice.org/documents/commission/IWC62docs/62-7rev.pdf>

¹³ See, e.g., Donald K. Anton, *Antarctic Whaling: Australia’s Attempt to Protect Whales in the Southern Ocean*, 36 B.C. ENVTL. AFF. L. REV. 319, 322-339 (2009).

¹⁴ Schedule, para. 10(e) n *, <http://iwcoffice.org/commission/schedule.htm>.

¹⁵ See Sean D. Murphy, *Contemporary Practice of the United States*, 95 AM. J. INT’L L. 132, 150-51 (2001).

issue a “special permit” authorizing whaling for “scientific research,” subject to such conditions as the party “thinks fit” (Art. VIII(1)).

A. Municipal Action

Australia has long criticized Japan over increasing regular annual takes of now over 1000 minke whales in the Southern Ocean.¹⁶ Australia has maintained that Japan’s scientific research whaling is of great concern because there are “no agreed abundance estimates for the species” and that it is a “sham” for commercial whaling.¹⁷ In order to provide greater protection for whales under municipal law, in 1999 Australia passed the *Environment Protection Biodiversity Conservation Act* (EPBC Act),¹⁸ which created the Australia Whale Sanctuary (AWS) in its exclusive economic zone (EEZ), including the EEZ that Australia contentiously declared in 1994 adjacent to its Antarctic territorial claim. It is an offence to kill or take whales in the AWS under the EPBC Act.

Using the EPBC Act, in 2004 Human Society International brought a successful action in the Federal Court of Australia to enjoin Japanese scientific whaling in the Southern Ocean AWS. The Federal Court found a Japanese whaler to be in violation of the Act and enjoined future breaches, but the Commonwealth Government has failed to take enforcement action against Japan, presumably because of the contentious nature of the predicate claim underlying the Southern Ocean AWS. Neither Japan nor most of the world recognize Australian jurisdiction in these waters but regard them as high seas.¹⁹

¹⁶ See Commonwealth of Australia, Report of the National Task Force on Whaling, *A Universal Metaphor: Australia’s Opposition to Commercial Whaling* chap. 2 (May 1997) <http://www.environment.gov.au/coasts/publications/whaling/pubs/whaling.pdf>.

¹⁷ See, e.g., Australian Antarctic Division, *New Australian Research Shows Japan’s Scientific Whaling is a Sham* (Mar. 28, 2006), <http://www.aad.gov.au/default.asp?casid=21638>; Australian Antarctic Division, *Whaling – Back to the Bad Old Days, Warns Campbell* (April 1, 2005), <http://www.aad.gov.au/default.asp?casid=19640>.

¹⁸ Environmental Protection Biodiversity Conservation Act 1999 (Cth), <http://www.comlaw.gov.au/comlaw/management.nsf/lookupindexpagesbyid/IP200401830?OpenDocument>.

¹⁹ See Donald K. Anton, False Sanctuary: The Australian Antarctic Whale Sanctuary and Long-Term Stability, 8 SUSTAINABLE DEVELOPMENT L. & POL’Y 17, 18-20 (2008).

B. ICJ Action

While this litigation was pending, during the Australian federal election campaign in 2007, the Australian Labor Party promised to end Japanese whaling in the Southern Ocean by international legal action.²⁰ Once elected, the Labor Government continued to threaten legal action against Japan but pursued diplomacy as a first option in the IWC until the negotiations surrounding the recent compromise proposal contained in the Proposed Consensus Decision²¹ collapsed in May 2010.

On May 31, 2010, Australia finally filed its Application Instituting Proceedings against Japan in the Registry of the International Court of Justice (ICJ).²² The commencement of the action by Australia brings to a head the dispute (sometimes acrimonious) concerning Japan's annual Southern Ocean whale hunt that has persisted over twenty years.²³ In general terms, Australia alleges in its Application that the implementation of the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JAPRA II) is a "breach of obligations assumed by Japan under the International Convention for the Regulation of Whaling ("ICRW"), as well as its other international obligations [under the Convention on International Trade in Endangered Species (CITES), the Convention on Biological Diversity (CBD)] for the preservation of marine mammals and the marine environment."²⁴

1. JAPRA & JAPRA II

Japan first introduced its Whale Research Program under Special Permit in the Antarctic (JAPRA) in the 1987-88 Southern Ocean whaling season. As noted above, JAPRA was necessary because Japan withdrew its objection to the IWC moratorium in 1987. From

²⁰ Rod McGuirk, Australia to take Japan to Court over Whaling, *The Guardian*, Friday, May 28, 2010, <http://www.guardian.co.uk/world/feedarticle/9100572>.

