Whales and Tuna: The Past and Future of Litigation between Australia and Japan

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I. INTRODUCTION

Australia’s relationship with Japan is of undeniable importance. Japan is Australia’s largest trading partner, constituting Australia’s top export market for more than forty years.1 The economic links between Australia and Japan have solidified across the years through a series of treaties2 and may crystallize in the adoption of a Free Trade Agreement.3 In 2007, the relationship took a new direction with the adoption of a Joint Declaration on Security Cooperation,4 providing an operational framework for Australian and Japanese defense forces to work together in certain situations and to “establish mechanisms to improve strategic alignment.”5 Japan also has considerable strategic interests in maintain-
The relationship has not always run smoothly, and one commentator has noted that Australia’s attitude towards Japan could be characterized as ambivalent, with Australia undecided as to whether Japan “most closely represents friend or foe.”

While the economic relationship is of considerable significance for Australia, Japan views Australia as of “relatively modest significance” in view of the small size of Australia’s consumer market. In terms of trade, investment, aid, and military security, Japan is more focused on its relationship with the United States, China, and East Asian states, than on its relationship with Australia.

When it comes to questions of the utilization and conservation of ocean resources, there are few comparable issues where Australia and Japan’s positions have been more polarized. Most notable in this regard is Australia’s strong opposition to Japan’s current program of scientific whaling in Antarctica. The prospect of litigation currently hangs over this dispute, with Australia challenging Japan’s adherence to its conservation and management obligations relating to whales. One of the purposes of the present article is to compare Australia’s current dispute with Japan over whales with another source of tension between these two states: the conservation and management of southern bluefin tuna (“SBT”). SBT are of relevance in Australia and Japan’s relationship because of the geographic location of this species around Australia and the high consumer demand for SBT in Japan for sale as sashimi. While Japan and Australia have sought to cooperate with respect to SBT, these efforts have also been fraught with difficulties—especially in relation to Japan’s unilateral Experimental Fishing Program (“EFP”) and with regard to recent revelations of Japan’s twenty-year history of under-reporting its SBT catches. Australia, with New Zealand, resorted to litigation against Japan in 1999 to challenge the institution of its EFP.

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7. “One of the most notable characteristics of Australia’s attitude towards Japan has always been ambivalence: of wanting a close economic relationship and yet wary of Japanese military and economic strength. Since the earliest bilateral contacts, Australians have been undecided as to whether Japan most closely represents friend or foe.” Shirley Scott, Australian Diplomacy Opposing Japanese Antarctic Whaling 1945-1951: The Role of Legal Argument, 53 AUSTL. J. INT’L AFF. 179, 179 (1999) [hereinafter Scott, Japanese Antarctic Whaling].
8. Mulgan, supra note 6, at 2.
9. Id.
Australia’s past experience in litigating against Japan over SBT has important lessons for Australia in deciding whether litigation should be pursued in relation to Japan’s whaling activities in Antarctic waters. While the dispute over SBT is not exactly aligned with Australia’s current dispute with Japan over whales, the potential outcomes from litigation may well be similar and would be worth pursuing for those reasons. In making this assessment, Part II sets out a framework for Australian and Japanese foreign policy-making. This context then informs the analysis in Part III, which compares the dynamics that existed prior to the institution of arbitration in SBT to the current situation regarding the whaling dispute, assessing the various factors that may influence foreign policy-making in this regard. Part IV then briefly explains the result of the SBT litigation itself and addresses the immediate questions for Australia in deciding whether to move to litigation over whaling in relation to the possible forum for the case, what claims could be asserted and proven, and what findings a court or tribunal might be prepared or able to make. After having considered the immediate outcomes from both the actual litigation over SBT and the hypothetical whaling litigation in Part IV, Part V explores what impact litigation has had on subsequent relations between Japan and Australia in dealing with SBT since the decision in 2000. Again it will be asked: Is it possible to draw further parallels for whales? The longer-term benefits of litigation exemplified in the SBT cases augurs in favor of litigation over whales if negotiations otherwise remain at a stalemate in the near future.

II. FRAMEWORK FOR DECISION MAKING ON INSTITUTING LITIGATION

In assessing whether states are likely to turn to litigation as a means of resolving their dispute, a range of factors, both legal and non-legal, must inevitably be taken into account. As Richard Silk has observed, “[t]he issues underlying even a single-species fishery dispute are often complex, ranging from legal issues, biological issues, and economics, to politics.” For SBT and whales, issues such as historic practice, the existence and functioning of international organizations, economic incentives, public interest, scientific uncertainties, general national interest, as well as legal rights and duties all figure into determining whether a dispute is amenable for resolution through litigation. These are the aspects that can be most readily identified and analyzed as relevant in assessing reasons for instituting legal proceedings and appear to be the most

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14. These factors have been drawn from various issues addressed in a range of government papers and media.
likely factors that may influence any final policy decision for Australia in resorting to litigation against Japan. They are discussed in detail in Part III. This Part sets forth an explanation on how and why the Australian and Japanese governments individually reach decisions on matters of foreign policy, with a focus on the Australian approach since it is more likely to be the applicant in legal proceedings. An understanding of how and why governments make decisions assists in appraising the factors that are likely to feature in choosing one particular form of dispute settlement over another.

A. LEVELS OF AUSTRALIAN FOREIGN POLICY-MAKING

Deciphering how any government makes decisions on foreign policy is no easy task, and it must be acknowledged that any outsider will have difficulties in assessing what precise factors contribute to determining a particular course of action. Having to rely on information that is publicly available will always be a limiting aspect to any assessment of foreign policy. Political scientists have engaged in analyses of foreign policy in order to devise general theories and models that may be applied to different factual scenarios. One difficulty with these analyses has been that the more abstract and general these theories have become, the more disconnected they are from the reality of foreign policy processes.

In analyzing the Australian approach to foreign policy-making, Allan Gyngell and Michael Wesley have sought to overcome this separation of theory from practice by examining foreign policy processes across four interrelated levels, which is intended to render "a much clearer picture of the actual dynamics and considerations that inform foreign policy making." In discerning different levels of foreign policy-making, there is no attempt to devise yet another general model, but Gyngell and Wesley instead use these levels, and interaction across releases, as well as in academic commentary and news reports on the disputes in question. Specific sources are identified in relation to the different factors discussed in Part III.

15. One of the ground-breaking analyses in this regard was published in 1954. FOREIGN POLICY DECISION MAKING: AN APPROACH TO THE STUDY OF INTERNATIONAL POLITICS (Richard C. Snyder, H.W. Bruck & Burton Sapin eds., 1962).

16. ALLAN GYNGELL & MICHAEL WESLEY, MAKING AUSTRALIAN FOREIGN POLICY 17 (2nd ed. 2007). In this regard, Gyngell & Wesley contrast the position of academics and practitioners as follows:

The practitioner's view of foreign policy is of a world of complex detail and incessant demands on time, attention and resources . . . . Their experience of trying to implement policy in the difficult, wilful, resistant world of IR makes them sceptical of high-sounding schemes and principles, as well as the moral simplicity and unqualified solutions offered by academics and public alike. In contrast, the academic's world is one of abstraction and generalisation, of post-hoc analysis and probabilistic prediction. Details, caveats, and information falling outside of general trends are obstacles and pedantic irritations that detract from the more instructive 'big picture' and from the explanatory power of the theory.

Id. at 7-8.

17. Id. at 22.
the levels, as means of providing "an accessible yet realistic account" of the process followed in Australia. Their analysis is particularly relevant for the questions under examination here because they consider Australian foreign policy-making processes and so have accounted for Australian governmental structures and the relationship between different levels and branches of government, including the role of the Australian public service and its diplomatic corps.

In describing the different levels used by Gyngell and Wesley, it is important to bear in mind that there is often interaction and overlap between the activities being undertaken and the actors involved. The fluidity of any situation means that it is not possible to plug information in one end and expect an answer to pop out at the other end. Nonetheless, these levels provide a framework for understanding what might be influencing Australian government decision making on foreign policy matters and are relied upon here for that reason.

Gyngell and Wesley describe the first level as the strategic level at which "foreign policy is made as a series of commitments and attitudes on the relations between a society and the outside world, usually expounded in general policy statements . . . and ministerial speeches." The second is the contextual level whereby "[c]onsiderations of context inform a policy issue with an appraisal of the array of costs, benefits, opportunities and constraints, its relationship to other policy issues and contemporary initiatives, and its relevance to strategic policy goals and values, and assessments of the significance and utility of courses of action." A range of "situational factors" affect the contextualization of a policy issue, including whether the same or analogous issues have occurred in the past, its urgency, the impact on social values, the specificity of the issue in question, and whether it is a sudden development or long term trend.

The third level is organizational, which "involves both the process of guiding a policy response through existing organizational structures, and the process of marshalling and apportioning resources to policy issues." In the Australian context, the structure in place for foreign policy-making is basically hierarchic, with matters commonly (but certainly not always) being reported up a chain of

18. Id. at 31.
19. Australian foreign policy, derived from a Westminster style of government, is largely concentrated in the executive, institutionally relatively hierarchic, and predominantly collegial by way of culture. Id. at 35. "Foreign policy making in Australia is invariably characterised by three properties: it is consensual more often than conflictual; its various actors play complementary rather than competing roles; and the vast bulk of policy work involves ongoing policy issues or 'flows' rather than sequential and distinct decisions and initiatives." Id. It can be contrasted in this regard with the strict separation of powers, institutional rivalries, and tendency towards competing interests that exist within the foreign policy-making system of the United States. Id.

20. Id. at 31-32.
21. Id. at 22.
22. Id. at 25.
23. Id. at 26.
24. Id. at 27.
command for decision and moving back down this chain for implementation.25 Finally, “[o]perational-level foreign policy making refers to the activity of those representatives of the state who monitor, at the most detailed level, developments in the policy space, and who implement the content of foreign policy, whether through diplomatic, bureaucratic, media or other channels.”26 It is at the operational level that there is “minute attention to complex detail” and the greatest impulse to avoid mistakes so that decisions will be based on certainties rather than risks.27

These different forms of policy-making need to be understood within the various institutions and actors involved in the policy-making process, with consideration given to their particular influence.28 The institutional setting for foreign policy-making in Australia is predominantly hierarchic, with distinctions typically drawn between elected and appointed officials; the latter comprising the tenured public service as well as policy advisors appointed by the elected officials.29 While the demarcation between elected and appointed officials is sometimes blurred,30 “demarcations of authority and responsibility are important determinants of the involvement and influence of various actors in the policy process.”31 As would be expected in a hierarchic structure, the higher levels of the bureaucracy and government ministers have the greatest responsibility and hence the most influence over policy decisions.32 While final decisions rest with the minister, these decisions are shaped by the information that is reported from the lower levels of bureaucracy and gradually refined and re-shaped as it makes its way up the chain of command.33

This structure feeds into the different levels of Australian foreign policy. The operational level is predominantly the realm of the lower level of the bureaucracy, which has functional or geographical specializations. The organizational level reflects which actors have a voice on a particular issue and the weight accorded to their voice. The contextual level tends to merge both oversight and specialization roles. The minister is then the most important voice at the strategic level.34 The factors most likely to be influencing government decision making on whether to resort to international litigation for the protection of marine resources

25. Id. Gyngell & Wesley further note that coordination in the Australian foreign policy-making process occurs informally and, most usually, collegially. Id. at 29. While such an approach is no doubt of benefit for Australian interests, it is a characteristic that tends to make the process less penetrable by external observers.
26. Id. at 29.
27. Id.
28. Id. at 34.
29. Id. at 39-44.
30. Id. at 42.
31. Id. at 43.
32. Id.
33. Id. Gyngell & Wesley further consider the various modes of communication used between actors and institutions and note that these in turn may shape how foreign policy is made. Id. at 44-47.
34. Id. at 48.
would therefore seem to be those that reflect the strategic and contextual levels, as these levels involve the most authoritative policy-makers. The operational and organizational levels remain important inasmuch as they become important sources of information that feed into the other levels.

B. POLICY-MAKING IN JAPAN

While this article predominantly focuses on the Australian position, as it is considering whether Australia should (or will) institute international legal proceedings against Japan, Japan’s position will also be considered to the extent it is likely to inform Australian decision making. The same levels of policy-making may be assessed, although it must be acknowledged that the governmental structure of Japan is markedly different to that of Australia, and its domestic institutions strongly influence how and what decisions are made in relation to Japanese foreign policy.

Atsushi Ishii and Ayako Okubo have considered the role of Japan’s domestic political structure in relation to Japanese whaling policy.\textsuperscript{35} In doing so, they have drawn on Karel van Wolferen’s “Japanese System,”\textsuperscript{36} and Shohei Yonemoto’s “Structural Paternalism” model.\textsuperscript{37} The former identifies an amorphous political structure within Japan that comprises a complex of overlapping hierarchies and no supreme institution with ultimate jurisdiction over the others.\textsuperscript{38} The primary players identified within the Japanese System include the bureaucrats, political cliques, clusters of industrialists, and the press, all of whom have a key interest in maintaining their power.\textsuperscript{39} Shohei Yonemoto similarly points to these actors as vital in Japanese decision making.\textsuperscript{40}

The major policy-making activities are extremely concentrated in the administrative executive (the higher echelons of the bureaucracy) to the point that legislators rarely devise policy by themselves but rely on and lobby the bureaucrats for legislative change.\textsuperscript{41} Atsushi Ishii and Ayako Okubo describe the process as follows:

The resulting policymaking process lacks transparency because the process essentially turns out to be [bureaucrats] incorporating demands submitted by


\textsuperscript{39} Id. The press is, however, a “lesser” player.

\textsuperscript{40} Ishii & Okubo, supra note 35, at 70-72.

\textsuperscript{41} Id. at 71.
the legislators and lobby groups behind closed doors into legislative proposals and implementation. The resulting policy lacks a clear share of responsibility; the bulk of Japanese policies merely outline the main substance of the policy in question and leave large room for discretionary power to the government agency in charge to decide on the details of policy implementation. 

This division of power then influences the various forms of policy devised in Japan and so must be taken into account in discussing the Japanese perspective on the various factors that may be engaged in deciding on forms of international dispute settlement in relation to whales and SBT.

III. PRE-LITIGATION: WHAT INFLUENCES GOVERNMENT DECISIONS TO LITIGATE

The dynamics of Australian and Japanese foreign policy-making are taken into account in this Part in discussing the varied considerations that have influenced or likely influence government decision making in pursuing litigation in relation to SBT and whales. The factors identified are: history, the role of international organizations, the economy, the public interest, science, politics (in terms of the general national interest), as well as legal issues.

A. HISTORIC SETTING OF SBT FISHING AND WHALING

Both Australia and Japan share long histories in the exploitation of ocean resources. As fishing technologies have improved, vessels from both states were able to stay at sea longer and venture farther from their home ports. For Australia and Japan, their main interaction in relation to the exploitation of marine living resources commenced after World War II when the Allied Occupation in Japan authorized both tuna and whaling expeditions, the former extending south to the equator and the latter reaching into Antarctic waters. At the time, Australia was concerned about the impact these activities would have on its own maritime industries but largely failed in its efforts to constrain the development of Japan’s tuna fishing and whaling.

By the late 1970s, Japan’s fishing activities were forced to adjust to the advent of the Exclusive Economic Zone (“EEZ”) whereby coastal states could claim sovereign rights over the exploitation of living resources in a zone extending up to 200 miles from their coast. Professor Bernard Oxman has described Japan’s reluctant acceptance of the new coastal state rights as a desire for order, rather

42. Id. (relying on Yonemoto’s work).
43. See Shirley V. Scott, Australia’s First Tuna Negotiations with Japan, 24 MARINE POL’Y 309, 309-10 (2000) [hereinafter Scott, Tuna Negotiations] (discussing the expeditions with a focus on tuna).
44. See id. at 309-10; Scott, Japanese Antarctic Whaling, supra note 7, at 179 (focusing on the tuna industry).
than unilateralism, at sea.\textsuperscript{46}

The increasing attribution of maritime rights to coastal states, as well as growing awareness of the need to conserve and manage ocean species to ensure ongoing exploitation, have influenced Japan and Australia's decisions in relation to SBT and whaling. Australia and Japan's decisions and collaborations on SBT and whaling are set forth, respectively, in the two following sections. The historic perspectives on SBT and whaling are important in providing context to inform policy decisions. In particular, the history of Australia and Japan's relationship concerning these species shows that there are long-term trends involved, which facilitates predictions as to what behavior might be expected in the future (a situational factor in Gygnell and Wesley's contextual level of foreign policymaking). In addition to amplifying the contextual level, the historic setting permits identification of key shifts in government policy. Such changes at the strategic level are especially evident when considering Australia's decision to cease commercial whaling.

