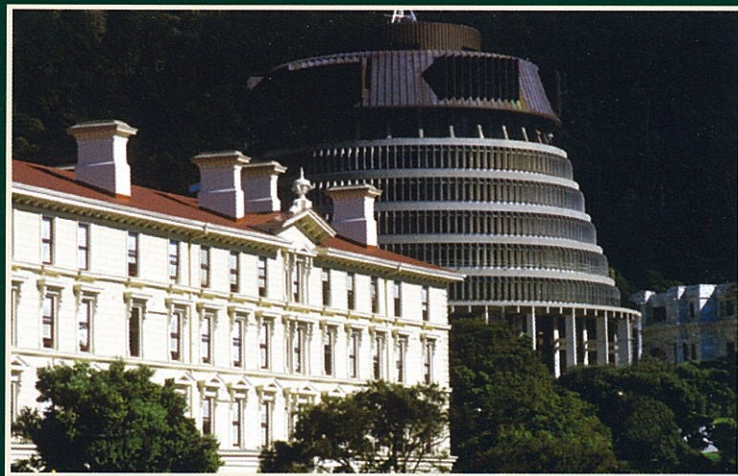


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THIS ISSUE INCLUDES CONTRIBUTIONS BY:

Christopher Harker  
Maya Park  
Geoff McLay

Sascha Mueller  
Elise Anne Clark  
RP Boast

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**Victoria**

UNIVERSITY OF WELLINGTON

*Te Whare Wānanga  
o te Upoko o te Ika a Māui*



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*Te Kauhanganui Tātai Ture*

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# JAPANESE SCIENTIFIC WHALING IN ANTARCTICA: IS AUSTRALIA ATTEMPTING THE IMPOSSIBLE?

*Maya Park\**

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*The long standing whaling controversy has reached a new level, with Australia filing proceedings against Japan in the International Court of Justice on 31 May 2010. This paper analyses the strength of Australia's causes of action, focusing on the International Convention for the Regulation of Whaling. It concludes that Australia is taking a large risk in launching this case due to the uncertainty of success. This may have serious implications for the future of the International Whaling Commission and the future of whales.*

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## **I INTRODUCTION**

The Japanese whaling programme has been the topic of hot debate on the international stage for many years. The catalyst for the current debate was Japan's announcement at the 2005 meeting of the International Whaling Commission (IWC) of its intention to commence the second phase of its whaling programme, under which the taking of whales for scientific purposes would double. Japan insists that it has a legal right to hunt whales for scientific research under the International Convention for the Regulation of Whaling (ICRW).<sup>1</sup> So-called scientific whaling has been criticised by non-governmental organisations (NGOs) and anti-whaling states as a loophole or a way of circumventing the moratorium on commercial whaling adopted by the IWC. The central argument on this point is that Japan's whaling programme is commercial whaling under the guise of scientific research, and not genuinely for scientific purposes. Although many countries have conducted whaling for scientific research in the past, Iceland is currently the only other country conducting scientific whaling.<sup>2</sup> Diplomatic measures and repeated resolutions issued by the IWC rejecting

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\* Submitted in completion of an LLB(Hons) degree at Victoria University of Wellington. I would like to acknowledge the assistance of Joanna Mossop.

1 International Convention for the Regulation of Whaling (opened for signature 2 December 1946, entered into force 10 November 1948) [ICRW].

2 See International Whaling Commission "Scientific Permit Whaling" (2010) International Whaling Commission <[www.iwcoffice.org](http://www.iwcoffice.org)>. Prior to 1982 when the moratorium was agreed, over 100 scientific permits were issued by governments including Canada, USA, USSR, South Africa and Japan. Following the

Japan's scientific whaling programme have not been successful in bringing it to an end. After threatening to take Japan to the International Court of Justice (ICJ) if it did not cease or at least revise its whaling programme, Australia instituted proceedings in the ICJ on 31 May 2010.

This article will briefly outline Japan's whaling programmes as a background to the legal analysis. It will then canvas Japan's international obligations as identified in the Australian application for proceedings in the ICJ, and discuss the strength of Australia's arguments. The focus is on the legal arguments under the ICRW and although Australia's claims under Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Convention on Biological Diversity (CBD) will be briefly covered, it is not the aim or within the scope of this paper to deal with these in detail. This article suggests that Australia is misguided in believing that it has a strong enough case to succeed before the ICJ, and that there is currently no international law providing a blanket ban on whaling or that achieves the purpose of ceasing lethal whaling altogether. Finally, it will discuss the implications of taking the case to the ICJ, and the effect the proceedings may have on the already weak IWC.

## ***II THE JAPANESE WHALING PROGRAMMES***

In 1982 the IWC adopted a zero catch quota for commercial whaling, effectively creating a moratorium which took effect from the 1985–1986 whaling season.<sup>3</sup> Japan originally objected to the moratorium under art V of the ICRW, but withdrew its objection in 1987 after pressure from the United States.<sup>4</sup> The large scale issuance of scientific permits by Japan coincided with the entry into effect of the moratorium, with the "Japanese Whale Research Programme under Special Permit in the Antarctic" (JARPA) commencing in the 1987–1988 season.<sup>5</sup>

In addition to the moratorium, the IWC established a whale sanctuary in the Southern Ocean in 1994 in which commercial whaling is prohibited.<sup>6</sup> Japan has lodged a partial objection to the Southern Ocean Sanctuary in respect of Antarctic minke whales, although the moratorium on commercial whaling still applies in this area.<sup>7</sup>

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entry into force of the moratorium in 1986, Norway, Iceland and Japan issued scientific permits, and in recent years, only Iceland and Japan have issued permits.

3 ICRW, above n 1, para 10(e).

4 Donald K Anton "Dispute Concerning Japan's JARPA II Program of 'Scientific Whaling' (Australia v. Japan)" (2010) ASIL Insights <[www.asil.org](http://www.asil.org)>.

5 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)" (2008) 17 *RECIEL* 56 at 56.

6 Schedule to the ICRW, above n 1, para 7(b).

7 See ICRW, above n 1, footnote to para 7(b) of the Schedule to the ICRW.

After the implementation of the moratorium, the number of whales taken under scientific permit substantially increased. Under JARPA 300–400 Antarctic minke whales were taken annually from 1987–1988 to 2004–2005.<sup>8</sup> While Japan had taken a total of 840 whales from all international waters for scientific research in the 31 years preceding the moratorium, 6800 Antarctic minke whales were taken from Antarctic region during the 18 years of JARPA.<sup>9</sup> The objectives of JARPA were to examine the role of whales in the Antarctic ecosystem and the effect that environmental changes have on whales, as well as to clarify stock structures and estimate the biological parameters of whales in order to improve management of whale stocks.<sup>10</sup> The reviews of JARPA by the IWC Scientific Committee were not as negative as they have been painted by some commentators.<sup>11</sup> The preliminary investigation carried out in 1997, although concluding that the results of JARPA were "not required for management under the RMP", recognised the scientific merits of the research.<sup>12</sup> The Scientific Committee noted that the results had "the potential to improve the management of minke whales in the Southern Hemisphere" in several ways and that "JARPA had set the stage for answering many questions about long term population changes regarding minke whales" in the JARPA research area. It also noted that:<sup>13</sup>

[t]he results of analyses of JARPA data could be used ... to increase the allowed catch of minke whales in the southern hemisphere, without increasing the depletion risk above the levels indicated [by the RMP trials].

The full review of JARPA conducted in December 2006 agreed with the view that although JARPA was not required for Revised Management Procedure (RMP) management, it was capable of improving management of Antarctic minke whales and stated that:<sup>14</sup>

... the dataset provides a valuable resource to allow investigation of some aspects of the role of whales within the marine ecosystem ... [and] this has the potential to make an important contribution to the Scientific Committee's work in this regard.

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8 International Whaling Commission Scientific Committee "Report of the Intersessional Working Group to Review Data and Results from Special Permit Research on Minke Whales in the Antarctic, Tokyo, 12-16 May 1997" (1998) SC/49/Rep1 at 389 [1997 SC Report].

9 *Resolution on JARPA II* IWC Res 2005-1 (2005).

10 International Whaling Commission, above n 2.

11 See Gillian Triggs "Japanese Scientific Whaling: An Abuse of Right or Optimum Utilisation?" (2000) 5 *Asia Pac J Envtl L* 33 at 36.

12 1997 SC Report, above n 8, at 378.

13 *Ibid.*

14 International Whaling Commission Scientific Committee "Report of the Intersessional Workshop to Review Data and Results from Special Permit Research on Minke Whales in the Antarctic, Tokyo, 4-8 December 2006" (2006) SC/59/Rep1 at 28 and 31 [2006 SC Report].