²¹ Proposed Consensus Decision, *supra* n.12.

²² Dispute Concerning Japan's JAPRA II Program of "Scientific Whaling," Application Instituting Proceedings (31 May 2010), <http://www.icj-cij.org/docket/files/148/15951.pdf> (hereafter Application).

²³ See eg Donald K. Anton, Antarctic Whaling: Australia's Attempt to Protect Whales in the Southern Ocean, 36 *BOST. COLL. ENVTL. AFF. L. REV.* 319, 322-339 (2009).

²⁴ Application, at para. 2.

1987 through 2005, an eighteen year period, over 6800 Antarctic minke whales were taken under JAPRA.²⁵ JAPRA II commenced in 2005 with a two year feasibility study.²⁶ JAPRA II more than doubles the JAPRA annual take of minke whales to $850 \pm 10\%$ and expands the program to include for the first time the lethal study of humpback and fin whales, with annual takes of up to fifty each.²⁷ Humpback whales are listed as Annex I species (most threatened) under the Convention on International Trade in Endangered Species (CITES)²⁸ and fin whales are listed as endangered on the International Union for the Conservation of Nature (IUCN) Red List.²⁹

As the Australian Application points out, the IWC has adopted a number of recommendations concerning JAPRA and JAPRA II under Article VI of the ICRW. In 2003, the IWC called on Japan to halt JAPRA, or to ensure that it was limited to non-lethal research.³⁰ The IWC adopted further resolutions in 2005 and 2007 that expressed concern about the Japanese special permit system of whaling and skepticism about the scientific purposes of JAPRA II. The 2005 resolution strongly urged Japan not to proceed with lethal whaling under JAPRA II.³¹ The 2007 resolution called upon Japan to suspend indefinitely the lethal aspects of JAPRA II conducted in the Southern

²⁵ Resolution on JAPRA II, IWC Res. 2005-1 (2005), para. 6, <http://www.iwcoffice.org/meetings/resolutions/Resolution2005-1.pdf>. (Resolution on JAPRA II). The resolution expressed concern at this number when “compared to a total of 840 whales killed globally by Japan for scientific research in the 31 years period prior to the moratorium.”

²⁶ IWC, 59th Annual Meeting of the IWC, Anchorage, U.S., May 28-31, 2007, [Revised] Chair’s Summary Report of the 59th Annual Meeting, at 4, n.3, <http://www.iwcoffice.org/documents/meetings/ChairSummaryReportIWC59rev.pdf>.

²⁷ *Id.*, at 5, n.3.

²⁸ Convention on International Trade in Endangered Species, Appendices I, II and III (valid from 23 June 2010), <http://www.cites.org/eng/notif/2010/E007A.pdf>.

²⁹ IUCN Red List of Threatened Species, *Balaenoptera physalus*, <http://www.iucnredlist.org/apps/redlist/details/2478/0> (endangered).

³⁰ Resolution on Southern Hemisphere Minke Whales and Special Permit Whaling, IWC Res. 2003-3, <http://www.iwcoffice.org/meetings/resolutions/resolution2003.htm#3>.

³¹ Resolution on JAPRA II, *supra* note 4;

Ocean Whale Sanctuary.³² Perhaps not surprisingly, Japan has opted to continue with its scientific research whaling.

2. The Particulars of Japan's Alleged Breaches

The Application Instituting Proceedings begins by briefly introducing the general nature of its claim and the Court's jurisdiction, which is not likely to be subject to a preliminary objection. The Application then outlines the content of its dispute with Japan. It recounts obligations of Japan under Article V and the moratorium and the Southern Ocean Whale Sanctuary established by the Schedule to the ICRW. It is curiously silent at this point about specific treaty obligations under CITES, CBD and any customary international law that are in play.

The Application then sets out the conduct of Japan that allegedly gives rise to the breaches of its obligations. It starts by characterizing Japan as “ostensibly” ceasing commercial whaling following the withdrawal of its objection to the moratorium and the commencement of JAPRA as “purported[ly]” legitimized “by reference to Article VIII of the ICRW.” The Application then provides a detailed account of the development of JAPRA and JAPRA II, including the consistently growing catches of minke whales (and addition of fin and humpback whales as target species) over the years and the fact that whale meat caught under both iterations of the program has been sold commercially in Japan.