1. The Rise and Rise of SBT

SBT are a highly migratory species and can be fished on the high seas as well as in the EEZ of various states. They spawn south of Indonesia in the Indian Ocean and then migrate down along the coast of Western Australia, and then some portion travel eastwards along the Australian continental shelf while some head towards South Africa.\textsuperscript{47} The states primarily fishing SBT are Australia, Japan, New Zealand, South Korea, Taiwan, and Indonesia.\textsuperscript{48} Their life expectancy is approximately 40 years, and they may grow over 2 meters in length and weigh over 200 kilograms.\textsuperscript{49}

Both Australia's and Japan's tuna fishing industries expanded rapidly throughout the 1950s,\textsuperscript{50} with the global catch peaking in 1961 at over 81,000 tons.\textsuperscript{51} "By the early to mid-1960s the Japanese were fishing off Australia on a large and increasing scale and Japanese survey vessels were researching the waters for new grounds."\textsuperscript{52} Australia's first challenge to this activity by Japan could be seen in

\textsuperscript{47} Australian Gov't, Department of Environment and Heritage, \textit{Strategic Assessment of the Southern Bluefin Tuna Fishery}, 5 (2004).
\textsuperscript{48} Id. at 6.
\textsuperscript{49} Id. at 5.
\textsuperscript{50} See Scott, \textit{Tuna Negotiations}, supra note 43, at 310 ("The Australian tuna industry underwent rapid expansion in the 1950s, the catch increasing from 0.3 million pounds in 1950/51 to 9.8 million in 1960/61."); see also Oxman, supra note 46, 309 (referring to the "mothership-type tuna fishing expeditions" conducted in the 1950s).
\textsuperscript{52} Scott, \textit{Tuna Negotiations}, supra note 43, at 311.
Australia's decision to claim exclusive fishing rights over a 12-mile zone around Australia in 1968. In describing the history of Australia and Japan's first tuna negotiations, Shirley Scott has noted that Australia carefully considered the repercussions on its relationship with Japan in establishing this zone. Australian officials eventually considered that their claim could not be seriously challenged, even though a fishing zone of 12 miles was not yet widely accepted under international law.

The SBT industry in Australia developed steadily throughout the 1960s and the following two decades. Australia's efforts were enhanced in this regard through the establishment of the Australian Fishing Zone, which was claimed in 1979 and preceded Australia's declaration of an EEZ in 1994. Within this area, Australia initially targeted juvenile stock using purse seine nets. Under a Head Agreement, signed in 1980, Japanese operators were granted limited access to the Australian Fishing Zone through annual subsidiary agreements to target larger adult fish using longline fishing methods. In return for payment of an annual fee, Australia agreed to allow in a certain number of vessels, specified the ports the vessels could access and set out conditions in relation to reporting of catch and scientific data. Japanese fishing vessels also continued to operate in international waters, predominantly using longlines to catch SBT.

By the early 1980s, Australia and Japan, along with New Zealand, recognized the importance of cooperation in the conservation and utilization of SBT. Informal management began between Australia, New Zealand, and Japan in 1982, which resulted in the establishment of a global total allowable catch in 1985. Ongoing concern about the status of the species led the Australian Prime Minister to announce in 1989 that Australia would press for a moratorium on the

53. See id. at 314 (describing Australia's establishment of an exclusive fishing zone).
54. See id. at 309-18.
55. Id. at 312.
56. Hayashi, supra note 51, at 365.
57. Fisheries Amendment Act, 1978, § 3 (Austl.).
59. Sato, supra note 45, at 221.
60. David Campbell, Debbie Brown & Tony Battaglene, Individual Transferable Catch Quotas: Australian Experience in the Southern Bluefin Tuna Fishery, 24 MARINE POL'Y 109, 110 (2000); see also Anthony Bergin & Marcus Haward, Southern Bluefin Tuna Fishery: Recent Developments in International Management, 18 MARINE POL'Y 263, 267 (1994) [hereinafter Bergin & Haward, Recent Developments].
61. Bergin & Haward, Recent Developments, supra note 60, at 267.
62. See Campbell, Brown & Battaglene, supra note 60, at 110. "The key to the Australia-Japan relationship is undoubtedly the Japanese interest in maintaining access to the [Australian Fishing Zone (AFZ)]. Although Japan lands approximately 80% of its SBT catch outside the AFZ the high quality of catch within this zone makes this access particularly important to the Japanese." Bergin & Haward, Recent Developments, supra note 60, at 267.
63. Hayashi, supra note 51, at 36.
64. SBT (PM), supra note 12, ¶ 22.
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taking of SBT.\textsuperscript{65} The call for a moratorium provided a catalyst for agreement on a major quota reduction, but the moratorium was not pursued.\textsuperscript{66} At the time, Japan sustained the largest cut in its catch of SBT among the three states, as it had traditionally taken the greatest quantity.\textsuperscript{67} Despite these efforts, the numbers of SBT continued to decline.

Australia, New Zealand, and Japan decided to formalize their cooperation on the management of SBT in 1993 with the adoption of the Convention for the Conservation of Southern Bluefin Tuna ("CCSBT").\textsuperscript{68} The CCSBT is intended "to ensure, through appropriate management, the conservation and optimal [utilization] of southern bluefin tuna."\textsuperscript{69} The main feature of the CCSBT is the creation of a Commission ("SBT Commission")\textsuperscript{70} and through it, a mechanism for the establishment of a total allowable catch and its allocation among the parties.\textsuperscript{71} Acquiring, enhancing, and exchanging scientific knowledge about SBT is a recurring feature of the convention.\textsuperscript{72} Another significant aspect of the CCSBT is that parties are not able to object and thereby opt out of agreed management measures after those decisions are made.\textsuperscript{73} The SBT Commission "set 2020 as the target year for achieving its long-term management goal of recovering the SBT spawning stock biomass to the level of 1980," as the stock would be self-sustaining at that level.\textsuperscript{74}

Australia, Japan and New Zealand were the original members of the SBT Commission, with South Korea joining in 2001 and the Fishing Entity of Taiwan joining an Extended Commission in 2002.\textsuperscript{75} The Philippines, South Africa, and the European Community have been formally accepted as Cooperating Non-Members whereby they agree to adhere to the management and conservation objectives of the CCSBT, including the agreed catch limits.\textsuperscript{76} Indonesia, originally a principal non-member, joined the commission in 2008.\textsuperscript{77}

Disagreement has been manifest in the SBT Commission as the member states

\textsuperscript{65} See Bergin & Haward, Recent Developments, supra note 60, at 267 (citing to Australian Prime Minister's Environment Statement in July 1989).
\textsuperscript{66} Id.
\textsuperscript{67} SBT (PM), supra note 12, ¶ 22.
\textsuperscript{69} Id. art. 3.
\textsuperscript{70} Id. art. 6.
\textsuperscript{71} Id. art. 8.3(a).
\textsuperscript{72} References to scientific knowledge are made in Articles 5, 12, 8, and 9. Id. arts. 5, 12, 8 & 9. The latter provision establishes a Scientific Committee as an advisory body to the SBT Commission. Id. art. 9.
\textsuperscript{73} Anthony Bergin & Marcus Haward, Australia's Approach to High Seas Fishing, 10 INT'L J. MARINE & COASTAL L. 349, 358 (1995).
\textsuperscript{74} Hayashi, supra note 51, at 366.
\textsuperscript{76} Id.
\textsuperscript{77} Commission for the Conservation of Southern Bluefin Tuna, supra note 75.
have often been unable to agree on a total allowable catch and its allocation, a
decision that must be made by consensus.\textsuperscript{78} While the state parties agreed that the
informal catch levels established in 1989 should be maintained at the time the
CCSBT entered into force in 1994, no further agreement on changing that amount
could be reached in the immediate following years.\textsuperscript{79} The situation in 1998 was
exacerbated when Japan proposed that it should be able to take an extra 1464 tons
of SBT as part of its EFP.\textsuperscript{80}

Even within this multilateral context, Australia and Japan have worked
together for fishing SBT within Australia's EEZ. The mutual interests in the SBT
fishery have previously resulted in agreements between Australia and Japan to
allow a certain number of Japanese vessels into the Australian EEZ to catch part
of Japan's global quota.\textsuperscript{81} Australian and Japanese operators entered into a joint
venture agreement in which a proportion of the Australian quota was leased to the
Japanese joint venture partners.\textsuperscript{82} Through this collaboration, Australia was able
to develop its own longline fishing capability\textsuperscript{83} and establish SBT farming off the
coast of South Australia.\textsuperscript{84} This aquaculture industry involves juvenile SBT being
captured in purse seine nets, towed closer to shore, and then held in cages off-shore
for fattening until they are ready to be harvested.\textsuperscript{85} Japanese operators withdrew
from the fishery at the end of 1996, thereby reducing the joint venture catch, as a
result of the disagreement over global quota.\textsuperscript{86} The bilateral agreements with
Japan also lapsed at this time.\textsuperscript{87} Australia imposed a call-port ban on Japanese
tuna boats in 1998 and "refused to sign a bilateral fishing agreement that would
have allowed Japan to fish for other species in the Australian [EEZ]."\textsuperscript{88} This
background was the setting in place when litigation between Australia, New
Zealand, and Japan began over SBT.

\begin{footnotes}
\item 78. CCSBT, supra note 68, art. 7 ("Decisions of the Commission shall be taken by a unanimous vote of the
Parts present at the Commission meeting.").
\item 79. Agreement was not reached on a new total allowable catch until 2003.
\item 80. Deborah Horowitz, \textit{Southern Bluefin Tuna Case (Australia and New Zealand v Japan) (Jurisdiction and
Admissibility), The Catch of Poseidon's Trident: The Fate of High Seas Fisheries in the Southern Bluefin Tuna
\item 81. Bergin & Haward, \textit{Recent Developments,} supra note 60, at 267.
\item 82. Campbell, Brown & Battaglene, \textit{supra} note 60, at 114.
\item 83. Bergin & Haward, \textit{Recent Developments,} supra note 60, at 268.
\item 84. See \textit{infra} notes 155-57 and accompanying text.
\item 85. Id.
\item 86. Campbell, Brown & Battaglene, \textit{supra} note 60, at 114-15.
\item 87. Australian Gov't, Eastern Tuna and Billfish Fishery, Factual Brief prepared by the Australian Fisheries
fisheries/tuna/ebtf/notices/aap/long.htm.
\item 88. Hayashi, \textit{supra} note 51, at 368. "Future fishing access to Japanese longline vessels has been considered
very unlikely given the expansion of the domestic fishery." Australian Gov't, Eastern Tuna and Billfish Fishery,
\end{footnotes}
2. The Rise and Fall of Whaling

Japan's history of whaling may be traced to the twelfth century, when coastal communities in Japan engaged in whaling.\(^8^9\) Australia's whaling activities form part of its early colonial history and the earliest explorers of Australia's coastline noted the abundance of whales passing by.\(^9^0\) As with fishing, the number of whales harvested and the areas from which they were taken greatly expanded as new technologies were developed. In addition, the types of species hunted were expanded as numbers of previously targeted species were depleted.\(^9^1\) It was only in the 1930s that the global decline in whale stocks prompted multilateral action at a governmental level to save the whaling industry with the adoption of the 1931 Convention for the Regulation of Whaling.\(^9^2\) This treaty prohibited the taking of right whales, as well as calves or immature whales and lactating whales.\(^9^3\) The 1931 Convention was largely unsuccessful, owing to the "lack of scientific knowledge [that] resulted in inadequate conservation measures; some major whaling States refused to sign the convention; and no enforcement mechanisms were in place, leaving it to the individual States to police their own whaling vessels."\(^9^4\) Neither Australia nor Japan was a party to this treaty.\(^9^5\) Australia did subsequently ratify a 1937 whaling treaty, the International Agreement for the Regulation of Whaling, which sought to prevent the taking of certain species of whales that were under a specific length, as well as to ban outright the taking of right and gray whales.\(^9^6\) Again, Japan was not a party, and the treaty had little effect on whaling activities.\(^9^7\)

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93. Article 5 prohibits the "[t]aking or killing of calves or suckling whales, immature whales, and female whales which are accompanied by calves (or suckling whales)." Convention for the Regulation of Whaling, supra note 92, art. 5.


96. International Agreement for the Regulation of Whaling, June 8, 1937, 52 Stat. 1460, 190 L.N.T.S. 79. A series of protocols to this agreement were subsequently adopted.

97. See Kobayashi, supra note 89, at 187.
After World War II, the 1946 International Convention on the Regulation of Whaling ("ICRW")\textsuperscript{98} was adopted, with Australia as an original signatory and Japan becoming party to the treaty in 1951.\textsuperscript{99} The preambular paragraphs of the ICRW indicate that the treaty is concerned with "the proper conservation of whale stocks" in order to "make possible the orderly development of the whaling industry." The treaty clearly recognizes the need for conservation and that conservation will allow for continued whaling.\textsuperscript{100} The key features of the ICRW are the establishment of the International Whaling Commission ("IWC"),\textsuperscript{101} the adoption of a Schedule to the Convention; recognition of the right of contracting parties to issue special permits for the purposes of scientific research;\textsuperscript{102} and a requirement that parties take steps to enforce the measures adopted under the ICRW through appropriate punishment or prosecution.\textsuperscript{103} The Schedule comprises regulations addressing the conservation and utilization of whale resources.\textsuperscript{104} Any amendments to the Schedule:

(a) shall be such as are necessary to carry out the objectives and purposes of this Convention and to provide for the conservation, development, and optimum utilization of the whale resources;

(b) shall be based on scientific findings;

(d) shall take into consideration the interests of the consumers of whale products and the whaling industry.\textsuperscript{105}

A three-fourths majority is required for amendments,\textsuperscript{106} and a government may not be bound by an amendment if it objects within ninety days of its adoption.\textsuperscript{107}

During the Allied Occupation of Japan following World War II, the United States permitted Japan to resume Antarctic whaling as a means of "lessen[ing] the financial burden of food relief for the Japanese, as well as [addressing] the world shortage of fats and oils."\textsuperscript{108} This decision was opposed by Australia at the time, partially because Australia considered developing its own Antarctic whaling

\textsuperscript{100} Gillian Triggs, \textit{Japanese Scientific Whaling: An Abuse of Right or Optimum Utilization?}, 5 Asia Pac. J. Envtl. L. 33, 47 (2000) ("The underlying assumption of the Whaling Convention is thus that, with proper conservation measures, the whaling industry will continue.").
\textsuperscript{101} ICRW, supra note 98, art. VIII.
\textsuperscript{102} Id. art. IX.
\textsuperscript{103} Id. art. V(1).
\textsuperscript{104} Id. art. V(2).
\textsuperscript{105} Id. art. III(2).
\textsuperscript{106} Id. art. III(2).
\textsuperscript{107} See id. art. V. This period may be extended under the terms of Article V.
industry and because it was believed it would help to consolidate Australia's asserted sovereignty in Antarctica. In short, Australia was interested in controlling the resources of the Antarctic seas.

Regulation of whaling activities under the ICRW was not especially successful in the decades following its adoption. Initial quotas did not distinguish between different whale species and allowed for the "Whaling Olympics," whereby an Antarctic season was established, rather than setting national quotas, and whalers raced to kill as many whales as possible in the time allowed. Other problems faced through the 1960s included the lax enforcement of conservation regulations, especially in light of the dominance of pro-whaling parties to the ICRW; dishonest reporting of whale catch totals, and setting catch quotas in excess of sustainable utilization.

In the 1970s, increasing public awareness of environmental causes and concerns about the regulation of the commons, which included the oceans and resources within it, emerged. The entry into force of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") was another factor that began to influence the attitudes of whaling states. In particular, at the U.N. Conference on Environment and Development, a recommendation was adopted that governments institute a ten-year moratorium on whaling.

109. Id. at 180-81; see also Shirley V. Scott, Japan's Renunciation of Territorial Rights in Antarctica and Australian Diplomacy, 35 POLAR REC. 99 (1999). Scott also writes that Australia had security concerns over Japan's resumption of whaling. She states:

Australians were also aware that the Japanese considered whaling a useful way of training naval personnel and the vessels as valuable stand-bys should they ever be needed to be adapted for military purposes. So the resumption of Japanese Antarctic whaling was not an actual but a symbolic threat to Australia.

Scott, Japanese Antarctic Whaling, supra note 7, at 180.

110. Sato, supra note 45, at 219.


112. See DARBY, supra note 90, at 61; see also Cinnamon Carlame, Climate Change—the New "Super-whale" in the Room: International Whaling and Climate Change Politics—Too Much in Common?, 80 S. Cal. L. Rev. 753, 758 (2007) [hereinafter Carlame, Climate Change]. Darby further notes that Norway, Britain, Japan, the Netherlands, and Argentina all competed in the Whaling Olympics, but "the ugliest face of Antarctic factory whaling" in the 1950s was Soviet. DARBY, supra note 90, at 67.

113. Rose & Crane, supra note 91, at 166.

114. See infra notes 227-29 and accompanying text.


118. Rose & Crane, supra note 91, at 166 (noting that CITES is "a powerful tool for the protection of endangered species, including whales").

