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Dispute Concerning Japan's JARPA II Program of "Scientific Whaling" (Australia v. Japan)

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Introduction

On May 31, 2010, Australia filed an Application Instituting Proceedings against Japan in the Registry of the International Court of Justice (ICJ), bringing to a head a longstanding dispute concerning Japan's annual Southern Ocean whale hunt.[1] For over one hundred 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 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 Agidir, Morocco, negotiations failed over a Proposed Consensus Decision[2] 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.[3]

I. The Whaling Dispute Between Australia and Japan

The IWC's so-called moratorium on commercial whaling[4] forms the crux of the dispute between Australia and Japan. When the IWC adopted the "zero catch quota" amendment in 1982, Japan lodged a formal objection under Article V of the International Convention for the Regulation of Whaling (ICRW). An amendment to the Convention's Schedule, such as the moratorium, does not bind a government that registers an objection to it.[5] In 1984, the United States threatened to punish Japan for its objection 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. At the same time, however, Japan announced that it would continue to take hundreds of minke whales each season "for purposes of scientific research."[6]

Scientific whaling is regulated under Article VIII of the ICRW. It provides that

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despite anything else in the Convention (including the moratorium), a party may issue a "special permit" authorizing whaling for "scientific research," subject to such conditions as the party "thinks fit" (Art. VIII(1)). Japan's whaling program in Antarctic waters is mostly conducted in the Southern Ocean Whale Sanctuary, established by the IWC in 1994.[7] All commercial whaling is prohibited in the sanctuary regardless of the conservation status of whale stocks. Japan objected to this amendment of the Schedule with regard to Antarctic minke whales, but not humpback or fin whales.[8]

Australia has long criticized Japan for increasing annual takes that now amount to over 1000 minke whales in the Southern Ocean.[9] 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.[10] Once elected, the Labor Government continued to threaten legal action against Japan but pursued diplomacy in the IWC until May 2010, when the negotiations surrounding a compromise proposal seemed ready to collapse. On May 31, 2010, Australia finally filed its Application with the ICJ.

In general terms, Australia alleges that the implementation of the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA 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."[11]

A. JARPA & JARPA II

Japan first introduced its Whale Research Program under Special Permit in the Antarctic (JARPA) in the 1987-88 Southern Ocean whaling season. For Japan to carry out any whaling, JARPA permit authorization was necessary once Japan had withdrawn its objection to the IWC moratorium. From 1987 through 2005, an eighteen year period, over 6800 Antarctic minke whales were taken under JARPA.[12]

JARPA II commenced in 2005 with a two year feasibility study.[13] JARPA II more than doubles the JARPA annual take of minke whales to 850 ± 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.[14] Humpback whales are listed as Annex I species (most threatened) under the Convention on International Trade in Endangered Species (CITES)[15], and fin whales are listed as endangered on the International Union for the Conservation of Nature (IUCN) Red List.[16]

In 2003, an IWC resolution called on Japan to halt JARPA or to ensure that it was limited to non-lethal research.[17] Further resolutions in 2005 and 2007 expressed concern about the Japanese special permit system of whaling and skepticism about the scientific purposes of JARPA II. The 2005 resolution strongly urged Japan not to proceed with lethal whaling under JARPA II.[18] The 2007 resolution called upon Japan to suspend indefinitely the lethal aspects of JARPA II conducted in the Southern Ocean Whale Sanctuary.[19] Perhaps not surprisingly, Japan has opted to continue with its

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DOCUMENTS OF NOTE

Australia's Application Instituting Proceedings against Japan

International Convention for the Regulation of Whaling

Convention on International Trade in Endangered Species

Convention on Biological Diversity

Whale Research Program under Special Permit in the Antarctic (JARPA)

International Union for the Conservation of Nature Red List

Statute of the International Court of Justice

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scientific research whaling.