The Application next relates the science Australia relies on as to the status of the three whale stocks targeted by JAPRA II. Australia maintains, in relation to minke whales, that there appears to have been a substantial decrease in the abundance estimates indicated in the results of two circumpolar surveys and the population structure remains unknown. For fin whales (14 of which are alleged to have been taken under JAPRA II), Australia maintains that “[v]irtually nothing is known about the abundance or recovery of fin whales in the Southern Ocean.” It highlights that fin whales have been classified at very high risk of extinction by the IUCN. For humpback whales, Australia acknowledges indications of recovery of Antarctic stock in the area covered by JAPRA II. However, it claims that this may be due to migration of stocks from other areas in Oceania now depleted and that the mixing of stocks makes it impossible to target only whales in stocks now recovering.

³² Resolution on JAPRA, IWC Res. 2007-1, <http://www.iwcoffice.org/meetings/resolutions/Resolution2007-1.pdf>.

Australia's Application then recounts the history of IWC recommendations on JAPRA, JAPRA II and special permit whaling. It highlights those recommendations in which the IWC has called on or urged Japan to abandon JAPRA II. It claims that these recommendations have been repeatedly ignored.

The Application then moves to the history of the stalemated negotiations over the IWC Proposed Consensus Decision. It concludes "that current and proposed IWC processes cannot resolve the key legal issue that is the subject of the dispute between Australia and Japan, namely the legality of large-scale "special permit" whaling under JAPRA II." Finally, picking up on the allegation that Japan has ignored the recommendations of the IWC, Australia avers that Japan has refused to comply with other bilateral and multilateral requests to abandon JAPRA II. It points out that an *Aide Memoire*, signed by 30 states (plus the European Commission), objecting to JAPRA II and urging Japan to cease scientific research whaling, was transmitted to Japan in late 2007. It also highlights that Australia's bilateral engagement with Japan on the issue has failed to modify or terminate Japan's special permit whaling.

III. AUSTRALIA'S CASE AND BRIEF ANALYSIS

Before addressing the case proper, it should be noted that now the Proposed Consensus Decision has failed at the IWC meeting in Agadir, it has been reported that New Zealand may seek to join Australia's action.³³ If this is accurate, additional claims may be asserted. It is interesting that Australia has elected not to invoke potential breaches of the 1991 Environmental Protocol to the Antarctic Treaty identified by the "Canberra Panel" of independent legal and policy experts.³⁴ It has also refrained from asserting any rights it may have in the exclusive economic zone it has declared in Antarctic, where much of the Japanese Whaling takes place. Perhaps these items have been ignored because Australia wants to avoid any allegation that might put its Antarctic claim in potential jeopardy. If this is true, then it may

³³ Sarah Clarke, NZ May Join Australia's Whale Fight, ABC News, Friday, June 25, 2010, <http://www.abc.net.au/news/stories/2010/06/25/2936692.htm>.

³⁴ Report of the Canberra Panel, Japan's "Scientific" Whaling Program and the Antarctic Treaty System (12 January 2009), http://www.ifaw.org/assets/Media_Center/Press_Releases/asset_upload_file187_5177_1.pdf. Australia also elected not to assert possible breaches of the United Nations Convention on the Law of the Sea that might be available.

be that New Zealand will want to avoid these claims too in order to avoid contention around the Ross Dependency it claims.

Be this as it may, the gravamen of Australia's Application alleges that in "proposing and implementing" JAPRA II, Japan has breached obligations contained in the ICRW, the Convention on International Trade in Endangered Species (CITES) and the Convention on Biological Diversity (CBD), as interpreted in the light of each other and customary international law. One wonders at the outset if Australia is including an allegation that the mere proposal of JAPRA II by Japan is a separate violation of international law absent any implementation. Outside of a request for provisional measures urgently required to preserve respective rights and prevent irreparable prejudice, such a claim seems a stretch.

The Court's jurisdiction seems certain, at least with respect to the interpretation of the ICRW. However, preliminary objections may be forthcoming by Japan over the claims tied to CITES and CBD. Japan may argue that jurisdiction over these claims is lacking because of narrow compromissory clauses and an Australian reservation to its declaration under the optional clause.