Australia responded to these developments with the launch of a government inquiry into whaling in 1978, which concluded that Australian whaling should end and that Australia should oppose whaling internationally.\(^{120}\) This conclusion was reached on the bases of the depleted numbers of whales as well as the special nature of whales in view of their intelligence and highly developed brains.\(^{121}\) Following this inquiry, the Australian Prime Minister announced that the government would adopt the proposals contained therein, declaring there was “a change in policy from one of conservative utilisation of whale stocks controlled by International Agreement to one committed to a vigorous and active policy of protection.”\(^{122}\)

Other states also ceased whaling, as economic justifications for the activity diminished and evidence mounted as to the dire state of whale stocks around the world.\(^{123}\) The United States played a key role in promoting the end of commercial whaling, particularly as it threatened to sanction states that continued the activity.\(^{124}\) The states that continued commercial whaling throughout the 1970s were Japan, Norway, and the Soviet Union.\(^{125}\)

As the number of anti-whaling states party to the ICRW increased, the shift in balance in favor of these states permitted the adoption of a moratorium on commercial whaling in 1982.\(^{126}\) Section 10(e) of the Schedule provides in relevant part that:

> [C]atch 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.

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\(^{120}\) The inquiry was led by Sir Sidney Frost. See SYDNEY FROST, WHALES AND WHALING: REPORT OF THE INDEPENDENT INQUIRY (1978); see also DARBY, supra note 90, at 114-16.

\(^{121}\) DARBY, supra note 90, at 116.


\(^{123}\) Carlarne, Climate Change, supra note 112, at 760.

\(^{124}\) Id. at 781.

\(^{125}\) Id. at 774. Kobayashi suggests that states that sought to continue whaling were those that viewed whaling as “embedded in the culture and traditional diet,” whereas the states willing to relinquish the practice were those predominantly interested in whale oil. Kobayashi, supra note 89, at 194. However, this statement does not seem as valid for the Soviet Union as for Norway, Iceland, and Japan. The Soviet Union ceased commercial whaling in 1987, although it included an objection to the moratorium. DARBY, supra note 90, at'142. The Russian Federation has not withdrawn the objection.

\(^{126}\) A. W. Harris, The Best Scientific Evidence Available: The Whaling Moratorium and Divergent Interpretations of Science, 29 WM. & MARY ENVTL. L. & POL’Y REV. 375, 379 (2005). ("In an action that could only occur due to its expansion in membership, IWC passed a resolution in 1982, establishing an indefinite global moratorium on all commercial whaling.").
Japan filed an objection to this amendment to the Schedule\textsuperscript{127} but was ultimately pressured into withdrawing that objection by the United States.\textsuperscript{128} Japan similarly objected to the creation of the Southern Ocean Sanctuary in 1994,\textsuperscript{129} particularly as it applied to Antarctic minke whale stocks.\textsuperscript{130} In some respects, the creation of the Sanctuary adds little to the moratorium, especially because scientific whaling is still permitted in the Sanctuary. Further, the moratorium is reviewed annually whereas the Sanctuary has an indefinite duration.\textsuperscript{131} Since the adoption of the moratorium, Japan has issued special permits for scientific research, despite criticism from the IWC,\textsuperscript{132} and continues this practice to the current day. Australia, by contrast, has been a strong supporter of both the moratorium and the Southern Ocean Sanctuary.

The historic context of Australia and Japan's disputes over SBT and whales demonstrates significant divergences. Australia and Japan shared a mutually beneficial interest in the utilization of SBT up until the time of the dispute that led to litigation. While not completely smooth, Australia and Japan's relationship over SBT may be characterized as predominantly cooperative. Considerations at the contextual and strategic levels were seemingly aligned to the time of the dispute involving litigation. By contrast, Australia and Japan's shared commercial interest in whaling ended several decades ago with Australia's policy shift to conservation, and their views with respect to whales have been at odds ever since. It may still be notable, however, that Australia and Japan have continued to engage in the work of the IWC despite their differences, and so cooperation between the two states remains possible. The availability and the importance of these fora for the management of SBT and whales then becomes another factor for consideration in a state's decision to litigate over ocean resources and is

\textsuperscript{127} As did Norway, Peru, and the Soviet Union. \textit{Id.} at 379-81.

\textsuperscript{128} Japan was concerned that it would be excluded from U.S. fishing grounds by virtue of the Pelly Amendment. \textit{See} Maria Clara Maffei, \textit{The International Convention for the Regulation of Whaling}, 12 \textbf{Int'l J. Marine Coastal L.} 287, 298 (1997). The Pelly Amendment involves the United States applying sanctions when the nationals of a state are "engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species." \textit{Fisherman's Protective Act of 1967} (Pelly Amendment), 22 U.S.C. § 1978(a)(2) (2008).

\textsuperscript{129} Sanctuaries prohibit all forms of commercial whaling within their boundaries. An Indian Ocean Sanctuary was established in 1979. The northern boundary of the Southern Ocean Sanctuary follows the 40°S parallel of latitude, except in the Indian Ocean sector where it joins the southern boundary of that sanctuary at 55°S and around South America and into the South Pacific where the boundary is at 60°S. \textit{See} Int'l Whaling Comm'n, Whale Sanctuaries, \url{http://www.iwcoffice.org/conservation/sanctuaries.htm} (last visited January 22, 2009).

\textsuperscript{130} ICRW, \textit{supra} note 98, Schedule, ¶ 7(b) n.** (the Schedule was amended in 2008 and is available at \url{http://www.iwcoffice.org/commission/schedule.htm}).

\textsuperscript{131} Maffei, \textit{supra} note 128, at 296 (commenting that the "only practical advantage of the establishment of the Sanctuary is its duration.").

\textsuperscript{132} "The 49th-Annual meeting of the IWC then called on Japan to stop all whaling activities under its jurisdiction and noted that Japanese whaling was taking place within the [Southern Ocean Sanctuary]. DNA testing of whale meat found in Japanese markets indicates, moreover, that the humpback, fin whale and Bryde's whale species have been included in the take." Triggs, \textit{supra} note 100, at 36.
discussed in the next section.

B. NEED FOR COOPERATIVE MANAGEMENT: SBT COMMISSION AND THE IWC

For the management of both SBT and whales, the existence of an international organization to facilitate cooperation has been vital. This section highlights the respective roles of the SBT Commission and the IWC in this regard. In each instance, states are provided with a forum for reaching decisions on the best means to conserve and manage the stocks in question, to share information about the species and utilization practices, and to alter practices to reflect changed expectations about and experience in appropriate management.

The availability of these organizations impacts Australia's foreign policy as a situs for the communication of Australia's commitments and attitudes on particular policy issues, as well as providing impetus or incentives for changes in those commitments and attitudes. As such, international organizations may effect what happens at the strategic level of Australia's foreign policy. In addition, these fora have a role to play at the organizational level when considering the interaction of Australian decision-makers at various stages of the hierarchy in these settings. Also for Japan, the role of the Ministry of Agriculture, Fisheries and Forests ("MAFF") has proven critical in shaping Japanese policy at these organizations. Finally, the decisions made and information garnered through these cooperative regimes provides detail necessary for formulating policy at both contextual and operational levels. Most notably in relation to decisions over the possible use of litigation as a means of dispute settlement, it should be observed that the existence of a formal mechanism to allow states to discuss issues may provide the means of quelling or resolving disputes. The use of international organizations for the resolution of international environmental law disputes is well-recognized for its utility and effectiveness.

1. SBT Commission

The responsibility of the SBT Commission extends to collecting and accumulating scientific and legal information on SBT, deciding upon the total allowable catch and national allocations for each party, and considering regulatory and other matters arising from the work of the Scientific Committee. The Scientific Committee's authority includes: assessing and analyzing the status and trends of the SBT population; coordinating research and studies of SBT; and reporting and recommending to the Commission its conclusions on the status of SBT and on the

133. See infra notes 295-302 and accompanying text.
135. See CCSBT, supra note 68, art. 8.
conservation, management, and optimal utilization of SBT. Through the SBT Commission, the members have sought to improve monitoring of SBT fishing practices as well as enhance endeavors for enforcing catch quotas. The increase in the membership of the SBT Commission has boosted efforts at conservation.

2. IWC

The IWC, an international organization, is similarly the fulcrum for decisions on conservation and management with respect to whales. The IWC is established under Article III of the ICRW and is composed of one commissioner from each contracting party. Any state may accede to the ICRW, irrespective of their level of interest or involvement in whaling activities (and hence includes land-locked states such as Hungary and Slovakia), and membership currently stands at eighty member states. A prominent feature of the IWC at present is the division between its members as to whether they are in favor of commercial whaling (pro-whaling) or favor conservation over commercial utilization (anti-whaling). Greg Rose and Saundra Crane have described this dynamic as follows:

As more non-whaling states become Party to the ICRW, increasing pressure is being exerted on the IWC to establish more stringent measures for the protection of whales and to encourage the end of commercial whaling. This has marginalized the pro-whaling States, which have repeatedly threatened to leave the ICRW system. On the other hand, pro-whaling States have now adopted a similar retaliatory strategy; providing development aid to small island States without an interest in commercial whaling or whale conservation, luring them to join the IWC and persuading them to vote for commercial whaling . . . . These tactics stress the ageing of the IWC system. They force IWC members into polarized camps, rhetorical language and hypocritical statements.

This polarization now infiltrates all aspects of the work of the IWC, including the conduct and assessment of scientific research programs and any possible amendments to the Schedule of the ICRW regarding conservation and management decisions.

The IWC is assisted by three committees, including a Scientific Committee that has responsibility for reviewing scientific and statistical information with

136. Id. art. 9.
137. See, e.g., Rosemary Gail Rayfuse, Non-Flag State Enforcement in High Seas Fisheries 276-78 (2004).
138. See supra notes 75-77 and accompanying text.
140. Rose & Crane, supra note 91, at 165.
141. See supra notes 104-07 and accompanying text.
respect to whales and whaling, scientific research programs, and special permits for scientific programs, as well as considering any additional matters referred to it. It currently comprises almost 200 scientists, who may or may not be appointed by member states of the IWC. For present purposes, it may be noted that under Paragraph 30 of the ICRW Schedule, states issuing special permits for scientific whaling are to provide them to the IWC before they are issued and in sufficient time to allow the Scientific Committee to review and comment on them. In particular, the proposed permits “should” specify: the objectives of the research; number, sex, size, and stock of the animals to be taken; opportunities for participation in the research by scientists of other states; and the possible effect on conservation of stock. Although the Schedule anticipates such a role for the Scientific Committee, by virtue of Article VIII of the ICRW, the final decision on the issuance of and conditions attached to special permits rests with the state party to the ICRW.

Australia and Japan have both been active participants in the SBT Commission and the IWC. For the former, the small number of states party to the CCSBT and Australia and Japan’s considerable commercial interests in SBT have ensured each state dominant positions in reaching decisions over the conservation and management of the fish. For the IWC, the strongly-held and diametrically-opposed stance of each state has positioned them in leadership roles of the pro-whaling and anti-whaling camps. It is Australia’s interest in the Australian Antarctic Territory and Japan’s research in Antarctic waters that underlines each party’s key position, respectively. It is as a result of these positions that the activities of each organization implicate foreign policy-making for both states, as identified at the start of this section. The precise effects are explored in more detail in the following sections that discuss economic aspects, public interest, scientific uncertainty, and the broader national interests involved.

C. ECONOMIC INCENTIVES FOR LITIGATING ABOUT TUNA AND WHALES

The current economic interests in SBT and whales stand in stark contrast. The value of SBT continues to rise, assisted by their increasing scarcity but continuing demand, whereas the commercial demand for whale products has dramati-

143. See RAYFUSE, supra note 137.
144. ICRW, supra note 98, Schedule, ¶ 30 (the Schedule was amended in 2008 and is available at http://www.iwcoffice.org/commission/schedule.html).
145. Id.
146. 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 . . . .” (emphasis added). ICRW, supra note 98, art. VIII.
147. Of course, the economic, political and military power of the United States and the United Kingdom ensures that these states are key players among the anti-whaling states as well.
cally decreased, and this situation has remained unchanged in the face of reduced numbers of whales and the near-cessation of commercial whaling. This section examines the financial stakes engaged for Australia and Japan in relation to SBT and whales, further highlighting the context for policy-making. For SBT, the operational level is also at play because of the financial importance of this resource, particularly for the state of South Australia. Australia has stressed the importance of maintaining its competitiveness in global export markets. The economic interests of the Australian states in both SBT fishing and whale watching may have implications at an organizational level as more actors are involved in formulating policy responses. Overall, it seems apparent that the financial interests at stake hold some sway in decisions to resort to litigation.

1. How Much Do You Like Sashimi? The Economic Value of SBT

“While Australia has interests in straddling demersal stocks in the Tasman Sea and Indian Ocean, tuna fishing in the West-Central Pacific, and in the Patagonian toothfish fishery in sub-Antarctic waters, Australia’s only significant international fishery over the long-term has been that for southern bluefin tuna.” In 1999, “the exploitation of highly migratory and straddling fish stocks produce[d] over AUD 260 million in fish sales and employe[d] more that 3000 people in Australia.” Within this industry, SBT has provided “the mainstay of the Australian tuna fishery.” A 2004 assessment of the SBT fishery by Australia’s Department of the Environment and Heritage estimated the value of the commercial harvest from AU$57 million up to AU$450 million after value adding—that is, fattening the fish in farm cages prior to harvest.

The primary economic value in SBT rests in its use as sashimi in Japan. The Australian fishing industry has greatly benefited from this demand through the adaptation of their fishing practices to sell to the sashimi market. For example, in the mid-1980s, the average price of a ton of SBT doubled within three years because the fishing industry decided to divert the catch away from canneries to the much higher paying Japanese sashimi market. Profitability in the industry

150. Id. at 56 (citing AUSTRALIAN PARLIAMENT, JOINT STANDING COMM. ON TREATIES, FISH STOCKS AGREEMENT, REPORT 28, at 2.24 (1999)).
151. See Bergin & Haward, *Recent Developments*, supra note 60, at 264.
also increased as larger SBT were targeted, which were more marketable for sashimi compared to the smaller juveniles.  

The increase in value of Australian SBT fishing is also attributable to Australia-Japan industry-to-industry cooperation, including a joint venture operation. Anthony Bergin and Marcus Haward have described the advantages of the joint venture as including identification of resources and industry development in different coastal areas of Australia, expansion of funding for research programs, and development of Australia’s longline fishing practice and SBT aquaculture industry. The latter refers to the collaboration of Port Lincoln fishermen, the South Australian government, and Japan’s Overseas Fisheries Cooperation Foundation to establish feedlots of juvenile SBT caught by purse seine nets. After capture, the juveniles are held in cages off the South Australian coast. They are allowed to grow out to a more valuable size and to improve their flesh quality so the SBT becomes more desirable for the Japanese sashimi market. An increasing portion of Australia’s SBT quota has been allocated to the production of farmed tuna and, prior to the litigation over SBT, to the joint venture between Australia and Japan. 

While the Australian government has recognized the need for the stock to recover in order to ensure the economic viability of the industry into the future, the imposition of catch quotas has served to increase the price of SBT given the decreased availability in the face of continuing demand. Thus, even while Australian catch quotas have been reduced, the gross value of the fishery has increased. Nonetheless, Australia has professed a keen interest to ensure the

154. Id. Campbell et al. have similarly observed:

This increase in capture size of fish probably occurred because under individual transferable catch quota there is an incentive for operators to maximise the profit obtained from their quota. This has led to their concentrating on larger fish because of the higher prices received from higher canning conversion rates for larger fish, and the price received for larger fish on the Japanese sashimi market.

Campbell, Brown & Battaglene, supra note 60, at 115-16.

156. Bergin & Haward, Recent Developments, supra note 60, at 268.
159. Id.
160. “In recent years the quantity of tuna allocated under the Australia-Japan bilateral agreement has declined, with the allocation to the joint venture increasing. Thus it is reasonable to conclude that the joint venture boats are being given priority access to the resource.” Bergin & Haward, Recent Developments, supra note 60, at 268.
161. Tanter, supra note 148, at 34.
162. See Bergin & Haward, Recent Developments, supra note 60, at 267.
163. Campbell, Brown & Battaglene, supra note 60, at 114 (“Between 1984-1985 and 1995-1996 Australian catch quotas [limits] were reduced by 75% from 21000 [sic] to 5265 tonnes . . . . In spite of these reductions in allowable catch, the gross value of the fishery has continued to increase . . . . In 1982-1983, landings of 21 300
ongoing survival of the fishery, precisely because of the potential for much larger Australian exports in the future if the stock does recover sufficiently. The desire to support the marine aquaculture industry has been posited, as an explanation as to why Australia was willing to pursue litigation against Japan.

Economic motives also explain aspects of Japan’s decision making in relation to SBT. Australian officials suggest that Australia’s opposition to Japan’s EFP was due to Japan’s own economic motivations, in view of the significant rationalization of the Japanese fishing industry to allow for higher levels of imports. Further, Japan has been aggressive in seeking to expand its SBT catch in its efforts to ensure the continued economic viability of its fishing sector. As the major SBT importer, Japan has a clear interest in ensuring a stable, or increased, supply of product. Financial imperatives derived from domestic constituencies are also seen in relation to the Japanese traders supplying the sashimi market who have sought to respond to increasing demand. These traders’ desires for short-term economic gain are alleged to be behind an ongoing viable market for non-member fishing outside the CCSBT regime.