JARPA II followed the first programme, commencing in the 2005–2006 season. The first two seasons were feasibility studies, and the full programme commenced in the 2009–2010 season.<sup>15</sup> The annual take for JARPA II is set at  $850 \pm 10$  per cent Antarctic minke whales, 50 fin whales and 50 humpback whales.<sup>16</sup> This more than doubles the number of Antarctic minke whales taken under JARPA, as well as adding catch quotas for fin and humpback whales which were previously not targeted. The stated objectives of JARPA II are much the same as the original JARPA, comprising the monitoring of the Antarctic ecosystem, as well as clarifying changes in stock structure and improving the management procedure for Antarctic minke whale stocks, with the addition of the objective to model competition amongst the whale species.<sup>17</sup>

Ethics and moral values play a major role in NGOs and nationals finding JARPA and JARPA II objectionable, but the legal basis for these objections is the commercial character the programmes seem to have. Not only did JARPA commence at the same time as the moratorium entered into effect for Japan, but whale products are also treated commercially. The meat from harvested whales is sold for consumption once research has been carried out, with Japan using the profits from the commercial sale of whale products to support the Institute for Cetacean Research.<sup>18</sup>

The scientific validity of JARPA and JARPA II has been repeatedly questioned in the IWC.<sup>19</sup> Australia lists several resolutions adopted by the IWC in its application which supports its claim. Resolution 2003-3 noted that there were no valid abundance estimates of Southern Hemisphere minke whales and called on the Government of Japan to "halt the JARPA program, or to revise it so that it is limited to non-lethal research methodologies".<sup>20</sup> It recommended that the Government of Japan refrain from considering subsequent whaling programmes until after the Scientific Committee had reviewed both the first 16 years of JARPA and the abundance estimates for Antarctic minke whales.<sup>21</sup> Resolution 2005-1 commented that a circumpolar survey indicated that the abundance of

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15 "Scientific Permit Whaling", above n 2.

16 "Report of the International Panel of Independent Legal Experts on Special Permit ("Scientific") Whaling Under International Law" (Paris, 2006) [Paris Panel Report]. The Panel was composed of Laurence Boisson de Chazournes, Pierre-Marie Dupuy, Donald R Rothwell, Philippe Sands, Alberto Szekely, William H Taft IV and Kate Cook, and was commissioned by the International Fund for Animal Welfare (IFAW).

17 See The Institute for Cetacean Research "Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) – Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources" <www.icrwhale.org>.

18 Reuben B Ackerman "Japanese Whaling in the Pacific Ocean: Defiance of International Whaling Norms in the Name of 'Scientific Research', Culture and Tradition" (2002) 25 BC Int'l & Comp L Rev 323 at 329; Paris Panel Report, above n 16, at [9].

19 "Independent Panel of Legal and Policy Experts on Japan's 'Scientific' Whaling Program and the Antarctic Treaty System" (2009) International Fund for Animal Welfare <www.ifaw.org> at 7.

20 *Resolution on Southern Hemisphere Minke Whales and Special Permit Whaling* IWC Res 2003-3 (2003).

21 Ibid.



Antarctic minke whales is lower than an earlier estimate and expresses concern at the number of these whales taken under JARPA. The resolution urges the Government of Japan "to withdraw its 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".<sup>22</sup> Resolution 2007-1 noted that the Scientific Committee 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" and called upon the Government of Japan "to suspend indefinitely the lethal aspects of JARPA II conducted within the Southern Ocean Whale Sanctuary".<sup>23</sup>

### **III AUSTRALIA'S OBJECTION TO JARPA II**

Australia's application to the ICJ challenges the legality of Japan "proposing and implementing" special permit whaling under JARPA II.<sup>24</sup> The main focus of Australia's claim is Japan's obligations under the ICRW, but Australia also points to Japan's obligations under the CITES<sup>25</sup> and the CBD.<sup>26</sup>

In its application, Australia begins by outlining two obligations under the ICRW that it claims Japan has breached.<sup>27</sup> First, it claims that Japan has violated the obligation to refrain from commercial whaling under the zero catch quota brought into effect by para 10(e) of the Schedule to the ICRW.<sup>28</sup> Secondly, it claims that Japan has violated the obligation to refrain from undertaking commercial whaling of humpback and fin whales in the Southern Ocean Sanctuary under paragraph 7(b) of the Schedule to the ICRW.<sup>29</sup> The Schedule forms an integral part of the ICRW, and is thus

22 *Resolution on JARPA II*, above n 9.

23 *Resolution on JARPA IWC Res 2007-1* (2007).

24 Australia also considers that a similar programme conducted in the Northern Hemisphere (JARPN II) is in violation of Japan's international obligations: "Application Instituting Proceedings in the International Court of Justice by the Government of Australia" (31 May 2010) International Court of Justice <[www.icj-cij.org](http://www.icj-cij.org)> at [34] [Australia's application].

25 Convention on International Trade in Endangered Species of Wild Flora and Fauna (opened for signature 3 March 1973, entered into force 1 July 1975) [CITES]. Japan became a party on 6 July 1980.

26 Convention on Biological Diversity (opened for signature 5 June 1992, entered into force 29 December 1993) [CBD]. Japan became a party to the CBD on 28 May 1993.

27 Australia's Application, above n 24, at [36].

28 Paragraph 10(e) of the Schedule to the ICRW states: "Notwithstanding the other provisions of paragraph 10, catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits".

29 Paragraph 7(b) of the Schedule to the ICRW states: "In accordance with Article V(1)(c) of the Convention, commercial whaling, whether by pelagic operations or from land stations, is prohibited in a region designated as the Southern Ocean Sanctuary ... This prohibition applies irrespective of the conservation

binding on Contracting Parties.<sup>30</sup> Although Japan has made a reservation in respect of Antarctic minke whales in the Southern Ocean Sanctuary, it is subject to the general prohibition on commercial whaling, which Japan has accepted as binding.<sup>31</sup> Australia's argument in relation to these two obligations relies on the duty to perform treaty obligations in good faith in accordance with art 26 of the Vienna Convention on the Law of Treaties (VCLT) and customary international law.<sup>32</sup>

Japan purports to conduct JARPA II in reliance on art VIII of the ICRW which permits a Contracting Government to grant special permits authorising nationals to "kill, take and treat whales for purposes of scientific research".<sup>33</sup> Australia claims that Japan cannot justify JARPA II under art VIII of the ICRW due to, first, the "scale of the JARPA II program", secondly, "the lack of any demonstrated relevance for the conservation and management of whale stocks", and lastly, "the risks to targeted species and stocks".<sup>34</sup>

Australia also contends that Japan has breached and is continuing to breach arts II and III(5) of CITES in relation to the proposal to harvest humpback whales, which are listed in Appendix I as endangered. CITES places restrictions on the trade of those species included in Appendix I. Finally, Australia claims that Japan has breached arts 3, 5 and 10(b) of the CBD which involve obligations to ensure that activities within a state's jurisdiction or control do not cause damage to the environment of other states or areas beyond national jurisdiction, to cooperate with other parties to the CBD and to adopt measures to minimise impacts on biological diversity.<sup>35</sup>

By way of evidence, Australia focuses on the increasing number of Antarctic minke whales harvested since the implementation of the JARPA programmes, and the addition of fin and humpback whales as targeted species in phase two of the programme. The application then goes on

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status of baleen and toothed whale stocks in this Sanctuary, as may from time to time be determined by the Commission. However, this prohibition shall be reviewed ten years after its initial adoption and at succeeding ten year intervals, and could be revised at such times by the Commission. Nothing in this subparagraph is intended to prejudice the special legal and political status of Antarctica." As mentioned above, Japan lodged an objection to the Southern Ocean Sanctuary in relation to Antarctic minke whales when it came into force in 1994, thus it is legally permitted to carry out commercial whaling of Antarctic minke whales in the Southern Ocean Sanctuary (although this is still subject to the moratorium on commercial whaling).

30 ICRW, above n 1, art I(1).

31 Paris Panel Report, above n 16, at [48].

32 Australia's application, above n 24, at [8].

33 Nobuyuki Yagi "The Status of Scientific Research Whaling in International Law" (2002) 8 ILSA J Int'l & Comp L 487 at 488.

34 Australia's application, above n 24, at [37].

35 Ibid, at [38].

to give details of the status of the targeted whale stocks. The scientific evidence Australia relies on suggests that there has been "a substantial decrease in the abundance estimates of Antarctic minke whales".<sup>36</sup> In respect of fin whales, Australia points out that these have been classified as endangered by the International Union for the Conservation of Nature (IUCN), and that very little is known about "abundance or recovery" of these whales in the Southern Ocean. Australia acknowledges that there are "limited indications of some recovery in population numbers" of fin whales, but stresses that there is no agreed estimate of population numbers.<sup>37</sup> Finally, Australia also admits that there are indications of recovery in stocks of humpback whales in the Antarctic region, but then goes on to state that this may be due to the mixing of highly depleted and less depleted stocks which migrate to feed in the area targeted by JARPA II.<sup>38</sup>

The remedies sought by Australia in its application are first a declaration by the ICJ that in implementing JARPA II, Japan is in breach of its international obligations. Additionally, Australia requests the cessation of JARPA II and a guarantee that no further action will be taken under JARPA II until it is brought into conformity with Japan's international obligations.<sup>39</sup>

#### ***IV JURISDICTION AND ADMISSIBILITY***

Australia has founded jurisdiction of the ICJ on the declarations lodged by Japan and Australia under art 36(2) of the Statute of the ICJ. These accept the compulsory jurisdiction of the ICJ in relation to any other state which has accepted the same obligation.<sup>40</sup> There does not seem to be any solid basis for an objection to jurisdiction in respect of the ICRW. However, Japan has a stronger foundation to contest the jurisdiction of the ICJ in relation to the claims under CITES and the CBD based on Australia's reservation to its declaration.