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B. Australia's Application: The Particulars of Japan's Alleged Breaches

Australia's Application briefly introduces the general nature of its claim. The Court's jurisdiction is based on the parties' broad declarations of its jurisdiction as compulsory *ipso facto* under Article 36(2) of the ICJ Statute, although an Australian reservation may be in play. The Application then recounts Japan's ICRW obligations under Article V, the moratorium, and the Southern Ocean Whale Sanctuary. It is curiously silent in the introduction of the Application 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 characterizes Japan as "ostensibly" ceasing commercial whaling following the withdrawal of its objection to the moratorium and the commencement of JARPA as "purported[ly]" legitimized "by reference to Article VIII of the ICRW." The Application then provides a detailed account of the development of JARPA and JARPA II, including the growing catches of minke whales; the addition of fin and humpback whales as target species; 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 JARPA II. Australia maintains that two circumpolar surveys indicate a substantial decrease in the estimated abundance of minke whales and the population structure (i.e., age and sex) remains unknown. For fin whales (fourteen of which are alleged to have been taken under JARPA 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 JARPA II. However, it claims that this may be due to migration of stocks from other, now depleted, areas in Oceania and that the mixing of stocks makes it impossible to target only whales in recovering stocks.

Australia's Application then recounts the history of IWC recommendations on JARPA, JARPA II, and special permit whaling. It highlights those recommendations in which the IWC has called on or urged Japan to abandon JARPA 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 JARPA II." Finally, Australia avers that Japan has refused to comply with other bilateral and multilateral requests to abandon JARPA II. It points out that an *Aide Memoire*, signed by thirty states (plus the European Commission), objecting to JARPA 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.

II. Australia's Case and Brief Analysis

The gravamen of Australia's Application alleges that in "proposing and implementing" JARPA II, Japan has breached obligations contained in the ICRW, CITES, and CBD, as interpreted in light of each other and customary international law. One wonders at the outset if Australia is alleging that the mere proposal of JARPA 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."[20] 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.[21] This might be a problem for Australia's case directly. It 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 reliance on scientific research whaling provided for in Article VIII of the Convention. First, it asserts 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."[22] Second, it claims 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."[23] No mention is made of minke whales because of the Japanese objection to their inclusion in the Sanctuary. More interestingly, Australia concedes that "the JARPA II program has not yet killed any humpback whales;"[24] but humpbacks are presumably included in

the allegations either because Australia can prove permits have illegally issued already[25] 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.[26]

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 JARPA 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."[27] Australia's allegations lack precise reasons why and on what basis these matters disqualify JARPA II from either being considered special permit scientific research whaling or beyond what Article VIII allows. In essence, however, it appears 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 to protect whales[28] and specifically against Japan for Southern Ocean whaling.[29] Even so, success on a claim based on abuse of rights under Article VIII is heavily dependent on the facts and is by no means certain.

Certain influential jurists question the independent existence and utility of the doctrine of abuse of rights.[30] Perhaps more importantly, the text of Article VIII authorizes a state 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. In terms of preparatory work of the treaty that might bear on interpretation, Article VIII can be traced to a draft by Norwegian diplomat Birger Bergersen, who believed that "'the number of whales a country could take for science was less than 10; he didn't intend for hundreds [let alone thousands] to be killed for this purpose.'"[31] Moreover, 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 JARPA II. It is here that whatever proof Australia has that JARPA II lacks 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.

First, it seems that Australia is asserting that whaling carried out under JARPA 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 JARPA 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 JARPA II is, in fact, a *bona fide* scientific program.

Second, it appears Australia will claim that JARPA 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 JARPA II is uncertain, the precautionary principle will have a bearing and Australia may claim that the scale of JARPA 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. 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 continues to be breached) by Japan is CITES. Australia asserts that the proposed taking of humpback whales under JARPA II violated Articles II and III(5) of CITES. 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 may be puzzling to some. At the outset, the claim is problematic because Australia asserts that much of the Southern Ocean in which JARPA 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.[32] Putting this aside, though, the claim still has difficulties. It is true that JARPA 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 JARPA 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 JARPA 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 been

issued.[33]

C. The Convention on Biological Diversity

Australia also 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 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 national 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 harms the environment itself on account of adverse ecosystem impacts. Alternatively, it may be claiming that non-harvesting activities related to the implementation of JARPA 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 significant 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.[34] 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 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.[35]

About the Author

Don Anton is a member of ASIL and Corresponding Editor of *International Legal Materials*. He is a member of the International Law Association's Committee on International Law on Sustainable Development and a Fellow in the United Nations Institute on Training and Research's (UNITAR) program on International Environmental Law. Anton is a tenured member of the faculty of The Australian National University College of Law where he teaches International Law. Thanks go to Cymie Payne, Penelope Mathew, and Peter Sand for their insight and helpful comments.