The settlement of disputes arising under CITES is limited by Article XVIII to negotiation or, with mutual consent, binding arbitration by the Permanent Court of Arbitration. No form of ICJ jurisdiction is expressed in CITES. Recourse to dispute settlement for alleged breaches of the CBD is limited under Article 27 to only conciliation. Australia made a reservation to its optional clause declaration that excludes from ICJ compulsory jurisdiction any dispute about which "the parties have agreed . . . to have recourse to some other method of peaceful settlement."³⁵ Thus it seems open to Japan to object to jurisdiction on the basis of reciprocity that the CITES and CBD compromissory clauses are exclusive and jurisdiction over these claims are lacking.³⁶ This might be a problem for Australia's case directly. It

³⁵ Australian Declaration Recognizing the Jurisdiction of the Court as Compulsory (Mar. 22, 2002), available at <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=AU>; see also Japanese Declaration Recognizing the Jurisdiction of the Court as Compulsory (July 9, 2007), available at <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=JP> ("This declaration does not apply to disputes which the parties thereto have agreed or shall agree to refer for final and binding decision to arbitration or judicial settlement").

³⁶ See also Southern Bluefin Tuna Cases, (N.Z. & Austl. v. Japan), 117 I.L.R. 148 (ITLOS 1999) (teaching that as a matter of treaty interpretation and *lex specialis*, where dispute settlement provisions in two different treaties come into conflict, the more specific provision to the dispute is preferred even if that results in a removal of jurisdiction). Of course, this case does not involve two ordinary dispute settlement

also raises potential problems in connection with Australia's assertion that the ICRW must be interpreted in light of CITES and CBD because it might be viewed as an application of CITES and CBD through "the back door." Of course, the Court might take an expansive view of its jurisdiction or interpretive powers; and even if it does not, it can address any parallel customary international legal obligation or general principle that may be reflected in CITES or CBD, particularly CBD Art. 3 on the duty not to cause harm.

A. *International Convention for the Regulation of Whaling*

Australia maintains that Japan has violated two obligations contained in the Schedule to the ICRW, neither of which can be excused by the scientific research whaling exception provided in Article VIII of the Convention. First, it is asserted that Japan is in violation of the moratorium established by paragraph 10(e) of the Schedule in that it has failed to "observe in good faith the zero catch limit in relation to the killing of whales for commercial purposes."³⁷ Second, it is claimed that Japan has breached the prohibitions established in the Southern Ocean Whale Sanctuary under paragraph 7(b) of the Schedule by "undertaking commercial whaling of humpback and fin whales in the Southern Ocean."³⁸ No mention is made of minke whales because of the Japanese objection to their inclusion in the Sanctuary. More interestingly, Australia concedes that "the JAPRA II program has not yet killed any humpback whales,"³⁹ but humpbacks are presumably included in the allegations either because Australia can prove permits have illegally issued already⁴⁰ or because humpbacks remain part of JARPA II, and Australia is seeking an order from the ICJ that Japan cease implementation of the entire program.⁴¹

provisions that may be in conflict. The optional clause is paramount in my view. It is designed exactly for this type of situation where the Court would not otherwise have jurisdiction.

³⁷ Application at para. 36(a).

³⁸ Application at para. 36(b).

³⁹ Application at para. 16.

⁴⁰ See 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 (CITES)*, 17 REV. EUR. COMM. & INT'L ENVTL. L. 56, 63 n.66 & accompanying text (2008).

⁴¹ Application, *supra* note 1, ¶ 41(a).

As Article VIII of the ICRW allows parties to carry out scientific research whaling notwithstanding any other provision of the treaty, Australia further claims that Japan's breaches "cannot be justified under Article VIII" for three reasons: "the scale of the JAPRA II program," "the lack of any demonstrated relevance for the conservation and management of whale stocks," and "the risks presented to targeted species and stocks."⁴² What are missing from Australia's allegations are precise reasons why and on what basis these matters disqualify JAPRA II from either being considered special permit scientific research whaling or beyond what Article VIII allows. In essence, however, Australia is arguing that Japan has abused its rights under Article VIII of the Convention. Publicists have opined that such an action may lie in these general circumstances in order to protect whales⁴³ and specifically against Japan for Southern Ocean whaling.⁴⁴ Even so, success on a claim based on abuse of rights under Article VIII is by no means certain.