Australia has made a reservation to its declaration that excludes from compulsory jurisdiction, any dispute to which the parties "have agreed or shall agree to have recourse to some other method of peaceful settlement".<sup>41</sup> Both CITES and CBD provide for alternative methods of dispute settlement. Where a dispute arises under CITES, art XVIII requires the parties to negotiate between themselves or to submit the dispute to arbitration.<sup>42</sup> Under the CBD, parties agree to resolve a

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36 Ibid, at [14].

37 Ibid, at [15].

38 Ibid, at [16].

39 Ibid, at [41].

40 See International Court of Justice "Jurisdiction: Declarations Recognizing the Jurisdiction of the Court as Compulsory" International Court of Justice <[www.icj-cij.org](http://www.icj-cij.org)>.

41 Australian Declaration Recognising the Jurisdiction of the Court as Compulsory.

42 CITES, art XVIII.

dispute by negotiation, and failing this, they may mutually agree to conciliation or mediation.<sup>43</sup> Parties may also, by declaration, accept compulsory arbitration or submission to the ICJ. No such declaration has been made by either Australia or Japan. Thus Japan is likely to argue, on the basis of reciprocity, that Australia's reservation excludes the ICJ's jurisdiction in respect of CITES and the CBD. Although there has not yet been a successful objection based on this type of reservation, this is a much more clear-cut case than the previous attempt to do so.<sup>44</sup> The ICJ may have to proceed with this claim on a much narrower scope than Australia's original claim.

Additionally, Japan may attempt to argue even if the ICJ finds it has jurisdiction, that the claim is inadmissible. Defendants will often argue that there is no legal dispute. The mere fact that Australia claims that there is a legal dispute between itself and Japan is not enough. The Permanent Court of International Justice in *Mavrommatis Palestine Concessions (Greece v UK)* held that "[a] dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between two persons".<sup>45</sup> In the *South West Africa cases (Liberia v South Africa; Ethiopia v South Africa)*, the ICJ upheld the definition in *Mavrommatis Palestine Concessions (Greece v UK)* and added that "[i]t must be shown that the claim of one party is positively opposed by the other".<sup>46</sup> Legal disputes are defined under the ICJ Statute as concerning the interpretation of a treaty, any question of international law or breaches of international obligations. Although there is a difference of opinion between Australia and Japan as to the use of the scientific whaling exception, Japan may contend that there is no dispute between itself and Australia because the issue is between Japan and the IWC. Australia, as a member of the IWC would have no standing to bring this dispute. Tied into this is the argument that if the ICJ decides this issue, this would implicate the rights and obligations of states not party to the proceedings, in particular, parties to the ICRW, and that the ICJ cannot exercise jurisdiction over states without their express consent.<sup>47</sup> However, the legal interests of non-parties must be the "very subject matter" of the decision. As in *Certain Phosphate Lands in Nauru (Nauru v Australia)*, it is likely that the ICJ will find that although non-parties to these proceedings may be affected by the outcome, the determination of the obligations of other ICRW parties is not a

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43 CBD, arts 27(1) and 27(2).

44 See *Certain Phosphate Lands in Nauru (Nauru v Australia)* (1992) ICJ Rep 240 at 240 [*Phosphates case*] where the ICJ found that there was no agreement between Australia and Nauru for alternative recourse to dispute resolution.

45 *Mavrommatis Palestine Concessions (Greece v UK)* (1924) PCIJ (Series A) No 2 at 11.

46 *South West Africa cases (Liberia v South Africa; Ethiopia v South Africa) (Preliminary Objections)* [1962] ICJ Rep 319 at 328.

47 This principle comes from the *Case of the Monetary Gold Removed from Rome in 1943 (Preliminary Question) (Italy v France, United Kingdom and United States of America)* [1954] ICJ Rep 19 at 19. See similar arguments by the United States in *Nicaragua v United States of America* [1984] ICJ Rep 14 at 86 and Australia in *The Phosphates Case*, above n 44 at [49]. See also *Case Concerning Land, Island and Maritime Frontier Dispute (El Salvador v Honduras)* [1990] ICJ Rep 92 at 116.

prerequisite to determining the obligations of Japan.<sup>48</sup> Third parties have the option of applying to intervene in the proceedings if they have a legal interest.<sup>49</sup>

Japan may also contend that JARPA II does not interfere with any legal interests of Australia, which precludes Australia bringing a claim. States are entitled to invoke the responsibility of another state if the obligation breached is owed to a group of states and is established for the collective interest.<sup>50</sup> Australia does not have a right to have whaling for scientific purposes cease. However, pursuant to the ICRW, Australia has an interest in whales not being harvested for commercial purposes. Australia also has an interest in the conservation of whales by virtue of the objectives and obligations contained in the ICRW, CITES and the CBD.

## V PROVISIONAL MEASURES

The ICJ has the power to specify provisional measures to be taken in order to preserve the rights of the parties.<sup>51</sup> There must be "an imminent risk of irreparable prejudice to the rights of the requesting party".<sup>52</sup> It is surprising that Australia did not seek provisional measures for the suspension of JARPA II when it filed its application for proceedings or when the Japanese research fleets set out for the Southern Ocean. In the *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan)*,<sup>53</sup> Australia was able to seek provisional measures from the International Tribunal on the Law of the Sea (ITLOS), which ordered Japan to suspend its Experimental Fishing Program.<sup>54</sup> ITLOS took into account the uncertainty regarding the measures needed to be taken in order to conserve tuna stocks and that in these circumstances, parties should act with "prudence and caution".<sup>55</sup> However, Klein notes that the ICJ has not been as willing to award provisional measures as ITLOS in respect of environmental issues.<sup>56</sup> Furthermore, the stocks of southern bluefin tuna

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48 See the *Phosphates case*, above n 44, at [55].

49 Statute of the International Court of Justice (opened for signature 26 June 1945, entered into force 24 October 1945), art 62.

50 International Law Commission "Draft articles on Responsibility of States for Internationally Wrongful Acts" (2001), art 48(1).

51 Statute of the International Court of Justice (opened for signature 26 June 1945, entered into force 24 October 1945), art 41.

52 See *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (2007) ICJ Rep 1 at [49]–[50] [*Pulp Mills*].

53 *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan) (Provisional Measures)* (1999) 38 ILM 1624.

54 Natalie Klein "Whales and Tuna: The Past and Future of Litigation between Australia and Japan" (2009) 21 *Geo Int'l Env'tl L Rev* 143 at 194.

55 *Southern Bluefin Tuna*, above n 53, at [77]; Klein, above n 54, at 195.

56 Klein, above n 54, at 196. See *Pulp Mills*, above n 52, at [70]–[75] where the ICJ held that the alleged breach of international environmental norms could be remedied at the merits stage.

were clearly and heavily overexploited, thus there was a real possibility that without provisional measures the stocks would be irreparably depleted. Antarctic minke whale stocks are not in the same predicament. Japan is not taking so many whales as to endanger whale stocks. Perhaps this is why Australia has decided not to seek provisional measures. This lack of urgency in suspending JARPA II provides strength to the argument that Japan's whaling activities do not affect Australia's interests.

## **VI SCIENTIFIC WHALING AND THE ICRW**

### **A The Scientific Research Exception**

The main legal arguments under the ICRW turn on whether JARPA II can be properly classified as scientific research as permitted under art VIII, or whether it is commercial whaling as Australia claims, which is prohibited under paras 7(b) and 10(e) of the Schedule to the ICRW.

Article VIII reads:

Notwithstanding anything contained in this Convention 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 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.

This provision gives governments a very wide discretionary power to grant scientific whaling permits. The decision as to the permits to be issued and the restrictions and conditions attached to those permits is left up to the authorising government, as it "thinks fit".<sup>57</sup> With such a considerable discretion afforded to state parties, it is problematic that scientific research is left undefined.<sup>58</sup> Whether JARPA II is justified under art VIII will ultimately depend on the interpretation of "scientific research". Australia and Japan clearly have differing views as to how this should be interpreted. Japan conducts lethal research which it has previously said is for the purposes of collecting "data necessary for whale conservation and the proper use of whale resources".<sup>59</sup> This is based on an interpretation of the words of art VIII which construes the right widely. Australia makes it clear in its application that it takes a narrow interpretation of scientific research, excluding whaling which has any hint of a commercial aim such as the sale of whale meat.

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<sup>57</sup> Klein, above n 54, at 162.

<sup>58</sup> Ibid, at 175.

<sup>59</sup> Yagi, above n 33, at 489.

The Paris Panel<sup>60</sup> came to the opinion that because art VIII is expressed as an exception to the general rules of the ICRW, it should be construed narrowly.<sup>61</sup> Additionally, it has been suggested that the "seemingly sovereign right to issue a special permit 'for purposes of scientific research'" contained within art VIII has limits due to the criteria that must be met in order to issue a permit.<sup>62</sup> These criteria comprise the requirement that proposed permits must be submitted to the Scientific Committee for review and comment before they are issued, informing the IWC once they have been issued, and transmitting the results of the research to a designated body annually.<sup>63</sup> Additionally, the *IWC Guidelines for the Review of Scientific Permit Proposals* which reflect IWC Resolution 2003-2, provide further guidance for the application of art VIII.<sup>64</sup> IWC Resolution 1986-Appendix 2 recommends that Contracting Governments should take the guidelines drawn up by the Scientific Committee into account before granting permits.<sup>65</sup> The Guidelines call for the Scientific Committee to assess the scientific importance of the objectives of the research and its significance for the purposes of conservation and management as well as whether the research may be achieved using non-lethal methods.<sup>66</sup> IWC Resolution 2003-2 reiterates the IWC view from over 30 resolutions that special permit whaling should:<sup>67</sup>

... only be permitted in exceptional circumstances; meet critically important research needs; satisfy criteria established by the Scientific Committee; be consistent with the Commission's conservation policy; be conducted using non lethal research techniques; and ensure the conservation of whales in sanctuaries.