2. What is a Whale Worth? The Economic Value of Whales

In its heyday, whaling was an extremely profitable business, with the great baleen whales, as well as the sperm whale, of particularly high commercial value. Nearly every part of a whale could be commercially exploited and whale products have been used for a variety of purposes, including for food, oil, clothing, and tools. This demand for the variety of whale products decreased as other goods replaced those derived from whales. The lack of commercial worth of whales has been attributed as a primary reason for states abandoning whaling and favoring a conservationist stance. Even for Japan, whaling does not have much economic importance given the limited number of companies involved in

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164. Tanter, supra note 148, at 34.
165. See id. at 35.
166. Id. at 34.
167. Id.
169. See Sato, supra note 45, at 218 (nothing that Japan’s sashimi tuna demand is increasingly met through trading companies).
170. Id. at 231.
171. Notably, the baleen whales consist of the blue, right, humpback, and bowhead whales, in addition to the minke whale, which is a baleen whale of intermediate size. The sperm whale is a toothed great whale. Rose & Crane, supra note 91, at 160.
173. Maffei, supra note 128, at 301.
whaling and the small number of people employed.\(^{174}\) The lack of demand for the various whale products means that the commercial whaling industry is not likely ever to be worth as much as it was in the past, even if the moratorium was lifted.\(^{175}\)

Whale meat continues to be consumed, with Japan having one of the primary consumption markets.\(^{176}\) Consistent with Article VIII(2) of the ICRW, whales taken as part of scientific research may be processed and sold. Japan uses the revenue raised from its scientific whaling to fund part the work of its Institute for Cetacean Research.\(^{177}\) There have been mixed reports about the popularity of whale meat in Japan, with some claims that it is not liked by the younger generation of Japanese or that older generations of Japanese do not like to eat it as it is a strong reminder of food shortages following World War II.\(^{178}\) It has been reported that unsold whale meat from Japan’s 2007 scientific research has been provided to Japanese schools in an attempt to “regain a market for whale eating.”\(^{179}\)

The economic value of whales is otherwise attributable to the growing whale-watching industry in a number of countries.\(^{180}\) It has been estimated that more than nine million people go whale-watching each year in eighty-seven countries generating at least US$1 billion annually.\(^{181}\) In the Pacific Island region, the industry is growing at forty-five percent and worth US$21 million annually to the region.\(^{182}\) In Australia, whale-watching is particularly popular

\(^{174}\) Andrew R. Miller and Nives Dolgak, *Issue Linkages in International Environmental Policy: The International Whaling Commission and Japanese Development Aid*, 7 GLOBAL ENVTL. POL. 69, 88 (2007). Of course it could be argued that the drop in economic value for Japan is because of the moratorium and the limited avenues available for lawfully raising revenue from whaling.


\(^{177}\) 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. CMTY. & INT’L L. 56, 64 (2008) (noting that the “[Institute for Cetacean Research] earns more than 85% of its income from the sale of whale meat and whale oil from the Antarctic and North Pacific ...”).


\(^{180}\) Rose & Crane, *supra* note 91, at 181.


along Australia’s east coast from June to November each year as humpback and southern right whales undertake their annual migration. The International Fund for Animal Welfare has reported that “[w]hale watching is worth almost AU$300 million to Australia’s economy and an estimated 1.6 million people go whale watching there each year.” It has been suggested that “visitor expenditure on whale watching will grow to AU$3-4 billion over the next 20 years.” From this, it could be argued that the financial imperative has shifted for Australia so that more money is to be raised through conserving whale species rather than commercial harvesting. Australia’s Minister for the Environment has signaled this decision at the strategic level, claiming that whales are worth more alive than dead. The benefits and opportunities afforded to Australia through the whale-watching industry would undoubtedly feature at the various levels of policymaking. However, the economics of whale-watching are not as significant as those related to SBT and seem less likely to influence foreign policy. The lower financial stakes in whales may prove a disincentive for taking action to defend legal rights before an international court or tribunal. At most, whale watching may be important if Australia is required to establish as a matter of law what damage it has suffered as a result of Japan’s scientific research.

A claim of damage is more easily sustained in relation to SBT than it would be for whales.

D. PUBLIC INTEREST IN TUNA AND WHALES

As with economic interests, public interest in tuna and whales shows a contrasting position, but in this instance public interest in whaling far surpasses public interest in the welfare of SBT. Their physiological difference is one immediate explanation for this difference. Whales are marine mammals; it has


185. DEP’T OF ENV’T, WATER, HERITAGE, AND THE ARTS, supra note 184, at 17.


187. A difficulty here is that minke whales are the focus of Japan’s scientific research, but not the focus of whale-watching activities. Japan had anticipated taking fifty humpback whales annually as part of its research in Antarctica, which would have potentially had greater impact on whale-watchers. However, after considerable diplomatic pressure, Japan agreed not to take any humpback whales in its 2007-2008 season. See Chris Hogg, Japan Changes Track on Whaling, BBC News, Dec. 21, 2007, available at http://news.bbc.co.uk/2/hi/asia-pacific/7156288.stm.
been shown that they are able to communicate with one another and have considerable cognitive abilities and complex social patterns. Some commentators have gone so far as to suggest that whales might be entitled to a right to life. SBT are fish, and research about their life cycles or habits has been for the purpose of assessing their exploitation as an ocean resource. Tuna have not featured in popular fiction or movies, or in marine fun park shows in the same way that whales have.

1. Save the Tuna: Low Public Interest in SBT

The conservation cause for SBT has not garnered much popular support, and public interest in the species' survival has been split between conservation groups concerned about its endangered status and stakeholders in the tuna industry. With respect to the latter, it has been noted that, "[i]n addition to the desire for control over southern bluefin tuna, Australia's conservative stock estimate, reluctance to conduct a joint research program, and the recent easing of its opposition to joint experimental fishing can be explained in terms of conflicts within the domestic tuna industry." Australia has taken steps to ensure that government agencies allow for "the full participation of fishing industry representatives in decision-making," especially in cases "where decisions relate[] to the financial impacts of implementation ..." Non-governmental organizations' ("NGO") efforts in support of the conservation of SBT have not been as publicly visible as in respect to whaling. It would seem that as a consequence of the relative lack of public scrutiny, the states concerned have been more successful in rebuffing NGO initiatives that have countered government decisions. Japan opposed the involvement of Greenpeace as an observer at meetings of the SBT Commission because "Greenpeace was known to use radical methods to achieve its goals and to act against the provisions and spirit of the Convention." At the time, Greenpeace Germany had been responsible for a letter-writing campaign resulting in over 110,000 letters being sent to the Secretariat expressing their concern about SBT. NGOs

188. See Decker, supra note 89, at 257; see also Carlane, Saving the Whales, supra note 111, at 42.
190. Sato, supra note 45, at 224.
193. Id. (citing Agenda Item 9.2).
have scrutinized the work of the SBT Commission and have been credited with influencing Australia's decision making in relation to a joint experimental fishing program, arguing that it was a cover for commercial fishing.

Australia has, however, resisted public pressure to include SBT on the Threatened Species List composed under domestic legislation on the basis that "a listing may weaken Australia's ability to influence the global fishing management effort and the conservation of the species." Humane Society International argued that Australia could still maintain its national allocation at the SBT Commission but then authorize a smaller, or zero, quota as a matter of regulating the domestic industry as part of a contribution to the conservation of SBT. Despite pursuing legal action against the Environment Minister's decision, Humane Society International failed to reverse the decision as the Tribunal accepted evidence that principles governing the fishery did not lead to overfishing and minimized impact on the function and biological diversity of the ecosystem.

The views of the different lobby groups would carry some weight with Australian decision-makers at the various levels of the organizational hierarchy. The precise weight is difficult to ascertain given Australia's financial interest in the ongoing success of the SBT industry and its stated commitment to the values of conservation. Australia has maintained that its actions in pursuing litigation against Japan were "motivated by principled commitment to ecologically sustainable development." Arguably, both conservationists and the fishing industry's interests were aligned and served by the institution of litigation against Japan. Equally, the lack of wider public scrutiny when it comes to SBT may have supported a resort to litigation as the Australian government would receive little media attention following a possible adverse decision.

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194. Sato, supra note 45, at 225.
195. Id. at 224 (noting that this argument was "a recycling of the negative stereotype used against Japan's research whaling").
196. Jeanavive McGregor, Too Many Fishermen in the Sea, REPORTAGE, Nov. 2006, available at http://www.reportage.uts.edu.au/stories/2006/world/sbt.html. The Threatened Species Scientific Committee, which considered amendments to the Environmental Protection and Biodiversity Conservation Act for the Minister for the Environment and Heritage, had concluded that SBT was eligible for the listing under the Act. See id. Following the decision, a representative from HSI stated that:

Given that it is Australia's most lucrative fishery with very powerful lobbies that battle for it, the Government is not going to shut down the industry overnight. What they should at least have been doing is requiring the Australian industry to not fish the entire quota that comes down from the CCSBT.

Id.
199. Tanter, supra note 148, at 34.
2. Free Willy: The Popularity of Whales

Conservation activists, such as the International Fund for Animal Welfare, Humane Society International, Greenpeace, and the Sea Shepherd Conservation Society, have been far more successful in garnering public support to stop the killing of whales compared to the cessation of fishing of SBT. These NGOs have undertaken a range of campaigns—from sinking whaling vessels, obstructing whale hunts, recording and broadcasting images of whaling, to advertising and mass letter-writing—in order to increase community awareness and harness media attention to the plight of whales.° NGOs have also lobbied the annual meetings of the IWC, and are able to obtain observer status if they have offices in three countries.°° Their involvement has been met with resistance from some member states, however. Notably, Japan unsuccessfully sought to remove Greenpeace from the IWC in 1999 through cancellation of its accreditation because of the NGOs protests against Japanese whaling, which included trespass onto Japanese ships.°°° NGOs continue to press the whaling issue to the present day. Sea Shepherd has particularly maintained the matter in the Australian media with its dramatic encounters with Japanese whaling vessels in Antarctic waters, including the boarding of one of the Japanese vessels at sea to deliver a letter of protest.°°°

The iconic status of whales in conservation movements was cemented by the “Save the Whales” campaign.°°°° This campaign succeeded in creating general public awareness of the threatened status of whales and the need for action to be taken to prevent certain whale species from becoming extinct. “[T]he practical effect of the moratorium has been to address the concerns of NGOs that whales should be protected against killing for any reason, because it is [sic] an international cultural “icon” that cannot be killed in a humane or ethically acceptable way.”°°°° Former Australian Prime Minister Malcolm Fraser became interested in the whaling issue when his daughter returned from school one day wearing a “Save the Whale[s]” badge.°°°°° He subsequently commissioned an inquiry into whaling, which resulted in the termination of Australia’s whaling industry and the decision to oppose whaling internationally.°°°°°

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°° Many of the activities undertaken by NGOs from the 1970s to the present have been described in Darby’s book. See generally DARBY, supra note 90.
°°° Rose & Crane, supra note 91, at 168.
°°°° Gillespie, supra note 192, at 341.
°°°°°° See DARBY, supra note 90, at 103-04.
°°°°°° Tripps, supra note 100, at 49.
°°°°°°° DARBY, supra note 90, at 114.
°°°°°°°° See supra notes 120-22 and accompanying text.
The considerable public interest in the whaling issue in Australia influences the organizational and strategic levels of policy-making in that the views of the electorate may galvanize action so that the minister concerned is seen to be engaging with and responding to the issue. The Australian population’s interest in the possibility of litigating against Japan was evident during the Australian Prime Minister’s visit to Japan in June 2008. Prior to the visit, it was reported that Australia was backing away from the possibility of litigation in favor of diplomacy. However, the public backlash meant that the Prime Minister had to come forward to quell those reports and affirm to the Australian public that litigation remained an option. The reputational stakes are therefore much higher for Australia domestically in relation to litigation over whales than would have been the case for SBT, and the heightened public interest may temper Australia’s willingness to hand over control of the dispute to a third party.

E. SCIENTIFIC UNCERTAINTY

For both species, decisions regarding management, conservation, and exploitation have been complicated by differing scientific views on the status of the stocks. Scientific assessment and knowledge is a fundamental aspect of requirements relating to each legal regime and would be important at the operational level of policy-making. Both the CCSBT and the ICRW anticipate the use of scientific information in government decision making on their respective conservation and management issues. More specifically, the importance of science in the management of SBT and whales is acknowledged through the establishment of Scientific Committees within the SBT Commission and the IWC. As ocean resource management relies on the compilation, analyses, and exchange of scientific data and information, it is inevitable that science will play a significant role in disputes that emerge in relation to SBT and to whales. This section identifies the major scientific disputes that have emerged between Australia and Japan in relation to SBT and whales. At their core, both disputes revolve around the rate of recovery of the different species concerned.

1. Differences over the Maturity of SBT

Scientific differences with respect to SBT have arisen in relation to the basic

210. “Scientific uncertainty defines contemporary environmental lawmaking. It is not unique to the politics of whaling . . . .” Carlarne, Climate Change, supra note 112, at 770.
211. See CCSBT, supra note 68, art. 8.9; ICRW, supra note 98, art. VIII(4).
212. See generally, supra notes 135-36, 142-46 and accompanying text.
213. See Silk, supra note 13, at 812 (discussing scientific imprecision in the context of fisheries generally).
question as to the rate of recovery of the stock overall. This question is then linked to conflicting views as to the age that SBT reach maturity, with Japanese scientists taking the position that SBT mature in eight years, and Australian scientists believing that maturity is reached at twelve years. The age of maturity is relevant to determining the reproductive age of SBT and affects projections about how quickly population numbers may increase. Scientists from each state have challenged the other’s mathematical techniques, as well as the assumptions underpinning research design and its execution, and disagreed over ecological modeling. Yoichiro Sato has described some of these difficulties and highlights how different scientific conclusions may be reached:

The current stock assessment is based on data such as catch per unit effort (e.g., the number of fish caught per 1,000 hooks) and age composition of the caught fish (catch-at-age). The data are interpreted through a set of hypotheses, but each country assigns different weights to each hypothesis. The weighting process exposes the stock assessment to possible political influence, creating a large discrepancy in the stock estimates and the stock recovery projections. In addition, Australia defines the southern bluefin tuna parental mass as fish twelve years and older, whereas Japan points out the technical difficulty of accurately determining the age of giant tuna (which grow much slower than younger tuna) and insists on using the eighth year-the age of first spawning-as the maturity point. The Japanese delegates to the CCBST have objected to the Australian assessment of the stock on grounds that it assigns too much weight to the hypothesis that the areas where no data were available had no fish and therefore underestimates the overall stock size. Instead, Japan has claimed that the commercial tuna fleets in recent years operated shorter days and covered narrower areas of water due both to increased regulations and recovered stock, and the lack of data from the areas that were not fished should not be taken as absence of tuna there.

These differences motivated Japan to pursue its EFP, which was the ultimate catalyst for Australia and New Zealand to commence legal proceedings. During the litigation, Japan maintained that the dispute was in fact a scientific dispute, rather than a legal dispute. This position was not accepted either by The International Tribunal for the Law of the Sea (ITLOS) or the ad hoc arbitral tribunal.

214. Sato, supra note 45, at 222. ("The major disagreement between Australia and Japan has been over the projection of the stock recovery."); see also Tanter, supra note 148, at 32 ("The dispute between the three countries has both legal and scientific aspects, but the most important is the difference of scientific opinion about the state of the stocks.").


216. Tanter, supra note 148, at 33.

217. Sato, supra note 45, at 223.

218. See infra notes 304-19 and accompanying text.

219. See infra notes 316, 394 and accompanying text.
The approach of Japan on the one hand and Australia and New Zealand on the other, in relation to Japan’s institution of an EFP, was permeated by competing emphases on conservation and utilization. Japan is said to have a “utilitarian bias,” which is a result of its status as a state that has seen its high seas fishing industry significantly reduced by expanded control of ocean areas by coastal states. Japan’s EFP would have necessitated Japan taking a larger amount of SBT than had been allocated to it under the last agreed allocation at the SBT Commission. Japan commenced the EFP on a unilateral basis because “neither Australia nor New Zealand was [sic] willing to give fair consideration to Japan’s proposal for a joint program.” The EFP was warranted, Japan argued, as an independent panel of fisheries scientists had evaluated the EFP and considered it to be reasonable. In addition, Japan offered to count catches under the program against its own quota if the EFP showed that the stock was not improving. This “payback” approach had been utilized by Australia, New Zealand, and Japan on previous occasions when their fishing fleets had exceeded annual catch limits, and the approach had also received scientific support. In view of this scientific support for the EFP and the payback undertaking, Japan argued that its EFP did not pose any significant risk of irreparable or serious damage to the SBT stock. Nonetheless, Japan’s approach has been criticized for its bias towards commercial utilization whereas Australia and New Zealand have been overly biased towards conservation.