Certain influential authority questions the independent existence and utility of the doctrine of abuse of rights.⁴⁵ Perhaps more importantly, the text of Article VIII authorizes states to issue special permits subject to such restrictions and conditions it "thinks fit". Such a criterion seems to admit of very little, if any, limitation and may make it difficult to argue an abuse has occurred. Of course, things are more nuanced than this. Japan is bound by the obligation of "good faith" and as more facts come to light and the case unfolds, it may be that this obligation has not been met by Japan in implementing JAPRA II. It is here that whatever proof Australia has that JAPRA II lacks of any demonstrated relevance for the conservation and management of whale stocks will be especially important. Notwithstanding these problems, looking more closely at Australia's ICRW claims, it appears that the argument will proceed along two lines.

⁴² Application at para 37.

⁴³ Michael Byers, *Abuse of Rights: An Old Principle, A New Age*, 47 MCGILL L. J. 389, 427-429.

⁴⁴ Gillian Triggs, *Japanese Scientific Whaling: An Abuse of Right or Optimum Utilization?*, 5 ASIA-PACIFIC J. ENV'T'L. L. 33 (2002).

⁴⁵ See, e.g., BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 121 (1987); IAN BROWNLIE, *SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY PART I* 51-52 (1983)

First, it seems that Australia is asserting that whaling carried out under JAPRA II is not really for a “scientific purpose”, but is instead “commercial whaling” prohibited by the Schedule paragraph 10(e) moratorium. Australia will likely point to the ever increasing number of whales taken, the increasing range of target species, the increasing supply of whale meat to commercial markets in Japan, and the economic benefits of employment and capital return in the Japanese whaling sector, as indicators of commercial rather than scientific purpose. This argument may depend on whether the characterization of JAPRA II as commercial or scientific is a matter of “objective fact” to be determined by these sorts of criteria or whether it is a matter for Japan to decide. It will also depend on the evidence adduced by Japan that might establish that JAPRA II is, in fact, a *bona fide* scientific program.

Second, it appears Australia will claim that JAPRA II is beyond what is permitted by Article VIII. Again, Australia will likely point to a variety of factors including most prominently the size of the annual takes and the availability of non-lethal alternatives to accomplish the same research. It may argue that the increasing number of whales taken (1001 whales in the 2008-09 season according to the latest data) are far beyond the requirements of science and belie Japan’s “scientific research” claim. In addition, the viability of non-lethal means of research, it may be argued, shows that Japan’s insistence on the right of lethal research is a pretext for obtaining whale meat that can be processed and sold under Article VIII(2). If proved, this would tend to evince a lack of good faith on the part of Japan. Furthermore, if in fact the status of whale stocks covered by JAPRA II is uncertain, the precautionary principle will have a bearing and Australia may claim that the scale of JAPRA II is contrary to scientific research under the ICRW that respects the precautionary principle under international law.

Assuming Australia prevails on these ICRW claims, it does not mean whaling will be brought to an end in the Southern Ocean. At some level, scientific research whaling is explicitly permitted by Article VIII. If Japan were found to have abused its rights under Article VIII, it would still be open to Japan to bring its whaling within whatever parameters the Court might establish as consistent with the right.

B. Convention on International Trade in Endangered Species

The second treaty that Australia claims has been breached (and is continuing to be breached) by Japan is CITES. Australia asserts that the proposed taking of humpback whales under JAPRA II violated Articles II and III(5) of CITES. As noted, humpback whales are listed

in Appendix I of CITES. Under Article II(1) of CITES trade in Appendix I species “must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances.” Article III(5) only allows Appendix I species to be introduced from the sea beyond national jurisdiction into a state subject to a number of strict conditions certified by relevant state authorities, including that the introduction will not be detrimental to the species and that it will not be used for primarily commercial purposes.

The invocation of CITES is somewhat puzzling. At the outset the claim is problematic because Australia asserts that much of the Southern Ocean in which JAPRA II is carried out is part of Australia’s EEZ and thus not beyond the national jurisdiction of a state as required by Article III(5) and the definition of trade in Article II.⁴⁶ Putting this aside, though, the claim is still difficult to understand. It is true that JAPRA II may lead to CITES breaches, but it is difficult to see how Japan has already breached the Convention, as Australia avers, when Japan has yet to take any humpback whales under JAPRA II. Given this posture, it is curious that Australia has not asked the Court for a specific declaration that prospective introduction of humpbacks from the sea as envisioned by JAPRA II would constitute a breach of CITES. Still, it is possible that the claim has relevance because, as noted, Australia is seeking an order declaring generally that JARPA II in its entirety is in violation of Japan’s obligations. Moreover, a convincing case of a CITES breach by Japan exists if it can be proved that humpback whale permits have issued.⁴⁷

C. *The Convention of Biological Diversity*

Finally, Australia alleges that Japan is in violation of obligations contained in Articles 3, 5 and 10(b) of the CBD. Article 3 requires states to ensure that activities under their jurisdiction and control do not

⁴⁶ Australia has not alleged that Japan is engaged in international trade of humpbacks in the form of export, but rather, that it might introduce them from the sea. This has the same beyond national jurisdiction requirement as Article III(5).