Taking into account these limitations or conditions, the Paris Panel argued that whaling must be carried out exclusively for the purpose of scientific research and not only as a subsidiary purpose.<sup>68</sup> The Paris Panel further expressed the opinion that simply describing commercial whaling as scientific whaling or conducting commercial whaling pursuant to a special permit purportedly

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60 The Paris Panel, composed of independent international legal experts, was commissioned by the International Fund for Animal Welfare to produce a report on the legality of special permit ("scientific") whaling under international law in 2006.

61 Paris Panel Report, above n 16, at [52]; See also Donald R Rothwell "The Legality of Japan's Scientific Whaling Under International Law" (2009) Greenpeace Japan <[www.greenpeace.or.jp](http://www.greenpeace.or.jp)> at [14].

62 Triggs, above n 11, at 51; Paris Panel Report, above n 16, at [52].

63 See ICRW, above n 1, arts VIII(1) and VIII(3) and Schedule, para 30.

64 Paris Panel Report, above n 16, at [55]; Klein, above n 54, at 203.

65 *Resolution on Special Permits for Scientific Research* IWC Res 1986-Appendix 2 (1986).

66 International Whaling Commission "Guidelines for the Review of Scientific Permit Proposals" (last updated 22 June 2010) International Whaling Commission <[www.iwcoffice.org](http://www.iwcoffice.org)>.

67 *Resolution on Whaling under Special Permit* IWC Res 2003-2 (2003).

68 Paris Panel Report, above n 16, at [53]–[54].

issued under art VIII does not legitimise it, and that in order to be legitimate, it must be carried out for genuine scientific purposes.<sup>69</sup>

Whether whaling can be properly classified as scientific or commercial may depend on whether an objective or subjective test is used.<sup>70</sup> A subjective approach would simply identify what Japan considers to be scientific whereas an objective approach would look at what would objectively be deemed scientific. The Paris Panel was of the view that the classification should be judged on an objective basis.<sup>71</sup> Rothwell considers that the substantial increase in the number of whales taken by Japan, the enlargement of the targeted species, the commercial or economic benefits of JARPA II for Japan such as the maintenance of employment and infrastructure in the whaling sector, and the increasing supply of whale meat to commercial markets in Japan demonstrates that the dominant purpose of JARPA II is commercial rather than scientific.<sup>72</sup> Triggs also argues that an international tribunal is likely to consider the primary purpose of a permit.<sup>73</sup> She states that the Japanese whaling programme may have "a predominant purpose other than scientific research" where there is evidence that the research is not required for whale management, the use of whale meat is primarily commercial rather than for scientific research, and that a smaller sample size and non-lethal methods can achieve the same or at least sufficiently reliable scientific results.<sup>74</sup>

Japan is likely to point to its sovereign and discretionary right to issue permits under art VIII. Advocates for Japan's position have argued that "[i]t is hard to imagine a broader statement of the treaty parties' ability to carry out certain activities by national decision" and that art VIII is broader than a mere exemption from the ICRW general provisions, as it provides no criteria, standards or other guidance, and it recognises the sovereign right of states to have the sole discretion to issue permits for scientific research.<sup>75</sup> Although the Scientific Committee reviews permit proposals and permits must be reported to the IWC, there is nothing to suggest that the authorising government must obtain approval from the IWC or that an IWC recommendation that a permit should not be granted must be complied with.<sup>76</sup> Further, suggested limitations on art VIII that come from the IWC resolutions are merely recommendations as provided in art VI of the ICRW, thus they are non-

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<sup>69</sup> Ibid, at [49].

<sup>70</sup> Anton, above n 4, at IIA.

<sup>71</sup> Paris Panel Report, above n 16, at [49].

<sup>72</sup> Rothwell, above n 61, at [11]–[12].

<sup>73</sup> Klein, above n 54, at 52.

<sup>74</sup> Ibid.

<sup>75</sup> Eldon VC Greenberg, Paul S Hoff and Michael I Goulding "Japan's Whale Research Program and International Law" (2002) 32 CAWILJ 151 at 151.

<sup>76</sup> Ibid, at 159.



binding and Japan is not required to comply with them.<sup>77</sup> States have an unequivocal and unqualified right to issue permits for scientific research, and Japan is well within its rights to decide what activities come within the scope of scientific research, regardless of whether the research is endorsed by other parties to the ICRW.

Advocates for the Japanese position have admitted that the Japanese whaling programmes were created as a result of the moratorium on commercial whaling.<sup>78</sup> However, they have asserted that the purpose is not to circumvent the moratorium by commercially whaling under the guise of scientific research.<sup>79</sup> Rather, it has been argued that the research carried out by Japanese whalers is required to provide scientific data to the IWC in order for the IWC to conduct reviews of the moratorium and Southern Ocean Sanctuary "on the best available science and consistent with the Convention's objectives of achieving the twin goals of conservation and utilization of whale resources".<sup>80</sup> It has been stressed that even if the underlying intention of the research is to support the resumption of commercial whaling, this is acceptable and even consistent with both the moratorium and the Southern Ocean Sanctuary due to the original intention that the ban on commercial whaling would be a temporary measure.<sup>81</sup> This is indicated by the provisions for review in paras 10(a) and 7(b) of the Schedule.

Furthermore, in response to the argument that Japan deals with whale products commercially by selling them in the domestic market, Japan needs only to point to art VIII(2) which states that:

Any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted.

This gives the authorising government discretion to dictate how the harvested whales should be dealt with. Thus by selling whale meat and other whale products on the domestic market, Japan is complying with art VIII(2) of the ICRW.

### ***B Purpose and Objectives of the ICRW***

The good faith duty is a critical element of Australia's argument in its application to the ICJ. Pursuant to art 31 of the VCLT, a treaty is to be interpreted in good faith in accordance with the

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77 Ibid, at 158.

78 Ibid, at 161.

79 Ibid.

80 Ibid, at 157.

81 Ibid.

ordinary meaning to be given to its terms in their context, and in light of its object and purpose.<sup>82</sup> The ICRW was concluded in order to "provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry".<sup>83</sup> The preamble refers to the interest in safeguarding whale stocks for future generations, the necessity of protection from over-fishing, the common interest in achieving optimum levels of whale stocks "as rapidly as possible without causing widespread economic and nutritional distress", the sustainable exploitation of whale stocks, and the desire to "establish a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks". Australia's argument focuses on the conservation aspect of the ICRW and ignores the original overarching motivation, which is to ensure that whales may continue to be exploited.

With the change in community values towards the protection of whales and pressure from NGOs, many IWC members, including Australia, are now condemning the exploitation of whales. It has been suggested that IWC practice since the conclusion of the ICRW demonstrates a move towards a pro-conservation focus.<sup>84</sup> The IWC agreed to a ban on commercial whaling in 1982, and implemented two whale sanctuaries in 1994. This pro-conservationist stance taken by many of the ICRW members is reflected in many of the IWC's resolutions. The *Berlin Initiative on Strengthening the Conservation Agenda of the International Whaling Commission* adopted by the IWC in 2003 pointed out the evolution of the IWC's "conservation-oriented agenda" and the international recognition it has received for its contributions to the conservation of whales.<sup>85</sup> The IWC also established a conservation committee under art III(4), charged with preparing and recommending a conservation agenda.<sup>86</sup>

Article 31(3)(b) of the VCLT states that "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" may be taken into account when interpreting a treaty. According to Triggs, where there is a consensus between the parties for development of new values, it is not necessary for a strict interpretation of the document to be made.<sup>87</sup> The Paris Panel considers that this practice is evidence that international law has developed such that conservation is now the primary goal.<sup>88</sup> If this pro-conservationist approach

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82 Vienna Convention on the Law of Treaties (open for signature 23 May 1969, entered into force 27 January 1980), art 31.

83 ICRW, above n 1, preamble.

84 Tanya Wansbrough "On the Issue of Scientific Whaling: Does the Majority Rule?" (2004) 13(3) RECIEL 333 at 333.

85 Ibid.

86 Ibid.

87 Triggs, above n 11, at 48.

88 Paris Panel Report, above n 16, at [71]–[75].

were to be accepted, this would indicate that art VIII should be interpreted narrowly.<sup>89</sup> The Paris Panel refers to the *Gabcikovo-Nagymaros (Hungary v Slovakia)* case,<sup>90</sup> stating that the ICJ had confirmed that developing international norms may be taken into account in treaty interpretation.<sup>91</sup> The persuasiveness of this case to interpretation of the ICRW is questionable, as the relevant treaty in the *Gabcikovo-Nagymaros (Hungary v Slovakia)* case contained provisions which expressly contemplated an evolving interpretation, taking into account new norms of international law.<sup>92</sup> Furthermore, the fact that at least Japan does not agree with this conservationist approach means that pursuant to art 31(3)(b), an alternative "agreement of the parties" has not been established.<sup>93</sup> Triggs also cautions that restraint should be applied in taking a "dynamic" approach to treaty interpretation as this is usually only available where there is a lacuna or ambiguity in the agreement.<sup>94</sup> Birnie states that although a treaty can be interpreted broadly "to achieve its general purposes ... it cannot be perverse, and must conform to the objects and purposes of the convention and to the general rules of international law concerning treaties."<sup>95</sup> Furthermore, as Burke argues, an agreement should not be reinterpreted in a way which subverts its major purpose by substituting a purpose not shared by all parties and actively rejected by some.<sup>96</sup> To reinterpret the statute with conservation as the primary purpose would be to impose a "preservationist regime" on states which did not intend to consent to such a regime when they became parties to the ICRW.<sup>97</sup>

It is pertinent to note that not all IWC practice indicates an evolution towards preservation of whale stocks. The IWC adopted the St Kitts and Nevis Declaration in 2006 which supports the resumption of whaling.<sup>98</sup> The resolution repeats the objectives of the conservation of whale stocks for the orderly development of the whaling industry and states that "the International Whaling Commission (IWC) is therefore about managing whaling to ensure whale stocks are not over-

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<sup>89</sup> Triggs, above n 11, at 50.