2. Whaling Science and JARPA II

For whales, the scientific uncertainty has arisen because of the scientific measurements used for determining the allowable catch and because of a history of underreporting or misreporting of whaling activities. For the latter, it is now publicly known that the former Soviet Union deliberately submitted falsified catch statistic data to the IWC for decades. As a result, there has been considerable criticism of the IWC methods to gather catch history data as well as

220. Sato, supra note 45, at 220.
221. Hayashi, supra note 51, at 368.
223. Id.; see also Sato, supra note 45, at 224.
224. Morgan, supra note 222, at 541 n.30.
225. Id. at 541.
226. Sato, supra note 45, at 218-19 (“[T]he dispute over experimental fishing at the state-to-state level was a game in which pseudoconservationist Australia and conservationist New Zealand and more utilitarian-oriented Japan argued over whether such research was necessary and, if so, who would pay for it.”).
227. See Carlarme, Climate Change, supra note 112, at 770. (“Between the 1940s and the late 1960s, scientific uncertainty over whale characteristics, population numbers, and hunt levels was pervasive.”).
228. Harris, supra note 126, at 396; see also DARBY, supra note 90, at 61-65.
One of the key weaknesses for the IWC has been its reliance on member states for data, which is underscored by its deference to member states in questions of science as well. These features are discussed here in relation to the scientific methods applied and considered within the IWC, as well as in relation to the procedure for the issuance of special permits for scientific research. It is one of these special permits that has been the source of controversy for Australia and Japan and is discussed in the final subsection.

a. Scientific Methods within the IWC

With respect to the scientific measurements, the initial measure used for setting catch limits in the IWC was the Blue Whale Unit ("BWU"). The BWU was based on the oil yield capacity of the blue whale and so was centered on the quantity of whale oil that would be produced during a whaling season. Each whale was assessed by reference to the BWU, which set out an equivalency for other whale species based on their size compared to the blue whale. On this basis, one blue whale was said to equal two fin whales or 2.5 humpback whales or six sei whales. It was not until the mid-1970s that the IWC abandoned the BWU measure and implemented a concept of ecosystem management instead of single species management.

Following the imposition of the moratorium, the IWC then developed a Revised Management Procedure, which was intended to enable the future sustainable exploitation of whales. The Procedure "focuses solely upon abundance estimates and historical whaling data, not biological factors, to generate catch limits." The Scientific Committee supported its adoption in 1991 as it established a framework to assess the viability of exploiting discrete stocks of cetaceans with only a small chance of adversely affecting whale stocks. However, with the increase in anti-whaling states within the IWC, a decision was reached that it should not become operational until a Revised Management Scheme, establishing international supervision and control and humane killing methods, had been instituted. It was acknowledged at the 2007

229. See Harris, supra note 126, at 395.
230. See Carlarne, Climate Change, supra note 112, at 758; see also Kobayashi, supra note 89, at 213.
231. See Philip Hammond, Whale Science—And How (Not) to Use It, 3 SIGNIFICANCE 54, 54 (2006).
232. Rose & Crane, supra note 91, at 170-72; see also Suhre, supra note 115, at 310; Carlarne, Climate Change, supra note 112, at 762.
234. Alexander Gillespie, Whaling Under a Scientific Auspice: The Ethics of Scientific Research Whaling Operations, 3 J. Int'l Wildlife L. & Pol'y 1, 42 (2000). Gillespie goes on to comment that the mortality studies that are part of Japan's research program in Antarctica would not fall within the terms of this Procedure. Id.
235. Suhre, supra note 115, at 311.
236. Harris, supra note 126, at 413. The chairman of the Scientific Committee resigned over this decision, as it overrode a unanimous decision of that Committee. See Decker, supra note 89, at 257-58.
annual meeting of the IWC that an impasse had been reached within the IWC on
the formulation of the Revised Management Scheme, and no further work has
been undertaken.237

b. Issuance of Scientific Permits under Article VIII of the ICRW

The ICRW expressly anticipates that scientific research will be undertaken by
state parties but does not provide any definition or scope as to what that research
take. It is instead clear that the discretionary power resting in state parties
to the ICRW to undertake scientific whaling is considerable. Article VIII allows
state parties to determine what permits for scientific whaling will be issued and
pursuant to what conditions. There is no requirement that states receive approval
from the IWC to issue the permits, although any results are to be transmitted to
the IWC.238 The Scientific Committee is entitled to review any proposed
scientific permits and may issue recommendations with regards to the permit.239
This additional procedural requirement has minimal impact on the exclusive
jurisdiction of the state in making decisions on scientific whaling.

With the adoption of the moratorium on commercial whaling, scientific
whaling is one of the remaining permissible whaling activities.240 This exception
to the moratorium is routinely described as a “loophole” by anti-whaling states,
NGOs, and the media.241 Nonetheless, the moratorium expressly states that it is
to be kept under review and is to be based upon the best scientific advice. On this
basis, it has been argued that Japan’s use of the “loophole” is entirely legitimate:

The Japanese research program was created in direct response to the morato-
rium. In effect, it was intended to provide the scientific basis for the IWC to
make precisely the decisions contemplated by the treaty parties when they
adopted the moratorium. That it may have been intended to generate data and
information that might support the resumption of commercial whaling should
scarcely be remarkable or a matter for criticism or concern. Japan was simply


238. ICRW, supra note 98, art. VIII(3).

239. See supra notes 144-46 and accompanying text.

240. The other is indigenous whaling. Although Japan has put forward an argument that its traditional coastal
whaling activities should be considered comparable to indigenous practices, this position has not been accepted
in the IWC. See Decker, supra note 89, at 274-76.

HERALD, available at http://www.smh.com.au/articles/2008/01/16/1200419882499.html; Australia to Propose
index/article.aspx?pDesc=1,1,22&type=top&File=080301061803, fwny7j3w.xml.
going about obtaining what the Commission said it wanted: research results that would permit future management decisions to be made.\textsuperscript{242}

However, following the adoption of the moratorium, the IWC has regularly condemned the issuance of scientific whaling permits and requested the cessation of the activity.\textsuperscript{243}

c. JARPA II

Australia's present dispute with Japan centers on the conduct of its scientific research program in the Antarctic, which is known as the Japanese Whale Research Program under Special Permit in the Antarctic or “JARPA.”\textsuperscript{244} The first JARPA ran from 1987 until 2005 with the goals of elucidating the role of whales in the Antarctic marine ecosystem, the effect of environmental changes on cetaceans, and the stock structure of the Southern Hemisphere minke whales to improve stock management, as well as estimating the biological parameters to improve the stock management of the Southern Hemisphere minke whale.\textsuperscript{245}

More than 6800 minke whales were killed during this research program.\textsuperscript{246} When the first JARPA was concluded, Japan immediately issued special permits to allow for JARPA II to commence in the 2005-2006 austral summer season with a two-year feasibility study.\textsuperscript{247} The full program began in 2007-2008 and has no fixed end date. The research methods for JARPA II are largely the same as the previous JARPA, with only some modifications.\textsuperscript{248} A notable change in JARPA II is that it is no longer limited to minke whales but anticipates that fifty fin whales and fifty humpback whales will also be taken each year.\textsuperscript{249} In addition to lethal sampling, JARPA II also includes sighting surveys, non-lethal biopsy
sampling, acoustic surveys for prey species, and the collection of oceanographic data. The objectives of JARPA II are also similar to the first JARPA and entail: (1) monitoring of the Antarctic ecosystem; (2) modeling competition among whale species and developing future management objectives; (3) elucidation of temporal and spatial changes in stock structure; and (4) improving the management procedure for the Antarctic minke whale stocks.

One of the theories posited by Japan in undertaking JARPA II is that the low level of abundance of blue whales is due to their niche in the ecosystem having been filled by the Antarctic minke whale. Japan therefore proposes that by selective harvesting of minke whales, the recovery of blue and fin whales would be accelerated.

A central difficulty is that the polarization within the IWC means that each side demands extreme degrees of certainty in any decisions on the taking of whales. Japan has sought to emphasize scientific assessment on the grounds that it provides a rational and non-cultural basis for decision making, and thereby overcomes the heavily politicized and emotional propaganda of anti-whaling states. However, the very existence of differing scientific views tends to show that even scientific assessments entail varied assumptions and so may not always be completely neutral. Although the IWC is required to take decisions based on science, this is ultimately only one factor and the differing views have meant that science is not always accorded the greatest weight in that decision making process. Questions of science are nonetheless likely to be a critical, if not decisive, aspect in any litigation against Japan concerning JARPA II. It may therefore be expected to weigh heavily across all levels of government decision making.

F. NATIONAL INTERESTS AT STAKE

The question of national interests raises some of the broader concerns that are at stake in Australia and Japan’s relationship concerning SBT and whales. While economic impact, the demands of domestic constituencies, and the vagaries of science all feature in government decision making with regard to marine species, broader strategic interests also need to be taken into consideration. Gyngell and Wesley describe the “slippery concept” of national interest as “a subjective
understanding of the common good of society—one that is more compelling and enduring than short-term preferences or sectional demands—to which all foreign policy must ultimately be oriented. 258 For Australia, these long-term strategic concerns with respect to whales and SBT predominantly relate to Australia’s standing in the international system, both vis-à-vis Japan specifically and more generally. Similar concerns arise for Japan, as well as issues of cultural pride.

1. Advance Australia Fair

The national interests involved for Australia in the management of SBT and the protection of whale species are predominantly related to factors already discussed, namely the economic importance of SBT 259 and the considerable public interest in whaling. 260 On a broader level, though, Australia does need to be mindful of the relevance of its reputation in international organizations like the SBT Commission and the IWC, as well as its standing in the international community more generally. In recent litigation before the Australian Administrative Appeals Tribunal, which challenged the ministerial decision setting a quota for SBT fishing in Australian waters, it was submitted that Australia would lose the influence of its leadership position within the SBT Commission if it opted for a self-imposed moratorium. 261 Within the IWC, the anti-whaling group includes states with which Australia has strong ties, such as the United States, New Zealand, and the United Kingdom. The pro-whaling group includes, apart from Japan, Norway, Iceland, Russia, China, various Pacific Island states, and several Caribbean states. 262 Australia’s alliance with anti-whaling states does not mean that Australia holds its relationship with Japan in low regard. As noted at the outset, Australia’s ties with Japan, especially its economic links, are strong, 263 and Australia counts Japan as an ally in a range of strategic and policy decisions. 264 It is more simply the case that when balancing factors such as domestic public pressure and economic consequences, consideration as to Australia’s relevant cohorts could have featured as well in assessing what position to

258. GYNELL & WESLEY, supra note 16, at 23 (“For Australia, as for most states, the national interest has invariably been defined as a combination of national security plus national prosperity, with the occasional dash of national values.”).
259. See Part III, Section C1.
260. See Part III, Section D1.
262. Miller and Dolšak list the following: Antigua & Barbuda, Benin, Cambodia, Cameroon, China, Côte d’Ivoire, Dominica, Gabon, Grenada, Guinea, Iceland, Japan, Kiribati, Korea, Mali, Marshall Islands, Mauritania, Mongolia, Morocco, Nauru, Nicaragua, Norway, Paula, Russia, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Solomon Islands, Suriname, and Tuvalu. Miller & Dollšak, supra note 174, at 78.
263. See supra notes 1-3 and accompanying text.
264. See supra notes 4-6 and accompanying text.
Australia would no doubt be mindful of how its position on whaling vis-à-vis Japan links to other issues and organizations. Yoichiro Sato reports that Japanese officials believe that Australia and New Zealand are unwilling to make concessions on SBT because those states are concerned about how they can then maintain a strong conservationist position on whaling. Most notably for Australia, issue linkage becomes important when account is taken of the fact that JARPA II is carried out in Antarctic waters and, more specifically, in an area that Australia has claimed as its EEZ under domestic legislation and that is also part of the Australian Whale Sanctuary. Australia’s rights over any EEZ off its claimed Australian Antarctic Territory are subject to the terms of the Antarctic Treaty. Scholars have differed on the entitlement of states party to the Antarctic Treaty to make claims over adjacent maritime areas. Australia has avoided controversy in the past by stating that it will only enforce its laws against Australian nationals. Ruth Davis has noted that “[t]his approach to enforcement has been adopted in order to balance the often conflicting goals of preserving Australia’s sovereignty claim whilst acting in a cooperative and collaborative manner within the Antarctic Treaty System.” As a result, Australia would be cautious about what actions it is willing to take against Japan in this maritime area since it could prove detrimental to the dynamic of the Antarctic Treaty System.

265. “By linking issues, actors can distribute benefits and costs over a larger range of actors, widen the political support for a regime, and facilitate the emergence of cooperative solutions.” Miller & Dolgak, supra note 174, at 69.

266. Sato, supra note 45, at 236.


269. Antarctic Treaty, art. IV, opened for signature Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71. The Antarctic Treaty establishes a cooperative governance regime between those states that have claims to sovereignty over different parts of Antarctica, as well as other states with interests in the area. Claimants to Antarctica have agreed under Article IV of the Antarctic Treaty that their territorial claims should essentially be held in abeyance (or are “frozen” or “put on ice”) and enables states to reach decisions on the management of the area without pursuing sovereignty claims.


271. See Davis, supra note 268, at 157.

272. Id.

The relevance of Australia and Japan's whaling dispute for the Antarctic Treaty System was brought into the spotlight through domestic litigation in Australia instituted by Humane Society International against Kyodo Senpaku Kaisha, the Japanese whaling company.\textsuperscript{274} Humane Society International sought an injunction against Kyodo on the basis that between December 2000 and March 2004, Kyodo intentionally killed, took, and interfered with Antarctic minke whales in the Australian Whale Sanctuary,\textsuperscript{275} and intentionally treated and possessed those whales in contravention of sections of the Environmental Protection and Biodiversity Conservation Act ("EPBC"),\textsuperscript{276} because at no time did the respondents hold a permit or authority as required under that Act.\textsuperscript{277}

At first instance, the judge decided that it would be appropriate to seek submissions from the Australian Attorney-General in light of the international implications of the case.\textsuperscript{278} In the amicus brief, the Attorney-General stated:

\begin{quote}
Australia's claim to the Antarctic Territory, though not widely recognised, has not yet been disputed in an international court or tribunal (the avoidance of such disputes having been one aim of Article IV of the Antarctic Treaty). It was also stated that an assertion of jurisdiction by an Australian court over claims concerning rights and obligations found in the EPBC Act, in the view of the Government, would or may provoke an international disagreement with Japan, undermine the status quo attending the Antarctic Treaty, and 'be contrary to Australia's long term national interests.'\textsuperscript{279}
\end{quote}

In light of the government's views on this issue, the judge decided that it would be futile to proceed with the case, especially when "[f]utility will be compounded by placing the Court at the centre of an international dispute (indeed helping to promote such a dispute) between Australia and a friendly foreign power which course or eventuality the Australian Government believes not to be in Australia's long term national interests."\textsuperscript{280}

However, after a successful appeal,\textsuperscript{281} the injunctions sought were is-

\begin{itemize}
\item \textsuperscript{275} Id. \S 8.
\item \textsuperscript{276} Id.
\item \textsuperscript{277} Id. \S 24.
\item \textsuperscript{278} Id. \S 75.
\item \textsuperscript{280} Id. \S 35.
\item \textsuperscript{281} Humane Soc'y Int'l Inc. v. Kyodo Senpaku Kaisha Ltd. (2006) 232 A.L.R. 478 (the Full Court of the
\end{itemize}
sued. Australia has not yet had an opportunity to enforce these injunctions, as the Japanese whaling fleet did not enter an internationally-recognized maritime area of Australia, but concern continues to be expressed about the possible ramifications of this litigation for Australia in relation to its position within the Antarctic Treaty System and its claims to Antarctica. The potential for Australia to jeopardize either its claim to part of Antarctica or the delicate cooperative regime governing this region would be an important strategic consideration in pursuing litigation, reaching the highest levels of the Australian government and also relevant to the strategic and contextual levels of policy-making.

2. Inside and Outside Japan

Featuring strongly in Japan’s arguments about its continued desire to re-establish commercial whaling is the national tradition of consuming whale meat and rebuffing anti-whaling sentiment through claims of cultural imperialism. Many Japanese consider whale preparation and eating to be an integral part of the national cuisine that dates back thousands of years. Whale meat was particularly important to Japan after World War II, when it was credited with saving the population from starvation. As noted previously, although the consumption of whale meat in Japan has dropped, it continues to the present day. As Richard Silk has rightly commented, “[n]otwithstanding political posturing among disputants, fisheries disputes frequently include elements of racism.” Racial issues have certainly been featured in discussions of Japan’s whaling. The Japanese Fisheries Agency has sought to highlight cultural imperialism through what it views as contradictory attitudes towards eating animals in different countries. Pro-whaling groups in Japan have particularly rallied against what is perceived as

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Australian Federal Court considered that the political repercussions and issues of international law were irrelevant in a decision to grant leave to serve process outside of jurisdiction).