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Endnotes

[1] Application of Japan's JARPA II Program of Scientific Whaling (Austl. v. Japan) (May 31, 2010), *available at* http://www.icj-cij.org/docket/files/148/15951.pdf [hereinafter Application].

[2] Proposed Consensus Decision to Improve the Conservation of Whales from the Chair and Vice-Chair of the Commission, IWC Doc. IWC/62/7rev (Apr. 28, 2010) *available at* http://iwcoffice.org/_documents/commission/IWC62docs/62-7rev.pdf

[3] *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).

[4] International Convention for the Regulation of Whaling, Schedule, ¶ 10(e) (amended June 2009), *available at* http://iwcoffice.org/_documents /commission/schedule.pdf [hereinafter Schedule].

[5] *Id.* ¶ 10(e) n.*.

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

[7] Japan also issues permits in the north-west Pacific, the JARPN.

[8] Schedule, *supra* note 4, ¶ 10(e), 10(e) n.**.

[9] *See* Report of the National Task Force on Whaling, Austl., May 1997, A Universal Metaphor: Australia's Opposition to Commercial Whaling, ch. 2, *available at* http://www.environment.gov.au/coasts/publications/whaling /pubs/whaling.pdf.

[10] Rod McGuirk, *Australia to Take Japan to Court Over Whaling*, GUARDIAN, May 28, 2010, *available at* http://www.guardian.co.uk/world /feedarticle/9100572 (providing that, during this campaign, Humane Society International used an Australian federal law to successfully enjoin a Japanese whaler in the Southern Ocean in waters off the Antarctic territory claimed by Australia); *see also* Donald K. Anton, *False Sancturary: The Australian Antarctic Whale Sanctuary and Long-Term Stability*, 8 SUSTAINABLE DEV. L. & POL'Y 17, 18-20 (2008).

[11] Application, *supra* note 1, ¶ 2.

[12] Res. on JARPA II, IWC Res. 2005-1 (2005), ¶ 6, *available at* http://www.iwcoffice.org/meetings/resolutions/Resolution2005-1.pdf (expressing 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").

[13] 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, *available at* http://www.iwcoffice.org/_documents/meetings /ChairSummaryReportIWC59rev.pdf.

[14] *Id.* at 5 n.3.

[15] Convention on International Trade in Endangered Species of Wild Fauna and Flora, Apps. I-III (valid from June 23, 2010), *available at* http://www.cites.org/eng/notif/2010/E007A.pdf.

[16] *Balaenoptera physalus*, IUCN RED LIST OF THREATENED SPECIES (July 2, 2010), http://www.iucnredlist.org/apps/redlist/details/2478/0.

[17] Res. on Southern Hemisphere Minke Whales & Special Permit Whaling, IWC Res. 2003-3 (2003), *available at* http://www.iwcoffice.org/meetings /resolutions/resolution2003.htm#3.

[18] Res. on JARPA II, *supra* note 12.

[19] Res. on JARPA, IWC Res. 2007-1 (2007), *available at* http://www.iwcoffice.org/meetings/resolutions/Resolution2007-1.pdf.

[20] 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").

[21] 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 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.

[22] Application, *supra* note 1, ¶ 36(a).

[23] *Id.*¶ 36(b).

[24] *Id.*¶ 16.

[25] *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).

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

[27] *Id.*¶ 37.

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

[29] Gillian Triggs, *Japanese Scientific Whaling: An Abuse of Right or Optimum Utilization?*, 5 ASIAN-PAC. J. ENVT'L. L. 33 (2002).

[30] *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).

[31] Sand, *supra* note 25 (quoting V. Morell, *Killing Whales for Science?*, SCIENCE, Apr. 27, 2007, at 532, 533).

[32] Australia has not alleged that Japan is engaged in international trade of humpbacks in the form of export, but rather that trade would be in the form

of the introduction from the sea. This has the same beyond national jurisdiction requirement as Article III(5). *See* Introduction from the Sea, CITES Res. 14.6, 15 (June 2007).

[33] Sand, *supra* note 25. *See also* Peter H. Sand, *Scientific Whaling": Whither Sanctions for Non-Compliance with International Law?* 19 FINNISH Y.B. INT'L L. 344 (2008) (on file with author). *Compare* 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), *with* Vassili Papastavrou & 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).

[34] DANIEL BODANSKY, THE ART AND CRAFT OF INTERNATIONAL LAW (2010).

[35] 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.