<sup>90</sup> *Gabcikovo-Nagymaros (Hungary v Slovakia)* [1997] ICJ Rep 7.

<sup>91</sup> Paris Panel Report, above n 16, at [69].

<sup>92</sup> See *Gabcikovo-Nagymaros (Hungary v Slovakia)*, above n 90, at 112.

<sup>93</sup> Maria Clara Maffei "The International Convention for the Regulation of Whaling" (1997) 12(3) Int'l J Marine & Coastal L 287 at 303.

<sup>94</sup> Triggs, above n 11, at 50.

<sup>95</sup> Patricia Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching* (Oceana Publications, New York, 1985) vol 2 at 654.

<sup>96</sup> William T Burke "Memorandum of Opinion on the Legality of the Designation of the Southern Ocean Sanctuary by the IWC" (1996) 27(3) Ocean Dev & Int'l L 315 at 323.

<sup>97</sup> Triggs, above n 11, at 48.

<sup>98</sup> *St Kitts and Nevis Declaration* IWC Res 2006-1 (2006).

harvested rather than protecting all whales irrespective of their abundance".<sup>99</sup> It goes on to note that:<sup>100</sup>

... the position of some members that are opposed to the resumption of commercial whaling on a sustainable basis irrespective of the status of whale stocks is contrary to the object and purpose of the International Convention for the Regulation of Whaling.

Additionally, the development and acceptance by the IWC of the RMP, envisages an eventual lifting of the moratorium and a resumption of commercial whaling.<sup>101</sup>

Some states, including Australia, seem to have reinterpreted *conservation* as *preservation* which stretches the language of the Convention too far. It would also be going too far to assert that the ICRW has evolved so as to allow a total ban on whaling. It has been pointed out that the protection of whale stocks is not the only, or even primary, goal of the ICRW.<sup>102</sup> Furthermore, it is argued that the text of the ICRW "does not endorse a total protection of whales that would preclude the taking of any whales".<sup>103</sup> In fact, the words of the Convention are clear. As Triggs puts it:<sup>104</sup>

[t]he underlying assumption of the Whaling Convention is thus that, with proper conservation measures, the whaling industry will continue. Nowhere in the Convention is it envisaged that conservation might include a permanent ban on whaling for reasons other than a scientifically demonstrated threat to stocks or species.

Rather, the ICRW is an agreement to regulate the use of whale stocks in order to "avoid irresponsible exploitation".<sup>105</sup>

### ***C Good Faith and the Abuse of Rights Doctrine***

Many commentators in analysing the legality of scientific whaling have pointed to the doctrine of abuse of rights. This doctrine, according to Triggs, is closely connected to the obligation of states to perform treaty obligations in good faith under art 26 of the VCLT.<sup>106</sup> That Japan has breached the

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<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

<sup>101</sup> The RMP is a system for calculating catch quotas to ensure that when the moratorium is lifted, whaling will be conducted sustainably. See International Whaling Commission "Revised Management Procedure" (2009) <[www.iwcoffice.org](http://www.iwcoffice.org)>. See also William C Burns "The International Whaling Commission and the Future of Cetaceans: Problems and Prospects" (1997) 8 *Colo J Int'l Env'tl L & Pol'y* 31 at 54–55.

<sup>102</sup> Greenberg, Hoff and Goulding, above n 75, at 151.

<sup>103</sup> Yagi, above n 33, at 488.

<sup>104</sup> Triggs, above n 11, at 47.

<sup>105</sup> Yagi, above n 33, at 488–489.

<sup>106</sup> Triggs, above n 11, at 40.

duty of good faith is essential to Australia's argument in its application. In arguing that JARPA II is not justified under art VIII of the ICRW, it is also apparent that Australia is making an abuse of rights argument.<sup>107</sup>

The obligation of good faith was discussed by the ICJ in the *Gabcikovo-Nagymaros* case, which concluded that:<sup>108</sup>

... it is the purpose of the Treaty and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the parties to apply it in a reasonable way and in such a manner that its purpose can be realised.

Japan is obliged under the principle of good faith to perform its right to issue scientific permits in a reasonable manner. According to the Paris Panel, Japan has failed to show that they have exercised its right under art VIII reasonably.<sup>109</sup> The Panel reasons that the right has been exercised for commercial purposes and not scientific research: Japan has taken whales for research in circumstances where members of the ICRW have reiterated that the research did not meet critical needs and is not necessary for the management of the species, and Japan has used lethal research methods where non-lethal research methods are available and the location and number of whales taken may affect the conservation of whales.<sup>110</sup> Japan will be able to counter these types of arguments by showing the merits of its research which has been recognised by the IWC Scientific Committee and by pointing to the abundance estimates of Antarctic minke whales which show that they are not at risk of overexploitation.<sup>111</sup>

The doctrine of abuse of rights exists in many national, and predominantly civil, legal systems.<sup>112</sup> Thus it has been deemed to be a part of international law as a general principle of law which is recognised as a source of international law under art 38(1)(c) of the Statute of the International Court of Justice, or as part of customary international law.<sup>113</sup> International courts and tribunals have recognised the existence of the abuse of rights doctrine,<sup>114</sup> however, few express

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<sup>107</sup> Anton, above n 4, at IIA.

<sup>108</sup> *Gabcikovo-Nagymaros (Hungary v Slovakia)*, above n 90, at 142.

<sup>109</sup> Paris Panel Report, above n 16, at [87].

<sup>110</sup> Ibid.

<sup>111</sup> 1997 SC Report, above n 8, at 378; 2006 SC Report, above n 14, at 28 and 31.

<sup>112</sup> Michael Byers "Abuse of Rights: An Old Principle, A New Age" (2002) 47 McGill L J 389 at 391.

<sup>113</sup> Paris Panel Report, above n 16, at [83]; Triggs, above n 11, at 37; Byers, *ibid*, at 397.

<sup>114</sup> Including *Certain German Interests in Polish Upper Silesia* [1926] PCIJ Rep (Series A) No 7; *Free Zones Case* [1932] PCIJ Rep (Series A/B) No 46; *Barcelona Traction Case* [1955] ICJ Rep 4; *South West Africa Cases (Second Phase)* [1966] ICJ Rep 5.

findings have been made, and thus there is little guidance as to the substantive legal content of the doctrine.<sup>115</sup> The Paris Panel defined the abuse of right doctrine as:<sup>116</sup>

a state exercising a right either in a way which impedes the enjoyment by other states of their own rights or for an end different from that for which the right was created, to the injury of another state.

The connection between the doctrine of abuse of right and good faith can be seen in the *Shrimp/Turtle case*, in which the Appellate Body of the World Trade Organisation (WTO) stated:<sup>117</sup>

This principle [of good faith], at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right 'impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably'. An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members, and, as well, a violation of the treaty obligation of the Member so acting.

Triggs declares that this statement by the WTO Appellate Body is persuasive authority for the notion that the doctrine of abuse of rights requires a state to exercise rights reasonably and in a bona fide manner. Thus, she concludes, "the right to issue permits is ... an exceptional right which should be exercised bona fide in light of the purpose of the right; that is, scientific research".<sup>118</sup>

The Paris Panel considered that it is arguable that Japan has abused its right under art VIII of the ICRW, reasoning that Japan has exercised its right to conduct special permit whaling for purposes outside the scope of art VIII, and that JARPA II threatens to cause injury to the collective and individual interests of the parties to the ICRW in conserving whales.<sup>119</sup> However, there is no evidence that JARPA II has affected the conservation of whales and it is arguable that JARPA II is well within the scope of art VIII's wide discretionary power.

Supporters of Japan's position have pointed to the uncertainty as to the existence and scope of the abuse of rights doctrine at international law to argue its inapplicability to this dispute.<sup>120</sup> It has

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<sup>115</sup> Triggs, above n 11, at 38.

<sup>116</sup> Paris Panel Report, above n 16, at [83]; See also *South West Africa Cases (Second Phase)*, above n 114, at 480-481; BO Iluyomade "The Scope and Content of a Complaint of Abuse of Right in International Law" (1975) 16 *Harvard Intl LJ* 47 at 91.

<sup>117</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (1998) WTO DOC WT/DS58/AB/R, AB-1998-4 at [158] (Report of the Appellate Body).

<sup>118</sup> Triggs, above n 11, at 42.