283. See Rothwell, supra note 241.
286. See Black, supra note 176 and accompanying text.
287. Silk, supra note 13, at 810.
289. “Various ethnic groups and peoples have given special status to various forms of life. Cows, which are generally considered food, are sacred animals in India. Deer are considered divine messengers on the Japanese island of Kinkasan but are just a common menu item in French cuisine. It should be called an act of ‘cultural imperialism’ and should not be tolerated that certain ethnic groups or peoples press their sense of values towards animals of their selection on other groups or peoples.” Japan Vows to Battle Anti-Whaling ‘Imperialism,’ THE SYDNEY MORNING HERALD, June 19, 2005, (cited in Miller & Dolgak, supra note 174, at 71). See also Hirata, supra note 284, at 142 (“There is a widespread view in Japan that the international criticism of Japan’s whaling practice is a form of ‘Japan bashing’ that reflects cultural imperialism.”).
Australia's racist attitudes and inconsistent approaches to killing and eating animals through a video posted on YouTube in January 2008. Cultural issues have featured strongly in Japan's arguments about whaling, and it has been suggested that this aspect has outweighed what would otherwise be compelling economic or political foundations for alternative decision making.

The relevance of issue linkage also has bearing on Japan, especially in terms of how positions on SBT and on whales may influence each other, as well as decisions on the conservation and management of other marine species. Anthony Bergin and Marcus Haward have observed that the listing of northern bluefin tuna under CITES contributed to the decision to formalize management arrangements of SBT under the CCSBT. In this regard, the potential for a decision in one forum to serve as precedent in another forum is of critical importance. In analyzing Australia and Japan's first tuna negotiations, Shirley Scott observed that the negotiations "were to be long and protracted" in view of Japan's concern in maintaining the position that areas beyond the territorial sea were to be regarded as high seas in which Japanese fishing vessels could operate freely. Japanese negotiators were concerned that a restrictive agreement with Australia would impinge on negotiations between Japan and other states. Indeed, "precedent was of more importance to the Japanese than the subject matter itself." To this end, Japan may not wish to compromise its scientific programs in either the IWC or the SBT Commission, or abandon its perspective on sustainable utilization of marine species in the event that any perceived concession in one forum may lead to the expectation of another such concession elsewhere.

The domestic politics of Japan are a key reason behind Japan's enduring pro-whaling position. In particular, it has been argued that the Ministry of Agriculture, Forestry and Fisheries ("MAFF") and the Japanese Fisheries Agency want to ensure continued political power by maintaining control of the whaling issue. The level of interest in and influence over whaling held by the legislators, as well as the relevant industry, are considerably less compared

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291. See Miller & Dolgak, supra note 174, at 87; see also Hirata, supra note 284, at 141.
292. Bergin & Haward, Recent Developments, supra note 60, at 271.
293. Scott, Tuna Negotiations, supra note 43, at 314.
294. Id. at 315. See also id. at 317 ("The preeminent concern of the Japanese negotiators during their talks with Australian officials in 1968 was the precedent any agreement with Australia would set for negotiations with other countries.").
295. Hirata argues that the MAFF wants commercial whaling to resume in order to strengthen their position in domestic bureaucratic politics. See Hirata, supra note 284, at 146.
296. Hirata notes, "most Japanese members of parliament are uninvolved in the decision making processes related to whaling, leaving authority in the hands of MAFF and Fisheries Agency officials. Japan has virtually no legislative advocates for the antiwhaling cause and no legislative supporter of anti-whaling activism." Id. at 147.
297. See id. at 140 ("Although business interests do exist, the industry does not have sufficient resources to
to the MAFF. Keiko Hirata argues that Japan’s pro-whaling position will only change if the bureaucrats within the MAFF and the Fisheries Agency alter their views or have power over this issue stripped from them. By contrast, Atsushi Ishii and Ayako Okubo have instead argued that it is in the interest of the MAFF to maintain the moratorium and continue scientific whaling. They identify a series of steps that Japan would be taking if it were serious about permitting the resumption of commercial whaling and argue that none of these actions have been pursued. Instead, the Fisheries Agency seeks to maintain the status quo so that it may maintain the flow of subsidies and commissions received for scientific whaling, and to ensure that scientific whaling will not be subjected to the review that is part of the Revised Management Scheme. Japan has been so successful within its domestic political structures in establishing positions on whaling tied to cultural imperialism and asserting its whale-eating tradition that any volte face would be untenable.

G. ISSUES OF LAW

It is difficult to predict what weight might be given to any of these national imperatives in decisions regarding how a dispute will be resolved. For litigation, all of these factors are played out to varying extents, and with varying degrees of acknowledgement, in the context of specific legal disputes. For a foreign policy decision by Australia to institute legal proceedings against Japan, the operational level becomes critical in terms of assessing the strengths and weaknesses of different legal arguments. International disputes always implicate the rights and obligations owed to states as a matter of international law. The facts of any dispute may be characterized as a violation of specific treaty rules or fall under more general obligations set forth in treaties or in customary international law, depending on how those rules are interpreted. The facts concerning the dispute of Australia and New Zealand against Japan over SBT and facts relevant to Australia’s current dispute with Japan over whales call into question the interpretation and application of particular treaty rules of the CCSBT and the ICRW, respectively, as well as the UN Convention on the Law of the Sea (“UNCLOS”).

lobby the government or the economic weight to impose its views.”).

298. Id. at 148.
299. Ishii & Okubo, supra note 35, at 56.
300. Namely, create an atmosphere both in the IWC and in the Japanese domestic arena that allows Japan to negotiate with anti-whaling states; respect the scientific advice of the Scientific Committee and maintain the credibility of Japanese scientific activities; engage in negotiations with anti-whaling states; and build a fallback strategy for withdrawal from the IWC and resumption of commercial whaling. Id. at 74.
301. Id. at 75-84 (arguing inter alia that no effort has been undertaken to dispel arguments about cultural imperialism; Japan has sought to counteract the work of the Scientific Committee and created distrust around its own research; and has not prioritized bargaining over its insistent continuation of its scientific research).
302. Id. at 85.
and rules of customary international law. This section discusses what legal disputes arose leading to the *Southern Bluefin Tuna* case and outlines the possible legal arguments that may be raised in relation to Japan's scientific whaling program in Antarctica. The merits of these arguments are then discussed in Part IV below.

1. Legal Questions in the Dispute over SBT

The legal dispute that emerged in relation to SBT concerned Japan's EFP and continuing difficulties in setting the total allowable catch due to ongoing differences about the status of the SBT stock. In 1998, Japan had sought an increase in the quotas for SBT catch and proposed that a joint experimental fishing program be undertaken as a means of resolving differing scientific views. When negotiations with Australia and New Zealand failed to produce any agreement on these issues, Japan notified Australia and New Zealand that it would commence a three-year unilateral EFP with an estimated catch of 1464 tons of SBT. Australia and New Zealand protested such a decision given their concerns about the status of the SBT stock, and informed Japan that such a program would be viewed as a termination of negotiations in terms of dispute settlement proceedings. When Japan commenced the EFP and refused to suspend it pending any mediation or arbitration under the terms of the CCSBT, Australia and New Zealand decided to refer the matter to arbitration under UNCLOS. Japan's unilateral institution of the EFP hence "proved to be the catalyst for, and the subject of, the litigation." Japan's actions could have been cast as violations of the CCSBT, particularly the obligation to cooperate in collection of information for scientific research on SBT, and the requirement for unanimity in decisions taken by the SBT Commission with respect to the total allowable catch and its allocation among the parties. Nonetheless, as Australia and New Zealand instituted proceedings against Japan under UNCLOS, the legal dispute was defined as violations of that treaty. In brief, Australia and New Zealand argued that Japan had breached obligations under Article 64 and Articles 116 to 119 of UNCLOS with regard to the conservation and management of SBT because it had failed to adopt

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305. Horowitz, supra note 80, at 813.
306. Id. at 814.
307. UNCLOS, supra note 303, art. 287(3).
309. CCSBT, supra note 68, art. 5(3).
310. Id. arts. 7, 8(3) & 8(7).
311. *See infra* notes 351-56 and accompanying text.
necessary conservation measures, particularly as the EFP would result in SBT being taken in excess of Japan’s allocation, and had failed to cooperate in good faith with a view to ensuring conservation of SBT.\textsuperscript{312} Various aspects of customary international law were also brought to bear on the dispute. In particular, the application of the precautionary principle (or approach) was addressed at the provisional measures stage of \textit{Southern Bluefin Tuna}\textsuperscript{313} and was implicitly endorsed by ITLOS.\textsuperscript{314}

Japan, for its part, denied that there was any legal dispute at all in relation to the SBT.\textsuperscript{315} Rather, Japan considered the case to involve “the proper method for assessing the SBT stock and the formulation of an EFP that would further such an assessment and contribute necessary scientific data.”\textsuperscript{316} This dispute concerned science and was not viewed by Japan as amenable to judicial resolution. In any event, Japan considered that to the extent that there was a legal dispute, it was one that arose under the CCSBT rather than UNCLOS.\textsuperscript{317} A further difficulty for Japan was that because of the limitations of the UNCLOS dispute settlement regime, whereby disputes concerning fisheries management in the EEZ are effectively excluded from compulsory arbitration or adjudication,\textsuperscript{318} it was unable to raise any counterclaim that it was the conduct of Australia and New Zealand in their EEZs that threatened the integrity of the stocks, rather than the EFP.\textsuperscript{319} Japan’s position was thus predominantly one of denying that there was truly a legal dispute, particularly refuting the argument that there was a dispute arising under UNCLOS. As discussed in Part IV, this last argument proved successful for Japan.\textsuperscript{320}

\section*{2. Legal Claims against Japanese Whaling}

Although Japan has agreed to the application of a moratorium on commercial whaling, it is still entitled to issue permits for the purposes of scientific whaling by virtue of Article VIII of the ICRW. The key legal dispute that therefore exists in relation to Japan’s whaling activities, and specifically JARPA II, centers on whether it is truly “scientific” or whether it is commercial whaling carried out under the banner of science in violation of the moratorium. Further disputes

\begin{itemize}
\item \textsuperscript{312} SBT (PM), \textit{supra} note 12, ¶ 28, 29 (setting out New Zealand and Australia’s claims respectively).
\item \textsuperscript{314} SBT (PM), \textit{supra} note 12, ¶ 77.
\item \textsuperscript{315} See infra notes 394-95 and accompanying text.
\item \textsuperscript{316} Hayashi, \textit{supra} note 51, at 375.
\item \textsuperscript{317} See infra notes 389-91 and accompanying text.
\item \textsuperscript{318} See \textit{Natalie Klein, Dispute Settlement In The UN Convention On The Law Of The Sea} 185 (2005).
\item \textsuperscript{320} See infra Part IV, Section C.
\end{itemize}
concerning the interpretation of Article VIII of the ICRW concern whether lethal research is permissible in all circumstances and the procedural requirements that must be fulfilled prior to the issuance of a special permit for scientific whaling and the commencement of the research program. An International Panel of Independent Legal Experts ("Paris Panel") addressed these arguments in a 2006 report,\textsuperscript{321} which are discussed in more detail in Part IV.

Building on arguments concerning the interpretation and application of Article VIII of the ICRW, Professor Gillian Triggs has argued: "The legal objection to Japan's scientific whaling is founded on an abuse of this right [to issue scientific permits] and on evidence that the criterion of scientific purpose has not been satisfied in good faith."\textsuperscript{322} The Paris Report found that "[i]n international law, abuse of rights refers to 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."\textsuperscript{323} The Paris Panel also reached the conclusion that an argument of abuse of right by Japan could be made.\textsuperscript{324} Supporters of Japan's whaling program argue that no such principle even exists under international law.\textsuperscript{325} Judicial application of the abuse of rights principle has been extremely limited,\textsuperscript{326} and it seems more likely that it adds moral weight to the argument of anti-whaling states rather than creating a separate legal violation in its own right.

In addition to the same customary international law principles that were implicated in Southern Bluefin Tuna, there are a range of legal instruments that are arguably violated by Japan's activity outside the ICRW, including UNCLOS, agreements that are part of the Antarctic Treaty System, and CITES. With respect to UNCLOS, Articles 65 and 120 place some emphasis on states to cooperate through "the appropriate international organizations" for the conservation, management, and study of cetaceans both in the EEZ of a coastal state and on the high seas.\textsuperscript{327} This reference does not absolve state parties of their responsibilities


\textsuperscript{322} Triggs, supra note 100, at 51.

\textsuperscript{323} Paris Report, supra note 321, ¶ 83.

\textsuperscript{324} Id. ¶¶ 82-98.

\textsuperscript{325} See Greenberg et al., supra note 242, at 177. ("A review of the sources of international law suggests that there is substantial uncertainty as to the existence of the principle and, if it does exist, there is certainly no consensus as to its precise contours or how it should apply in particular cases.").

\textsuperscript{326} The Appellate Body of the World Trade Organisation stated: "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 . . . ." Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products, ¶ 158, WT/DS58/AB/R (Oct. 12, 1998). This case is cited by the Paris Panel, but no further judicial authority for the application of the principle is accorded in their Report. See also Triggs, supra note 100, at 37-38.

\textsuperscript{327} Article 65, reads in full:
under UNCLOS. It is more the case that the standards set forth by the IWC become relevant to any assessment of the provisions under UNCLOS requiring cooperation for the conservation and management of the living resources of the high seas.

In considering the range of legal disputes existing in relation to JARPA II, reference may also be made to the work of the Sydney Panel of Independent International Law Experts ("Sydney Panel") who advised the International Fund for Animal Welfare on dispute settlement options Australia could pursue against Japan. The report of the Sydney Panel advised of a range of options under various treaties containing rights and obligations implicated by Japan's scientific whaling program. In particular, it concluded:

That Australia and New Zealand seek to raise their concerns over the conduct of JARPA II before the Antarctic Treaty parties, including at the Commission for the Conservation of Antarctic Marine Living Resources [and] ... [that] Japan's actions under JARPA II may be contrary to the requirement to conduct environmental impact assessment under the provisions of the 1992 Convention on Biological Diversity.

While the contents of the Sydney Panel's report have not been made public, it is sufficient for present purposes to note that legal arguments can also be raised against Japan based on possible violations of the Convention on the Conservation of Antarctic Marine Living Resources, which is part of the Antarctic Treaty System, as well as the Convention on Biological Diversity and CITES. The Paris Panel reached a similar conclusion, and its views, which have been made

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

UNCLOS, supra note 303, art. 65. Article 120 provides that "Article 65 also applies to the conservation and management of marine mammals in the high seas." Id. art. 120.


329. See UNCLOS, supra note 303, arts. 117-19.

330. The author was a member of the Sydney Panel, which was chaired by Professor Donald R. Rothwell of the Australian National University. Dr. Tim Stephens served as Rapporteur.


332. Id. at 2.


public, are discussed in more detail in Part IV.  

H. LESSONS FOR WHALING LITIGATION FROM THE PRELUDE TO THE SBT LITIGATION

At the 2008 Annual Meeting of the Australian and New Zealand Society of International Law, the Australian Attorney-General noted that "the foundation of any decision to litigate internationally is more than just an assessment of the possible legal arguments" and that the government would be required to "weigh up a range of legal and diplomatic factors." A range of such factors has been explored in this Part and considered in the context of how those factors may feed into the Australian foreign policy-making process. While the complexities of the decision are not to be underestimated, there are a range of observations that may be drawn out, particularly in the context of comparing Australia’s experience litigating over SBT with the current dispute over JARPA II.

There are some stark dissimilarities in the factors leading to litigation over SBT compared to the current situation regarding whales, especially with regard to economic incentives, the level of public interest in the two issues, and the national interests at stake. The similarities may be seen in the existence of international organizations to facilitate the conservation and management of each of the marine species, as well as the competing views on scientific evidence about the species concerned. It is not possible to conclude that the circumstances surrounding the current whaling dispute between Australia and Japan are sufficiently similar to those prior to the litigation between these states over SBT and that they thus automatically warrant a comparable course of action.

But the matter does not end there. It may be the case that each dispute is sufficiently unique in its factual setting that there can never be any presumption as to which mode of dispute settlement is appropriate. If litigation is to be considered as a dispute resolution option, the factual setting needs to be assessed in addition to what may happen during the course of the litigation and then subsequent to the litigation. The Australian Attorney-General noted as much, in commenting that “[a]nother factor which must be carefully reviewed is the likely result of the litigation. This means not only the prospects for success, but also the likely consequences of success or, indeed, failure.” The subsequent two Parts address these dimensions of the decision to litigate.

III. LITIGATION

It is clearly difficult, if not impossible, to predict the precise assortment of

335. See infra Part IV, Section D.
337. Id.
factors that will contribute to a government's decision to proceed to litigation to resolve an international dispute. Even if an array of issues or events contributes to the decision, it is also a matter of speculation as to which of those weighed most heavily in the minds of the decision-makers. There is at least one thing that is certain: a decision to litigate is not reached lightly. So much has been acknowledged by Andrew Serdy, a former lawyer in the Australian Department of Foreign Affairs and Trade who was involved in the Southern Bluefin Tuna cases:

It should be remembered, however, that the government lawyers' job, no less than that of private practitioners, is to keep their client out of court. Invocation of a compulsory dispute settlement clause is, and should be seen as, a last resort. Settling differences by negotiation is the stock in trade of every foreign ministry. For governments to embark on international litigation involves doing two things they are always reluctant to do: one is to deliver the fate of their policy into the hands of a body over which they have no control, and the other is to admit failure, in this case the failure of their diplomacy to avert the crisis.\textsuperscript{338}

Andrew Serdy's view reflects a common perspective that international litigation is a mode of dispute settlement of last resort, and is particularly unsuitable for the resolution of environmental disputes.\textsuperscript{339} Certainly, it was a noteworthy point in Southern Bluefin Tuna that it was the first time in more than ninety years that Japan had been involved in international litigation.\textsuperscript{340} Professor Bernard Oxman nonetheless considers Japan's attitude towards litigation to be consistent with its preference to maintaining order in the international legal system instead of "less orderly forms of conflict when governments prove unable to manage or live with their disagreements."\textsuperscript{341} This Part proceeds on the basis that litigation may well be preferable to address differences over whaling in preference to the current "less orderly forms of conflict."