⁴⁷ Sand, *supra* note 24. See also Peter H. Sand, “Scientific Whaling”: Whither Sanctions for Non-Compliance with International Law? 19 Finnish Y.B. Int’l L. 344 (2008)(in press; on file with author). See further, the debate between Dan Goodman, *Japan’s Research Whaling is Not Unlawful and Does Not Violate CITES Trade Rules*, 13 J. INT’L WILDLIFE L. & POL’Y 176 (2010) and Vassili Papastavrou and Patrick Ramage, *Commercial Whaling by Another Name: The Illegality of Japan’s Scientific Whaling: Response to Dan Goodman*, 13 J. INT’L WILDLIFE L. & POL’Y 183 (2010).

cause harm to other states or to areas beyond national jurisdiction. Article 5 requires states, “as far as possible and as appropriate,” to cooperate (including through international organizations) in the conservation and sustainable use of biological diversity beyond nations jurisdiction. Article 10(b) requires states, “as far as possible and as appropriate,” to adopt measures that avoid or minimize adverse impacts on biological diversity.

Unfortunately, Australia’s Application is short on any recitation of facts that give rise to the alleged CBD breaches by Japan. In terms of the duty not to cause harm under Article 3, it may be that Australia is claiming that the seasonal whale harvest in the Southern Ocean is harm to the environment itself on account of adverse ecosystem impacts. Alternatively, it may be claiming that non-harvesting activities related to the implementation of JAPRA II, such as pollution from Japanese whalers, are causing environmental harm prohibited by Article 3. The facts proved will be (almost) everything here, especially proof of causation, the nature and severity of the harm, and the exercise of due diligence by Japan. As it stands, however, there is a paucity of extant authority that supports Australia on the bare allegations of its Application.

In connection with the obligations imposed by Articles 5 and 10, their very “soft” nature is apparent in the identical qualifier in each provision. Of course, Articles 5 and 10 do impose binding legal obligations. Absent proof of something specific and egregious on the part of Japan, however, it is unlikely that the ICJ will be moved to find a breach of either.

CONCLUSION

It is an unfortunate fact that international environmental law’s substantive protection still goes only as far as states have consented. Sovereignty is still largely a barrier. As Dan Bodansky recently wrote, the international law of the environment is better placed to facilitate cooperation and enable observance of its norms, rather than compel compliance.⁴⁸ Australia has advanced a fair claim against Japan, but the foregoing illustrates success is anything but certain. The international norms that Australia has invoked against Japan leave much to be desired in terms of protecting whales. The ICRW, over which the Court clearly has jurisdiction, is a “first generation” environmental treaty with a resource exploitation default position and generous “opt out” provisions. This posture is in clear tension with the more holistic and

⁴⁸ DANIEL BODANSKY, *THE ART AND CRAFT OF INTERNATIONAL LAW* (2010).

contemporary conservation orientated obligations of CITES and CBD. One of the most interesting aspects of the case will be whether the ICJ can take advantage of the opportunity to start reconciling these tensions.

The uncertainty of success also raises the question, is the action worth it? From an Australian perspective, the action has not insignificant political and economic costs. However, as I have written elsewhere, the action is not without certain benefits. At a general level, it fosters an international rule of law, and surely that is a good thing. If Australia is to be true to its own traditions, it should pursue international justice through judicial means. Additionally, if the case is decided on the merits – even if adversely to Australia – we will have a definitive legal view from the ICJ on what has been the crux of a decades-long dispute between anti-whaling and pro-whaling states. One of the great deficiencies in the international legal system is the dearth of authoritative decisions about the meaning of disputed obligations. A binding third-party decision would permit the parties to move beyond an otherwise intractable dispute. This is as it should be.⁴⁹

⁴⁹ Donald Anton, *Whaling: Prospects for Success*, THE INTERPRETER, June 9, 2010, available at <http://www.lowyinterpreter.org/post/2010/06/09/Whaling-Prospects-for-ICJ-success.aspx>.