<sup>119</sup> Paris Panel Report, above n 16, at [82].

<sup>120</sup> Greenberg, Hoff and Goulding, above n 75, at 177.

been argued that because liability was not founded on the abuse of rights doctrine in the *Shrimp/Turtle* case, this case "does not rest on any independent principle of abuse of right", and:<sup>121</sup>

provides no support for the proposition that in the absence of [a specific treaty prohibition] an international tribunal can rely on any principle of abuse of right in international law to hold a government's action under an agreement invalid.

Accordingly, Klein states that "it seems more likely that [the abuse of rights doctrine] adds moral weight to the argument of anti-whaling states rather than creating a separate legal violation in its own right".<sup>122</sup>

That the abuse of rights doctrine has never founded liability demonstrates the difficulty Australia would have in establishing this ground. Even if the ICJ were to accept the abuse of rights doctrine as a legitimate principle, the broad discretion afforded by art VIII may make it difficult to argue that there has been an abuse of this right.<sup>123</sup> On the basis of the *Shrimp/Turtle* decision, Australia would also have to show that there has been a breach of its treaty rights. Australia does not have a right enshrined in the ICRW that whales shall not be killed for scientific purposes. Australia does have a right that whales shall not be hunted and killed for commercial purposes, as well as the right that whale stocks are conserved and protected from overexploitation. It is questionable whether the implementation of JARPA II affects the conservation of whale stocks and thus injures Australia's rights. It is even more doubtful that *proposing* JARPA II affects Australia's rights. Furthermore, as discussed above, it will be difficult to establish that the purpose is commercial. If Japan can show that its research has merits and is being done sustainably, this will be evidence that it is bona fide, reasonable and realises the overall purpose of conserving whale stocks for the development of the whaling industry.

## **VII LEGAL ARGUMENTS UNDER OTHER INTERNATIONAL INSTRUMENTS**

Australia also alleges that Japan has breached its obligations under CITES and the CBD. These obligations will be briefly examined, but it is not the aim nor within the scope of this paper to consider the obligations under these treaties in great detail.<sup>124</sup> Australia claims that Japan "has

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<sup>121</sup> Ibid, at 194 and 190.

<sup>122</sup> Klein, above n 11, at 186.

<sup>123</sup> Anton, above n 4, at IIA.

<sup>124</sup> These have been more carefully examined by other authors. See for example, Peter H Sand "'Scientific Whaling': Whither Sanctions for Non-Compliance with International Law?" (2008) 19 Finnish Yearbook of International Law 93; Dan Goodman "Japan's Research Whaling is Not Unlawful and Does Not Violate CITES Trade Rules" (2010) 13 J International Wildlife & Policy 176; Vassili Papastavrou and Patrick Ramage "Commercial Whaling by Another Name: The Illegality of Japan's Scientific Whaling: Response to Dan Goodman" (2010) 13 J International Wildlife & Policy 183; Sand, above n 5.

breached and is continuing to breach" arts II and III(5) of CITES in relation to the proposal to take humpback whales.<sup>125</sup> The CITES Convention recognises that "international co-operation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade".<sup>126</sup> The Convention sets up a system for regulating trade in specimens of species listed in the three appendices to the Convention.

Article II(4) provides that "[t]he Parties shall not allow trade in specimens of species included in Appendices I, II and III except in accordance with the provisions of the present Convention". humpback whales are listed in Appendix I of CITES which includes "all species threatened with extinction which are or may be affected by trade".<sup>127</sup> Pursuant to art II(1), "[t]rade in specimens of [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". Trade is defined in CITES as "export, re-export, import and introduction from the sea".<sup>128</sup> Australia specifically points to "introduction from the sea" of humpback whales which means the transportation into a state of specimens of any species which were taken in the marine environment not under the jurisdiction of any state.<sup>129</sup> In order to assess whether or not JARPA II constitutes "introduction from the sea" of whale parts or products listed in Appendix I, it is necessary to determine whether the provisos apply. "Introduction from the sea" is permissible only on the conditions that the introduction will not be detrimental to the survival of the species, and the whale parts or products are not be used for primarily commercial purposes.<sup>130</sup> The first condition is to be assessed on a scientific basis, thus the tribunal will have to consider scientific evidence provided by both parties.<sup>131</sup> The second condition is a factual inquiry with the burden of proof falling on Japan as the importer of whales to show that "the intended use of specimens of Appendix-I species is clearly non-commercial".<sup>132</sup> The CITES Conference Resolution 5.10 states that "primarily commercial purposes" shall include "all uses whose non-commercial aspects do not clearly predominate".<sup>133</sup> This inquiry will be similar to that under the ICRW.

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<sup>125</sup> Australia's application, above n 24, at [38].

<sup>126</sup> CITES, above n 25, preamble.

<sup>127</sup> Ibid, art II(1).

<sup>128</sup> Ibid, art I(c).

<sup>129</sup> Ibid, art I(e).

<sup>130</sup> Ibid, art III(5).

<sup>131</sup> Sand, above n 5, at 63.

<sup>132</sup> *Definition of "Primarily Commercial Purposes"* CITES Res 5.10, general principle 3, in Sand, above n 5, at 63.

<sup>133</sup> Ibid.



However, Australia may run into difficulties in establishing the relevance of their claim pursuant to CITES. Under CITES, Australia is limited to making a claim in relation to humpback whales due to the reservations Japan has made in respect of Antarctic minke and fin whales.<sup>134</sup> Although provision has been made for the taking of humpback whales under JARPA II, none have yet been taken.<sup>135</sup> Anton notes that it is unclear how CITES has been breached when there has been no transportation of humpback whales into Japan or any other state.<sup>136</sup> Even if Australia can establish that the proposal to take humpbacks is an "introduction from the sea", it would be difficult to rebut an argument from Japan that the intended use is non-commercial. The relevant factors including the increasing catch sizes and availability of non-lethal methods that Australia can point to as evidence of commercial purpose under the ICRW are in respect of Antarctic minke whales. However, if Australia manages to prove commercial use of Antarctic minke whales under the ICRW, this may be used as evidence of general intention.

The fact that Japan has proposed to take but not yet taken humpback whales is not necessarily fatal to Australia's case. In the *Headquarters Agreement* case, the ICJ found that a dispute existed based on the fact that legislation had been passed even though it had not been implemented.<sup>137</sup> In the *Arrest Warrant* case, the ICJ found that Belgium had breached international law by issuing an arrest warrant even though no arrest had taken place.<sup>138</sup> The ICJ may make a finding that the proposal to take humpback whales is enough to breach Japan's international obligations to "not allow trade" in humpback whales. Additionally, Anton has stated that it may be easier to argue that there has been a breach of CITES if Australia can prove that Japan has already issued permits for the taking of humpback whales.<sup>139</sup> He also states that this argument may be relevant for the declaration that JARPA II is generally in breach of Japan's international obligations.<sup>140</sup>

The third international instrument invoked by Australia is the CBD.<sup>141</sup> This has as its objectives the conservation of biological diversity and the sustainable use of its components.<sup>142</sup>

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134 For a list of reservations see "Reservations entered by parties" (2007) Convention on International Trade in Endangered Species of Wild Fauna and Flora <[www.cites.org](http://www.cites.org)>. Species are listed in their Latin names. Minke whales are *Balaenoptera acutorostrata* and fin whales are *Balaenoptera physalus*.

135 "Scientific Permit Whaling", above n 2.

136 Anton, above n 4, at IIB.

137 *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (Advisory Opinion)* [1988] ICJ Rep 3 at [42]–[43].

138 *Case Concerning the Arrest Warrant of 11 April 2000* (2002) ICJ Rep 14 at [70]–[71].

139 Ibid.

140 Ibid.

141 Australia's application, above n 24, at [38].

Australia argues in its application that Japan has breached obligations under the CBD to ensure that activities within its jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of its national jurisdiction,<sup>143</sup> to cooperate with other parties in the conservation and sustainable use of biological diversity<sup>144</sup> and to adopt measures to avoid or minimise adverse impacts on biological diversity.<sup>145</sup>

Australia does not elaborate in its application as to how Japan has breached these obligations. The obligation on states in art 3 to "ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control" has been recognised as a general obligation at customary international law.<sup>146</sup> Thus, even though the ICJ may find that it does not have jurisdiction in respect of the CBD, it may be able to make a finding on this obligation under customary international law. Australia may claim that Japan's whaling activities are causing damage to the environment by adversely affecting whale stocks which affects the balance of the marine ecosystem. The Paris Panel was of the opinion that any special permit whaling which undermines the conservation of whale populations may be in breach of obligations under the CBD.<sup>147</sup> Australia may also try to argue that Japanese whaling ships are causing pollution which is damaging the environment.<sup>148</sup> This will necessitate Australia providing evidence that whale stocks have been or will be adversely affected by JARPA II or that Japanese whalers are causing pollution that is having an adverse effect on the environment.

Sand states that "[t]here is no doubt that massive killings of protected marine mammals in the Antarctic ... " would fall under the provisions of the CBD.<sup>149</sup> However, this is a very strong assertion. This argument would have to be backed up by evidence that JARPA II is detrimental to the conservation of whale stocks, is unsustainable and thus adversely impacts marine biodiversity. Although the IWC states that there has been a considerable decline in abundance estimates, there is

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142 CBD, above n 26, art 1; "sustainable use" is defined in CBD, art 2 as the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, in order to maintain its potential to meet the needs and aspirations of present and future generations.