When turning to the resolution of legal disputes in this Part, it becomes possible to track what happened when Australia, with New Zealand, sought to resolve matters concerning SBT through litigation against Japan and how a similar step may be taken by Australia in response to Japan's scientific whaling program in Antarctica. More particularly, it is possible to compare Australia's experience in litigating SBT with what may happen should litigation be pursued

\textsuperscript{338} Serdy, supra note 328, at 715. See also McClelland, supra note 336 ("international litigation is not a substitute for diplomacy—it is a significant step and not one to be taken lightly.").

\textsuperscript{339} See Stephens, supra note 308, at 191, 194 (describing how international adjudication only has a limited role to play in securing compliance with environmental objectives and may lead to unhelpful results).

\textsuperscript{340} See Southern Bluefin Tuna Cases (N.Z. v. Japan, Austl. v. Japan), Verbatim Record (Requests for Provisional Measures), at 7, ITLOS/PV99/22 (Int'l Trib. for the Law of the Sea 1999). Australia, on the other hand, has appeared before the ICJ as either applicant or respondent three times.

\textsuperscript{341} Oxman, supra note 46, at 302. Japan's willingness to resort to litigation may be seen in its threat to pursue a claim against the United States before the World Trade Organization if the United States imposes trade sanctions in response to Japan's research program in the northern Pacific Ocean. See Ackerman, supra note 94, at 332-35.
in relation to whales.

There are several features of litigation that may be considered in undertaking this comparison and are addressed in this Part. Attention must first be accorded to the fora available for litigation under international law. This issue proved decisive in *Southern Bluefin Tuna* and so choice of forum for whaling litigation demands careful consideration. Second, important to the choice of forum is the question of availability and likelihood of provisional measures. Provisional measures were an important victory for Australia and New Zealand in *Southern Bluefin Tuna* and supported the use of litigation for the enforcement of international environmental law. For whales, an order for provisional measures may become vital, depending on the timing of the request vis-à-vis Japan's research program and if the number of whale stocks is as low as some scientists estimate. Then finally, a decision on the merits in any litigation is critical. This stage was not reached in *Southern Bluefin Tuna* and it is consequently a matter of speculation as to what the tribunal might have determined and how events would have unfolded as a result. Similarly, it is necessary to speculate about what a court or tribunal may decide in relation to the legality of Japan's scientific whaling program and what response from the various stakeholders may be forthcoming. It is this assessment of possibilities and probabilities that is part of any decision-making on whether litigation should be pursued.

### A. AVAILABLE COURTS AND TRIBUNALS

A fundamental tenet of international litigation is that a court or tribunal only has jurisdiction over states that have consented to that exercise of jurisdiction. A state must therefore agree in advance for a court or tribunal to have jurisdiction over any particular dispute, and this consent may be granted either at the time a state becomes party to a treaty or when a state agrees on an ad hoc basis for a matter to be referred to litigation. Consent to a court or tribunal's exercise of jurisdiction is not usually consent writ large but instead may be confined to the interpretation or application of a particular treaty or may include other limitations or exclusions. This section addresses the courts or tribunals to which Australia and Japan have consented for the purposes of arbitration or adjudication in relation to SBT and whales.

342. "It is well-established in international law that no state can, without its consent, be compelled to submit its dispute with other states either to mediation or arbitration, or to any other kind of pacific settlement." Advisory Opinion Concerning the Status of Eastern Carelia (Fin. v. U.S.S.R.), 1923 P.C.I.J. (ser. B) No. 11, at 27 (July 23). See also Natalie Klein, *Multilateral Disputes and the Doctrine of Necessary Parties in the East Timor Case*, 21 YALE J. INT'L L. 305, 313-16 (1996) (discussing an example of a modern application of this principle).

1. Forum Selection in *Southern Bluefin Tuna*

The CCSBT sets out a dispute settlement procedure in Article 16 in the event that any dispute arises between two or more of the parties concerning the interpretation or implementation of the convention. Arbitration (as per a procedure set forth in an Annex to the treaty) or resort to the ICJ is available only if the states agree. If the states do not consent to the reference of the dispute to the ICJ or to arbitration, then they must continue to seek to resolve the dispute by other peaceful means. The CCSBT has been characterized in its entirety as “an agreement to negotiate,” and the dispute settlement provisions reinforce this point. Article 16 in particular has been criticized as “a merry-go-round provision that forced its signatories into a fruitless negotiation cycle,” and as such, Australia and New Zealand were justified in resorting to dispute settlement under UNCLOS.

Japan offered to mediate under the terms of the CCSBT and subsequently informed Australia and New Zealand that it was willing to arbitrate the dispute under the CCSBT. However, each of these offers came with the proviso that Japan would continue its EFP while the dispute was being resolved. Australia and New Zealand considered this condition unacceptable.

Australia and New Zealand instead opted to pursue their claims under Part XV of UNCLOS, which enables states to institute legal proceedings if there is a dispute relating to the interpretation or application of that treaty. Once a state becomes a party to UNCLOS, it consents to one of the designated fora under that treaty exercising jurisdiction over disputes concerning UNCLOS; no further agreement is required (as is the case under the CCSBT). There are certain conditions that must be satisfied for the court or tribunal to exercise jurisdiction, including that the parties exchange views and otherwise attempt to resolve the dispute by other peaceful means before resorting to litigation. As discussed below, it was one of these conditions that proved Australia and New Zealand’s ultimate undoing in *Southern Bluefin Tuna*. It should also be noted at this point...

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344. CCSBT, *supra* note 68, art. 16.2.
346. Horowitz, *supra* note 80, at 819 (referring to Judge ad hoc Shearer’s observations in the provisional measures stage).
348. Id.
349. Id.
350. Id.
351. UNCLOS, *supra* note 303, art. 286.
352. Id. art. 2.
353. Australia, Japan, and New Zealand had indicated early on in UNCLOS negotiations “their view of compulsory jurisdiction as an important and integral element of [the] new convention.” Oxman, *supra* note 46, at 285-86.
355. See *infra* Part IV, Section C.
that Section 3 of Part XV also sets forth limitations and exceptions to the exercise of compulsory jurisdiction under UNCLOS. None of these were brought into play in *Southern Bluefin Tuna*, though it has been suggested that Japan was prevented from lodging any counter-claims regarding Australia's decisions over tuna fishing in its EEZ as a result of EEZ fisheries disputes being virtually entirely excluded from the compulsory dispute settlement regime.356

It was also open to Australia and New Zealand to institute proceedings against Japan before the ICJ, as all three states had accepted in advance the compulsory jurisdiction of the Court under Article 36(2) of the Court's Statute. However, all three states had accepted the Court's compulsory jurisdiction with certain caveats. Notably, Japan excludes disputes "which the parties thereto have agreed or shall agree to refer for final and binding decision to arbitration or judicial settlement" under its declaration. Likewise, Australia and New Zealand exclude disputes "in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement."357 If Australia and New Zealand had instituted proceedings before the ICJ, it is possible that Japan would have sought to exclude jurisdiction by reference to the limitations in their acceptances to compulsory jurisdiction, arguing that another forum did indeed exist under the CCSBT.

2. Available Fora for Litigation over JARPA II

When considering possible courts and tribunals for whaling litigation, it must first be observed that the ICRW does not have any clauses on dispute settlement. While state parties to the ICRW may utilize the availability of the IWC as a means of airing and resolving disputes, there is no preordained procedure that must be followed in the event that a conflict pertaining to the ICRW arises.

Without any available means of litigation under the ICRW, Australia would instead need to look to the ICJ (on the basis of Australia and Japan's respective acceptance of compulsory jurisdiction) or to other treaties that may have bearing on the dispute and contain dispute settlement procedures. To bring the matter before the ICJ, consideration would again need to be given to the terms of each state's declaration accepting jurisdiction. Unlike the situation in the *Southern Bluefin Tuna* cases, a dispute focused on possible violations of the ICRW and customary international law would be unlikely to trigger any exclusion to jurisdiction.358


358. If Japan sought to make Australia's claim to the Australian Antarctic Territory and adjacent maritime
Australia could also potentially turn to dispute settlement procedures available under other pertinent multilateral treaties. The most likely possibility would be proceeding under UNCLOS, arguing that Japan’s whaling activities are in violation of provisions of UNCLOS dealing with conservation and management of living resources on the high seas.\(^\text{359}\) In this instance, Australia would again have access to the compulsory dispute settlement mechanism available under UNCLOS and the dispute would be referred to an ad hoc arbitral tribunal.\(^\text{360}\) The Sydney Panel Report also identified aspects of the Antarctic Treaty System that have been triggered in light of one of the objectives of JARPA II comprising the monitoring of the Antarctic ecosystem.\(^\text{361}\) Claims could further be potentially raised under CITES and the 1992 Convention on Biological Diversity.\(^\text{362}\)

Choosing the forum to pursue litigation entails a number of considerations beyond a determination as to what court or tribunal is likely to have jurisdiction. The composition of the court may provide insights as to how many judges will need to be convinced of a legal position, ranging from a likely five arbitrators before an ad hoc tribunal to twenty-one judges before ITLOS. In this regard, if a permanent court, such as ITLOS or the ICJ, is a possible choice, then the views of the judges on related matters—as well as whether they are from pro-whaling or anti-whaling states—may be indicative as to what they could decide in the present case and prove influential in selecting a forum. The possibility of party-appointed arbitrators may be more appealing as a means of selecting decision-makers who are recognized authorities in the subject-matter of the dispute and whose views will carry weight with the parties at the time of the enforcement of the judgment.

Matters relating to the procedure of a particular court or tribunal may also be factored into decisions as to which forum will be selected. As a general matter, ad hoc arbitration allows for greater party control over the proceedings compared to permanent institutions that have adopted fixed rules for operation. The pre-existence of these rules may be perceived as both an advantage and disadvantage. Ad hoc arbitration may afford greater levels of confidentiality with respect to the

\(^\text{359}\) Australia claims an EEZ off the Australian Antarctic Territory, but this claim is not widely recognized by other states. Davis, \textit{supra} note 268, at 157.

\(^\text{360}\) In accordance with Article 287 of UNCLOS, parties are able to choose among four possible fora for compulsory proceedings entailing binding decisions. In the event that states choose different fora or do not elect any particular forum, then ad hoc arbitration becomes the default choice.

\(^\text{361}\) The conduct of JARPA II could be raised in the processes available under the CCAMLR. \textit{See Sydney Panel Executive Summary, supra} note 331, at 2.

pleadings, or even the judgment, than exists with the ICJ, where there is a more common tendency towards transparency and allowing public access. The speed by which a decision is reached may also be a factor. ITLOS, for example, has made time-efficiency a central goal of its operation and has issued provisional measures, orders, and decisions on the prompt release of vessels with appropriate alacrity.

B. PROVISIONAL MEASURES

In instituting proceedings under UNCLOS in Southern Bluefin Tuna, Australia and New Zealand were able to seek provisional measures from ITLOS pending constitution of the ad hoc arbitral tribunal. Australia and New Zealand sought orders that Japan immediately cease its EFP, that Japan restrict its harvest of SBT to the last-agreed national allocation, that the parties act in accordance with the precautionary principle, and that they otherwise not take any steps that would aggravate the dispute. Japan argued that ITLOS lacked prima facie jurisdiction because the dispute did not concern the interpretation or application of UNCLOS and that Australia and New Zealand had failed to reach a settlement as required under UNCLOS before resorting to arbitration. In the event that ITLOS found that it did have prima facie jurisdiction, Japan requested that the tribunal order the parties to recommence negotiations on the outstanding issues between them and for the matter to then be referred to a panel of independent scientists if disagreement continued after an additional six months. Through these submissions, Japan sought to characterize the dispute as a scientific disagreement, rather than a legal dispute, and maintained an emphasis on the need for negotiations rather than litigation.

ITLOS decided against Japan in finding that there were legal questions to be resolved, even though matters of science were also raised. It was also satisfied that it had prima facie jurisdiction under UNCLOS. Even though the CCSBT applied between the parties, that fact did not exclude the right of the parties to

363. See, e.g., Rules of Court for the International Court of Justice, arts. 53, 59 (Apr. 14, 1978), available at http://www.icj-cij.org/documents/index.php?p1=4&p2=3&p3=0. Although these rules allow the parties to request that written and oral pleadings not be made public, states appearing before the Court have not typically made such requests.


365. Id. at 318.

366. UNCLOS, supra note 303, art. 290(5).

367. SBT (PM), supra note 12, ¶ 31, 32 (setting out the requests for New Zealand and Australia, respectively).

368. Id. ¶ 33.

369. Id.

370. Id. ¶ 43.
raise claims under UNCLOS as well.\textsuperscript{371} In prescribing provisional measures, circumstances taken into account by ITLOS included that there was “scientific uncertainty regarding measures to be taken to conserve” SBT\textsuperscript{372} and that “the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna.”\textsuperscript{373} ITLOS therefore ordered Japan to halt its EFP by prohibiting any of the parties from conducting an EFP without the agreement of the others, or otherwise only within the national allocation accorded to the party conducting the EFP, and that the parties not exceed the annual national allocations at the levels last agreed.\textsuperscript{374}

The ITLOS order was subsequently lauded for its decision to apply a precautionary approach, requiring the states to maintain their total allowable catches at the last agreed amounts in the face of scientific uncertainty.\textsuperscript{375} Professor Barbara Kwiatkowska considers, however, that the emphasis on the environment ultimately clouded the Tribunal’s decision on other requirements for the issuance of provisional measures.\textsuperscript{376} The actual impact meant that Japan stopped the EFP a few days before it was scheduled to be completed and all the disputant states had to adhere to pre-set total allowable catch limits pending the conclusion of the litigation. “The arbitral award, in unusually explicit language, suggests that, although the provisional measures order would necessarily no longer be in effect, an attempt to return to the status quo prior to the issuance of that order would constitute an aggravation of the dispute.”\textsuperscript{377}

For Australia, the possibility of securing provisional measures to halt the current conduct of JARPA II would be very desirable, in pursuing litigation against Japan over whales. The Southern Bluefin Tuna precedent indicates that ITLOS would likely consider that the research should cease pending the resolution of the dispute in view of the scientific uncertainty surrounding the number of minke, fin, and humpback whales in the Antarctic. Moreover, effective conservation measures as required under UNCLOS would again require the parties to act with prudence and caution. On this basis, Professor Gillian Triggs has argued that “[t]he legal consequence of adopting a standard of prudence and caution is that it exposes the take of 400 minke whales as at least imprudent in the circumstances of uncertain scientific evidence.”\textsuperscript{378} Advocates for Japan instead take the view

\begin{itemize}
  \item \textsuperscript{371} Id. ¶ 51, 55.
  \item \textsuperscript{372} Id. ¶ 79.
  \item \textsuperscript{373} Id. ¶ 77.
  \item \textsuperscript{374} Id. ¶ 90.
  \item \textsuperscript{375} “The decision was heralded as not only protecting the southern bluefin tuna, but also as beneficial to the environment because it could frighten other parties into compliance with other fisheries agreements.” Sturtz, supra note 304, at 473.
  \item \textsuperscript{376} Kwiatkowska, supra note 313, at 155.
  \item \textsuperscript{377} Oxman, supra note 46, at 308.
  \item \textsuperscript{378} Triggs, supra note 100, at 45.
\end{itemize}
that prudence and caution did not require a complete cessation of fishing for SBT and so in the whaling context "a fortiori there is no basis to conclude that a scientific research take limited to just a few hundred whales per year and fully consistent with maintenance of sustainable whale populations, would be imprudent or incautious." \(^{379}\)

ITLOS may of course decide against ordering provisional measures if it is convinced of Japan's evidence that the current population of Antarctic minke whales is substantial enough to warrant a proportionately small number to be taken. \(^{380}\) Comparable arguments regarding fin and humpback whales could not be sustained. \(^{381}\) However, following Japan's unilateral decision not to take any humpback whales at the start of JARPA II, \(^{382}\) this announcement may obviate the need for a provisional measure directed at this particular species. What ITLOS may do instead in this regard is crystallize the unilateral undertaking provided by a state into a provisional measures order so that it carries binding weight under international law. \(^{383}\)

It should be noted that the outcome may well be different if Australia institutes proceedings against Japan before the ICJ, as the ICJ has not proven itself equally amenable to issuing provisional measures orders in support of the environment in the past. By way of recent example, in the first provisional measures order in the *In Re Pulp Mills on the River Uruguay*, \(^{384}\) the Court took the view that any alleged violation of international environmental norms by Uruguay could be remedied at the merits stage \(^{385}\) and that the evidence did not otherwise sufficiently demonstrate that there was a present threat of irreparable economic and social damage. \(^{386}\) In the *Icelandic Fisheries Case*, the ICJ set annual fish catch totals lower than that requested by the applicants, setting the totals using statistics of the previous five years that accounted for the increasing restriction on the

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380. The IWC currently estimates that there are 761,000 minke whales in the Southern Hemisphere, but there have been concerns expressed in the Scientific Committee that the number is in fact much less, and a review is currently underway to reassess the estimate (which was formulated in the 1980s). Int'\'l Whaling Comm'n, Whale Population Estimates, http://www.iwcoffice.org/conservation/estimate.htm (last visited Jan. 23, 2009).
381. The IWC estimates that there are 42,000 humpback whales in the Southern Hemisphere (south of 60S); the total number of fin whales globally is 33,200 (with no precise figures available for the Southern Hemisphere). *Id.*
383. This approach was taken by ITLOS in the *Land Reclamation* case and the *MOX Plant* case. *See Klein, supra* note 318, at 83-84.
385. *Id.* ¶ 70-71.
386. *Id.* ¶ 73-75.
In this regard, it could be argued that the ICJ allowed fishing to be continued because Iceland could ultimately have been compensated for any losses caused to its fishing industry in the face of British and German fishing in areas claimed by Iceland.