143 Ibid, art 3.

144 Ibid, art 5.

145 Ibid, art 10(b).

146 *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 1 at [29].

147 Paris Panel Report, above n 16, at [119].

148 Donald K Anton "Dispute Concerning Japan's JARPA II Program of 'Scientific Whaling' (Australia v Japan): A Backgrounder" (2010) ANU College of Law Research Paper No 33-10 at 14.

149 Sand, above n 5, at 61.

no suggestion that this is due to the Japanese whaling programmes.<sup>150</sup> Stock estimates are 460,000–690,000, thus there is no chance that stocks are at risk, even from JARPA II.<sup>151</sup> Fin whales are listed as endangered, thus there may be some argument that the harvesting of fin whales is unsustainable.<sup>152</sup>

Article 5 imposes a duty to cooperate, including through competent international organisations. Australia may be alleging that this obliges Japan to follow the numerous recommendations of the IWC either to stop its whaling programmes or to use non-lethal methods. It may also refer to the Aide Memoire sent by Australia and 29 other countries to inform Japan of their objection to JARPA II. This would be treading very shaky ground, as it would be in effect making non-binding recommendations binding. Japan may reason that it is cooperating with the IWC by conducting scientific research for the purposes of collecting "data necessary for whale conservation and the proper use of whale resources".<sup>153</sup> It has also been engaged in negotiations at the IWC which is a form of cooperation, albeit unsuccessful. The 2007 decision in *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay) (Pulp Mills)* held that it is an obligation at customary international law to carry out an environmental impact assessment (EIA) "where there is a risk that a proposed activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource".<sup>154</sup> In light of this, Australia may contend that the duty to cooperate involves an obligation to carry out an EIA and that Japan has failed to do so adequately.<sup>155</sup> However, the ICJ in *Pulp Mills* found that general international law does not specify the scope and content of an environmental impact assessment. Furthermore, the Court held that it is for each state to determine as part of its domestic legislation or in authorising the project, the specific content of the EIA required in each case. The state is to have regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as the need to exercise due diligence in conducting the assessment.<sup>156</sup> Japan's proposal to issue whaling permits may be found to be an adequate EIA. However, although the proposal considers the effects on whale stocks, it

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150 International Whaling Commission "Status of Whale Populations: Antarctic minke whales" (2010) <iwcoffice.org>.

151 Ibid.

152 IUCN "The IUCN Red List of Threatened Species" (2008) International Union for Conservation of Nature <www.iucnredlist.org>.

153 Yagi, above n 33, at 489.

154 *Pulp Mills*, above n 52, at [204].

155 Ibid, at [205].

156 Ibid.

does not consider other environmental effects.<sup>157</sup> The problem with the obligations under arts 5 and 10(b) is that they are qualified by the words "as far as possible and as appropriate". This qualification allows Japan significant discretion and it will be hard for Australia to prove breaches of these obligations.

### VIII EVIDENCE

*Pulp Mills* confirmed that the burden of proof lies on the applicant.<sup>158</sup> The Court held that "it is the duty of the party which asserts certain facts to establish the existence of such facts".<sup>159</sup> Japan, as the respondent, only has the obligation to cooperate and provide any evidence it has available to assist the Court.<sup>160</sup>

The strength and persuasiveness of the evidence provided by the parties is particularly important given that the Court does not seem to favour invoking the art 50 option to seek independent expert advice.<sup>161</sup> This is an issue where there is conflicting evidence from both sides. Despite disagreement between the parties on the authority and reliability of the evidence in the *Pulp Mills* case, the Court did not consider it necessary to discuss the merits, reliability and authority of the evidence.<sup>162</sup> The Court held that:<sup>163</sup>

it is the responsibility of the Court, after having given careful consideration to all the evidence placed before it by the Parties, to determine which facts must be considered relevant, to assess their probative value, and to draw conclusions from them as appropriate.

Use of independent experts may have enabled the Court to verify the accuracy of the information. Instead, the fact that the Court was unable to verify the accuracy of the scientific

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157 Government of Japan "Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) - Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources" (2005) Institute of Cetacean Research <[www.icrwhale.org](http://www.icrwhale.org)>.

158 *Pulp Mills*, above n 52, [162].

159 *Ibid.*

160 *Ibid.*, at [163].

161 Article 50 has only been used four times by the ICJ and the PCIJ: Panos Markouris "Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay): Of Environmental Impact Assessments and Phantom Experts" Hague Justice Portal <[www.haguejusticeportal.net](http://www.haguejusticeportal.net)>. See *Case Concerning the Factory at Chorzów (Germany v Poland) (Merits)* [1928] PCIJ Rep (Series A) No 17 at 99; *Corfu Channel (United Kingdom v Albania) (Judgment on Merits)* [1949] ICJ Rep 4 at 142; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America) (Appointment of Expert)* [1984] ICJ Rep 165.

162 *Pulp Mills*, above n 52, at [168].

163 *Ibid.*

evidence led to the conclusion that the Applicant was not able to satisfactorily establish harm to the environment.<sup>164</sup>

There will undoubtedly be conflicting evidence presented in this case with both Australia and Japan providing evidence in support of their claims. *Pulp Mills* has set an extremely high standard of proof which will be hard for Australia to meet. The onus is on Australia to prove that Japan's whaling activities constitute commercial whaling, are not carried out for scientific research, and that they are damaging the environment. Australia will need to make sure that it constructs a solid base of evidence to substantiate its claims.

Following *Pulp Mills*, the Court may require those providing technical or scientific evidence to testify as experts or witnesses rather than as counsel so that they may be questioned by the other party and the Court.<sup>165</sup> This will allow the Court and the other party to test the evidence by questioning the experts. This scrutiny should allow the Court to make a decision based on the best available facts and evidence.

## ***IX POTENTIAL EFFECTS ON THE IWC PROCESSES***

Prior to filing an application instituting proceedings in the ICJ, Australia had been pursuing diplomatic solutions through the IWC in respect of the scientific whaling issue. In its application, Australia gives a justification for resorting to the alternative forum of the ICJ, stating that:<sup>166</sup>

[i]t has become clear 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.

Other anti-whaling nations, New Zealand and the United States, have both expressed concern about the wisdom of launching a case in the ICJ, preferring instead to continue pursuing a diplomatic solution through the IWC.<sup>167</sup> However, with the failure of the IWC negotiations in Agadir, New Zealand is considering all of its options, including joining Australia in litigation.<sup>168</sup>

### ***A Recent History of IWC Processes***

The IWC, composed of one representative from each member state, provides a forum for the ongoing conflict between the states that support the recommencement of commercial whaling and

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<sup>164</sup> Ibid.

<sup>165</sup> Ibid, at [167].

<sup>166</sup> Australia's application, above n 24, at [29].

<sup>167</sup> See Andrew Darby "US warns of risks in Australia's whale action" *Sydney Morning Herald* (Sydney, 31 May 2010); "US, NZ criticise Australia's anti-whaling court bid" *ABC News* (Australia, 2 June 2010).

<sup>168</sup> New Zealand National Party "McCully disappointed by failure of IWC process" (press release, 24 June 2010).

the diametrically opposed anti-whaling states.<sup>169</sup> Not surprisingly, negotiations on the Revised Management Scheme (RMS) and other issues have reached a deadlock in the IWC.<sup>170</sup> The Small Working Group on the Future of the IWC was established in 2008 to:<sup>171</sup>

assist the Commission to arrive at a consensus solution to the main issues it faces and thus to enable it to best fulfil its role with respect to the conservation of whale stocks and the management of whaling.

Among the issues to be discussed and decided upon were commercial whaling, scientific permits, the purpose of the ICRW, the RMP and the RMS.<sup>172</sup> The Small Working Group did not reach its goal of developing a package by the 61st IWC meeting in 2009. A Support Group composed of 12 member states including Japan, Australia and New Zealand, was established to assist the IWC Chair and the Small Working Group on achieving the goal of developing a package. With the assistance of the Support Group, a draft *Consensus Decision to Improve the Conservation of Whales* was presented at the meeting of the Small Working Group in March 2010. Two of the more contentious issues during the negotiations in the Small Working Group and the Support Group have been catch limits and international trade.<sup>173</sup> The draft Consensus Decision could not be agreed upon, and on 22 April 2010 the Chair and Vice-Chair of the IWC released a compromise *Proposed Consensus Decision to Improve the Conservation of Whales* to facilitate discussion at the 62nd meeting of the IWC in Agadir in June.<sup>174</sup> Under the compromise text, the moratorium would stay in place, but catch limits for special permit whaling, objections and reservations would be set at 400 Antarctic minke whales per season reducing to 200 per season and ten fin whales per season reducing to five per season over a ten year period.<sup>175</sup> However, a consensus decision on this was not reached and talks on these issues have now been suspended until the 2011 annual meeting of the IWC.<sup>176</sup>

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<sup>169</sup> ICRW, above n 1, art III(1).

<sup>170</sup> International Whaling Commission "Future of the IWC: 2007 Annual Meeting, Anchorage, Alaska, USA" (2010) International Whaling Commission <[www.iwcoffice.org](http://www.iwcoffice.org)>.

<sup>171</sup> International Whaling Commission "Future of the IWC: Further discussions/negotiations on substantive issues" (2010) International Whaling Commission <[www.iwcoffice.org](http://www.iwcoffice.org)>.

<sup>172</sup> International Whaling Commission "Future of the IWC: The Small Working Group (SWG)" (2009) International Whaling Commission <[www.iwcoffice.org](http://www.iwcoffice.org)>.

<sup>173</sup> Chair and Vice-Chair of the International Whaling Commission "Proposed Consensus Decision to Improve the Conservation of Whales" International Whaling Commission <[www.iwcoffice.org](http://www.iwcoffice.org)> at 2.

<sup>174</sup> Chair and Vice-Chair of the International Whaling Commission "If you really care about whale conservation – give our proposal a fair reading" (press release, 11 May 2010).

<sup>175</sup> Proposed Consensus Decision to Improve the Conservation of Whales, above n 173.

<sup>176</sup> International Whaling Commission "2010 Meeting" (press release, 25 June 2010).

## ***B Implications of the Litigation for the IWC***

It is inevitable that the outcome of the litigation will affect processes within the IWC. Klein has suggested that litigation may benefit negotiations within the IWC if the ICJ judgment is able to provide guidance on the contentious issues.<sup>177</sup> The judgment may be able to clarify the scope of scientific research under art VIII and direct what the contemporary aims of the ICRW are, in order to resolve the ambiguity which currently exists. This guidance, Klein suggests, may have the effect of breaking the current deadlock within the IWC.<sup>178</sup> This would be the best outcome for the IWC, but it is unlikely to be this simple. It is likely that the decision will not favour either side, and that both will have to make concessions.

If the decision favours Australia's position, Japan may decide to leave the IWC as it has threatened to do in the past.<sup>179</sup> States leaving the IWC due to dissatisfaction with the organisation is not new. Iceland withdrew from the IWC in 1992 stating that "the IWC is, and will remain, an anachronistic and ineffective organization" and that "the [IWC] is no longer a viable forum for international cooperation on the conservation and management of the whale populations in our region".<sup>180</sup> Iceland, along with Norway, Greenland and the Faroe Islands, subsequently established the North Atlantic Marine Mammal Commission (NAMMCO).<sup>181</sup> However, Iceland's return to the IWC in 2002 indicates that the pro-whaling states still consider there to be some advantage in being a part of the IWC, such as the benefit of shared technology and whaling techniques.<sup>182</sup> Japan has reportedly previously considered withdrawing from the ICRW and forming an alternative regional organisation. Thus it is likely that with the catalyst of a loss in the ICJ it may decide that such benefits are outweighed by the restrictions imposed by the ICRW.<sup>183</sup>

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<sup>177</sup> Klein, above n 54, at 214.

<sup>178</sup> Ibid.

<sup>179</sup> At the 2007 International Whaling Commission meeting, Japan announced it was considering withdrawal from the ICRW and the International Whaling Commission: See The World Today "Japan Threatens to Leave International Whaling Commission" *Australian Broadcasting Corporation* (television broadcast, June 1, 2007), available at <www.abc.net.au/worldtoday>, in Donald K Anton "Antarctic Whaling: Australia's Attempt to Protect Whales in the Southern Ocean" (2009) 36 BC Env'tl Aff L Rev 319 at 320.

<sup>180</sup> Icelandic Ministry of Fisheries "Government of Iceland Announces Withdrawal from the International Whaling Commission" (press release, 27 December 1991) in Steven Freeland and Julie Drysdale "Co-operation or Chaos? Article 65 of United Nations Convention on the Law of the Sea and the Future of the International Whaling Commission" (2005) 2 MqJICEL 1 at 21.

<sup>181</sup> Kaye Anable "NAMMCO Defies the International Whaling Commission's Ban on Commercial Whaling: Are Whales in Danger Once Again?" (1993) 6 Transnat'l Law 637 at 638.

<sup>182</sup> Howard S Schiffman "The International Whaling Commission: Challenges from Within and Without" (2003-2004) 10 ILSA J Int'l & Comp L 367 at 373; Freeland and Drysdale, above n 180, at 16.

<sup>183</sup> Alex Kirby "Japan plans pro-whaling alliance" (2004) BBC News <<http://news.bbc.co.uk>>, in Freeland and Drysdale above n 180, at 26.

If Japan withdraws from the IWC, this is likely to cause a domino effect. Other pro-whaling nations which are equally dissatisfied with the IWC and other nations under Japan's economic persuasion may choose to follow Japan.<sup>184</sup> Withdrawn states may opt to join NAMMCO or to follow the precedent of Iceland, and establish their own regional organisations which allow commercial whaling.<sup>185</sup> The United Nations Convention on the Law of the Sea (UNCLOS) requires states to cooperate "through the appropriate international organizations" for the conservation, management and study of cetaceans.<sup>186</sup> It has been argued that the "appropriate organisation" is the IWC, though UNCLOS does not recognise any exclusive competence thus states could satisfy this obligation through other organisations.<sup>187</sup> Such alternate organisations are sure to challenge the credibility of the IWC as the primary international institution for the regulation and management of whaling.<sup>188</sup>

The decentralisation of whale management could create opposing organisations.<sup>189</sup> There would not be a consistent universal regulation scheme which is essential due to the migratory nature of whales, and international cooperation for the conservation of whales will decline or disappear altogether.<sup>190</sup> This would be damaging for the anti-whaling states' campaign, for while Japan and other pro-whaling states are still party to the ICRW, the anti-whaling states are able to leverage some degree of control over their whaling activities. Non-parties to the ICRW will have the freedom to unilaterally set catch limits for whales. The efforts to conserve whale populations by the IWC will be frustrated by unregulated whaling and the risk of the overexploitation of whales will increase.

Palmer has stated that if the case was lost by Australia, it would be unlikely that progress would be made in the IWC in the future and it would be more likely that the IWC would disintegrate.<sup>191</sup> A decision in Japan's favour will provide further force in the pro-whaling nations' campaign to lift the moratorium on commercial whaling. It may also see the anti-whaling states that have been relying on the IWC to resolve the issues in their favour giving up on the IWC as the primary international institution for the regulation of whaling. In this case, no international organisation would be left to regulate whaling; the effect would be much the same as if the pro-whaling nations leave the IWC.

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184 Judith Berger-Eforo "Sanctuary for the Whales: Will This Be the Demise of the International Whaling Commission or a Viable Strategy for the Twenty-First Century?" (1996) 8 Pace Int'l L Rev 439 at 444.

185 Freeland and Drysdale, above n 180, at 29–30.

186 United Nations Convention on the Law of the Sea (open for signature 10 December 1982, entered into force 16 November 1994), arts 65 and 120.

187 See Freeland and Drysdale, above n 180, at 18–19.

188 Berger-Eforo, above n 184, at 444.

189 Schiffman, above n 182, at 375; Anable, above n 181, at 650.

190 Ibid.

191 "Whaling Deal would need to be a good one – McCully" (2010) NZPA <[www.stuff.co.nz](http://www.stuff.co.nz)>.



On the other hand, a loss by Australia may restore the credibility of the IWC for pro-whaling states that criticise its protectionist stance which they argue is contrary to the purpose of the ICRW. Furthermore, it may bring home to states such as New Zealand and Australia which have been uncompromising in their opposition to whaling that the ICRW does not purport to ban whaling, and encourage the anti-whalers to make concessions which will allow the IWC to progress. Even if Australia does not get the outcome it desires, this litigation may be what is needed to clarify the position of the IWC and force it out of its "slough of despond".<sup>192</sup>

Whatever the outcome, the IWC, which has been criticised for its inefficacy is already skating on very thin ice and it will not take much for this already shaky institution to collapse.<sup>193</sup>

## **X CONCLUSION**

Australia's goal in bringing these proceedings is to put a stop to large scale scientific permit whaling by Japan. Australia has pointed to three international instruments, the ICRW, CITES and the CBD, to support its claim. As illustrated above, the success of Australia's arguments based on these conventions is uncertain and there is no international law which specifically provides protection for whales. Australia's main case rests upon the ICRW on the basis that Japan is actually conducting commercial whaling, which is an abuse of the right to issue scientific permits. However, the wording of art VIII is clear, and it gives unrestricted discretion to the authorising government to issue permits as it sees fit. Another factor which undermines Australia's argument is that the purpose of the ICRW was never to protect whales from exploitation, but rather to ensure the sustainable exploitation of whales to protect the whaling industry. Under CITES, the only whale species that Australia can make a claim in respect of is the humpback whale. Japan has yet to harvest humpbacks, thus it will be difficult to show that Japan has breached this convention. Under the CBD, Australia will have to prove that JARPA II undermines efforts for the conservation of whales, is unsustainable and has an adverse effect on marine biodiversity. Current evidence does not show that harvesting of Antarctic minke whales is unsustainable. Not only is it uncertain that Australia will be successful in this case, it is likely that litigation will harm rather than improve negotiations within the IWC. The uncertainty of success and the negative effect that this may have on the IWC and international cooperation on whaling in general can be seen in the concern expressed by New Zealand and the United States about the risks of undertaking litigation.

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<sup>192</sup> Geoffrey Palmer "Report of the fourth meeting of the Small Working Group (SWG) on the Future of the IWC" (2010) International Whaling Commission <[www.iwcoffice.org](http://www.iwcoffice.org)> at 24.

<sup>193</sup> See Ackerman, above n 18, at 339.