Provisional measures are an important piece in the overall litigation puzzle. If secured, Australia may not only save the lives of various whales, but may also claim an initial victory and satiate public support for this course of action. However, if Australia proceeded to the forum most likely to order provisional measures, namely ITLOS, it would then be committed to pursuing its claims over JARPA II in the framework of UNCLOS. If Australia prefers the litigation to address squarely the claims concerning violations of Article VIII of the ICRW, the ICJ would be the necessary forum. In this instance, Australia may need to sacrifice the likelihood of a short term gain of provisional measures for what would ideally be a greater long term gain in having the ICJ resolve the dispute. The key point here is that provisional measures are just one among many legal factors to be weighed in decisions on pursuing litigation.

C. JURISDICTION AND MERITS OF SBT

There was ultimately no decision reached on the merits in Southern Bluefin Tuna, as the arbitral tribunal found that it lacked jurisdiction to resolve the case under UNCLOS. In essence, the tribunal concluded it could not proceed because the CCSBT had its own dispute settlement procedure that effectively excluded the right of Australia and New Zealand to resort to the UNCLOS dispute settlement procedures. This conclusion had to be reached despite the argument that the substantive aspects of the dispute arose under UNCLOS as well as the CCSBT. As a result, this holding indicates that treaties dealing with law of the sea issues and including their own dispute settlement clauses are unlikely to be subject to the compulsory jurisdiction available under UNCLOS.

This decision could be viewed as a “win” for Japan inasmuch as there was agreement from the tribunal with Japan that the case had to be resolved under the

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389. The tribunal relied on Article 281(1) of the UNCLOS:
   If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.
390. SBT (J&A), supra note 12, ¶ 52.
391. Klein, supra note 318, at 41-42.
dispute settlement clause of the CCSBT. Australia and New Zealand "lost" because their concept of the UNCLOS dispute settlement procedure did not prevail and they were unable to gain the orders sought on the merits regarding Japan's EFP and the stalled efforts at negotiating a total allowable catch. Many commentators have viewed the Southern Bluefin Tuna case with disappointment for its failure to resolve complex questions related to the role of UNCLOS in guiding the management and conservation of highly migratory species. Marcos Orcellana, for example, observed that "the SBT Tribunal may have eroded the pivotal role of compulsory dispute settlement in developing the global public order of the high seas established by the UNCLOS constitutional regime, particularly in regards to the integrity of common resources such as highly migratory species." 392

But there was no "win" for Japan in terms of the legality of its EFP being established, and at least Australia and New Zealand did not "lose" because the tribunal found the EFP to be lawful. It has also been suggested that Japan suffered a "loss" in the litigation because it had failed to establish that substantive obligations in UNCLOS were discharged or displaced by the adoption of species-specific treaties. 393 Further, the tribunal indicated that the dispute was not likely to have been inadmissible just because it arose out of a scientific disagreement. 394 "This meant that, in the future, legal constraints would have to be taken into account as a matter of course, no doubt an unwelcome intrusion into the hitherto largely self-contained world of the Japanese fisheries authorities." 395 Overall, while the Southern Bluefin Tuna case is important for its examination of the parameters of the UNCLOS dispute settlement procedures, its contributions to the substantive legal questions before it were extremely minimal. Instead, the decision is relevant for present purposes in considering the effect of an adversarial process on Australia and Japan's bilateral relationship as well as assessing the subsequent working of the SBT Commission. These issues are considered in Part V.

D. POSSIBLE DECISIONS ON JURISDICTION AND MERITS FOR WHALING

1. Jurisdiction

Questions of jurisdiction will largely depend on which forum is selected for

392. Orcellana, supra note 319, at 464. See also Horowitz, supra note 80, at 813 ("Indeed, the ongoing inability of the parties to negotiate a revised [total allowable catch] provides a strong reason alone why the Tribunal ought to have found that it had jurisdiction, so that it could have set a new [total allowable catch] itself.").

393. Serdy, supra note 328, at 716.

394. SBT (J&A), supra note 12, ¶ 65.

395. Serdy, supra note 328, at 716 (describing this holding as "punctur[ing] a cherished myth among policymakers").
pursuing litigation against Japan in relation to JARPA II. It is common for any respondent state brought unwillingly before an international court or tribunal to challenge the jurisdiction of that body as well as the admissibility of the dispute before it. As mentioned above, Australia would be able to rely on the availability of compulsory jurisdiction before the ICJ for a case based on the ICRW and customary international law. To the extent a case before the ICJ implicates other multilateral treaties with their own dispute settlement clauses, then arguments would likely be presented that these clauses foreclose the possibility of resort to the ICJ. The precise contours of the grants of jurisdiction to each court, tribunal or other dispute settlement body would need to be examined carefully to determine if jurisdiction exists.

Australia would not need to fear a comparable result to *Southern Bluefin Tuna* if it pursued its case under the UNCLOS dispute settlement regime. The primary reason that the same holding would not apply is that the ICRW lacks its own dispute settlement clause and, as such, it does not have—in the words of Article 281 of UNCLOS—an agreement that excludes any further procedure. In arguing in *Southern Bluefin Tuna* that the UNCLOS dispute settlement regime could not prevail over all other dispute settlement clauses in other treaties, Japan specifically referred to the ICRW. To this end, Japan noted that Australia and New Zealand’s conception of the UNCLOS dispute settlement regime would mean that states party to treaties lacking a dispute settlement clause would find themselves subject to compulsory jurisdiction even though there had been no such intention that the possibility of compulsory adjudication or arbitration would exist. The tribunal did not need to address this view specifically, but it would still seem that the absence of any dispute settlement clause should be interpreted as allowing the parties to resort to any peaceful means of dispute settlement available, including the possibility of adjudication or arbitration where consent exists.

2. Merits

In terms of the merits of litigation over JARPA II, the possible holdings will depend in the first instance on which forum actually hears the dispute and hence what claims are made. In other words, what will be the subject matter jurisdiction

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396. See Declaration of Australia, supra note 357 and Declaration of New Zealand, supra note 357 and accompanying text.
397. See id.
398. Singapore tried to argue in the *Land Reclamation* case that negotiations ongoing between the parties indicated an “agreement between the parties” that excluded “any further procedure,” but was unsuccessful on this interpretation of Article 281. See *Land Reclamation in and around the Straits of Johor (Malay. v. Sing.)*, 7 I.T.L.O.S. 9, 32-33 (Oct. 8, 2003); See also Klein, supra note 318, at 65-66.
399. SBT (J&A), supra note 12, ¶ 38(i).
400. Id.
of the relevant court or tribunal deciding the case? So, for example, if a tribunal is constituted under UNCLOS, then it will be making decisions as to the interpretation and application of that treaty with respect to Japan's whaling activities. While aspects of the ICRW may need to be taken into account for an assessment of Japan's conduct under the standards set forth in UNCLOS, the final outcome would not determine specifically if Japan was in violation of the ICRW. Equally, if dispute settlement procedures in CITES, the Convention on Biological Diversity or within the Antarctic Treaty System were pursued, then the specific findings would relate to those legal instruments. If a case is instituted before the ICJ, there could well be opportunity for conflicts over the interpretation and application of the ICRW as well as customary international law. The precise ruling will therefore depend on what specific questions are put to the court or tribunal.

The nub of the dispute, though, is whether JARPA II is lawful. Japan would be able to argue that it is within its sovereign right and discretion to issue special permits for scientific purposes under Article VIII of the ICRW. Moreover, it is entitled to conduct scientific whaling regardless of the moratorium on commercial whaling and the existence of the Southern Ocean Sanctuary (which only forbids commercial whaling). As stated above, the moratorium actually anticipates that scientific whaling will be undertaken so that the zero-catch total will be changed eventually. Finally, resolutions of the IWC requesting Japan to "refrain" from research activities are not strictly binding and, as such, do not give rise to a treaty violation by Japan.

The Paris Panel, which produced a report for the International Fund for Animal Welfare on the legality of Japanese scientific whaling, has argued that conservation now has primacy in the interpretation of the ICRW in light of its object and purpose. At the time of its adoption, the ICRW had anticipated that whales would continue to be harvested, and the IWC was concerned with regulating the whaling industry to ensure its ongoing viability. While concerns

401. Particularly in view of Articles 65 and 120 of UNCLOS.
402. Japan's case has been argued very strongly by Greenberg et al., attorneys at law for the D.C. firm of Garvey, Schubert & Barer. See Greenberg et al., supra note 242, at 518. They assert, "Article VIII, confirming the presumably pre-existing powers of treaty parties to conduct research, recognizes their absolute, sovereign right to issue permits for scientific research in their sole discretion." Id. at 158. See also Yagi, supra note 175, at 488-89.
403. Japan protested application of the Southern Ocean Sanctuary to Antarctic minke whales, as well. ICRW, supra note 98, Schedule, ¶ 7(b) n.** (the Schedule was amended in 2008 and is available at http://www.iwcoffice.org/commission/schedule.htm).
404. See supra notes 240-42 and accompanying text.
405. "Plainly research focused upon establishing a scientific basis for the Commission again to set harvest quotas is entirely consistent with the terms of the moratorium." Greenberg et al., supra note 242, at 156. See also Yagi, supra note 175, at 493.
407. See PARIS REPORT, supra note 321.
408. Id. ¶¶ 71-77.
about conservation feature in the preamble to the treaty, these acknowledgements were related to the desire to maintain stocks at appropriate levels for ongoing utilization. Over sixty years later, the situation has changed and it is now argued that with current scientific knowledge and important affirmation of international environmental law principles that were mostly not in existence when the ICRW was adopted, the ICRW should now be understood in a different light.\textsuperscript{409} On this basis, the Paris Panel concluded that in interpreting Article VIII, "the conduct of 'scientific whaling' in such a way as to undermine the conservation measures agreed to by the Parties constitutes a breach of that Article and of the requirements of the Convention as a whole."\textsuperscript{410}

Questions have been raised, though, as to whether conservation must be equated with the prevention of any taking of whales. This "preservationist regime," manifested in the zero quota set by the IWC, could be viewed as going beyond the realm of conservation that was accepted by states in becoming parties to the ICRW and therefore lacks legal legitimacy.\textsuperscript{411} It has further been argued that national prerogatives in decisions about research and the obligation to utilize any whales taken during research are integral to the language and structure of the ICRW and so any interpretation that countenances outlawing or limiting research is plainly unacceptable.\textsuperscript{412}

\textit{a. Commercial or Scientific Whaling?}

It will be up to the court or tribunal to determine whether JARPA II is research for a "scientific purpose" or is "a sham or device to avoid the primary treaty obligation."\textsuperscript{413} Two indicators relied upon for showing that JARPA II is not truly for a scientific purpose are the sheer number of whales taken during the research program\textsuperscript{414} and the maintenance of lethal research as opposed to non-lethal research.\textsuperscript{415} With respect to the former, the IWC in Resolution 2005-1 expressed

\begin{footnotesize}
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\item \textsuperscript{409} "Like comparable constitutive international legal instruments, the Whaling Convention has provided a framework for the creation of norms of management that would not have been anticipated at the time the agreement was negotiated. As social values and scientific and other priorities have changed, so too have the practices developed under the whaling convention." Triggs, supra note 100, at 47.
\item \textsuperscript{410} Paris Report, supra note 321, ¶ 76.
\item \textsuperscript{412} Greenberg et al., supra note 242, at 160-61.
\item \textsuperscript{413} Triggs, supra note 100, at 52.
\item \textsuperscript{414} In looking at the totality of Japan's scientific research programs, Gales et al. comment: "Japan's expanded programme will result in annual catches that are more than half the total cumulative catches for scientific research by all nations in the past half-century." Nicholas J. Gales et al., Japan's Whaling Plan Under Scrutiny, 435 Nature 883, 883 (2005).
\item \textsuperscript{415} Id. ("The strongest scientific argument in favour of lethal sampling—the collection of genetic samples for determining population structure—could be conducted far more efficiently using non-lethal biopsy techniques."); See also Howard S. Schiffman, Scientific Research Whaling in International Law: Objectives and Objections, 8 ILSA J. Int'l & Comp. L. 473, 479 (2002) (noting that environmentalists maintain that "Japan has
\end{enumerate}
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concern that more Antarctic minke whales had been killed as a result of the
eighteen years of the first JARPA than by Japan globally in the thirty-one year
period prior to the moratorium.416 A.W. Harris has noted the complaint that “the
total number of whales of various species now being taken for research greatly
exceeds the number necessary in order to gather sufficient tissue samples for
scientific tests.”417 In particular, now that JARPA II has been extended to include
fin and humpback whales, the IWC has voiced concern about the impact of the
research on abundance estimates, particularly when the species are part of small
and vulnerable breeding populations.418

The Paris Panel, after examining the characteristics of JARPA II, concluded
that Japan “is conducting purportedly scientific whaling on an increasingly
commercial scale which threatens to undermine conservation measures adopted
by the Parties to the ICRW and to promote the illegal international trade in whale
meat.”419 Professor Gillian Triggs takes the position that it is not simply a matter
of determining whether some scientific research is being carried out. Instead, she
argues that factors such as the extent of guidance provided for management,
particularly when compared to the commercial uses of the whale meat, and the
research methodology applied, which could discern if non-lethal research was
possible and the quantitative sample size required, may well indicate that the
Japanese harvesting of whales has a predominant purpose other than scientific
research.420

By contrast, advocates for Japan’s position have argued:

Ultimately, it must be emphasized that the role of the IWC Scientific Com-
mittee is not to endorse or reject particular research studies or scientific permits.
Rather, it is to provide useful advice and guidance to members and the
Commission. That there is healthy debate within the Scientific Committee and
that no consensus may be reached on certain issues, including the consistency
of proposed research permits with IWC guidelines, scarcely means that the
science is bad or that the proponent of the research is acting in bad faith or for
improper purposes. Because of the value placed on whales in both pro- and
anti-whaling nations, debates are often heated, but in the deliberations of the
IWC Scientific Committee, Japan is not isolated. Scientists from other coun-

417. Harris, supra note 126, at 383.
418. Int’l Whaling Comm’n, Resolution 2005-1, supra note 416; see also Int’l Whaling Comm’n,
resolution2007.htm#res1 (expressing concern over the take of endangered and depleted breeding populations of
fin and minke whales).
419. PARIS REPORT, supra note 321, § 153.
420. Triggs, supra note 100, at 52.
In litigation, Japan would be expected to advance evidence demonstrating the scientific merit of JARPA II; detailing the amount and type of data collected, to what use it has been put, and what is hoped to be achieved through the research. This approach would be intended to counter any characterization that it is conducting commercial whaling under the guise of science.

Weighing up the merits of scientific evidence is no easy task for a court or tribunal, and it may be difficult for Australia to present an affirmative case that JARPA II is lacking in scientific merit. This difficulty is reinforced by the fact that the bulk of this evidence rests with Japan, and Australia is limited to formulating a case based on the documents and presentations Japan has made to the IWC. Australia sought to gather further evidence during the 2008 expedition when an Australian Customs vessel was sent to trail the Japanese whaling vessels for several weeks. This mission might have provided some salve to the public outrage concerning Japan's whaling activities at the time, but it remains to be seen whether the observations of those on board the Australian vessel will be sufficiently useful for the purposes of litigation over the conduct of the program, especially when compared to Japanese evidence from those actually involved in JARPA II.

An assessment of whether JARPA II is scientific or commercial whaling should be guided by conditions established under the ICRW and the IWC. In interpreting Article VIII, the Paris Panel was of the view that Article VIII had to be read narrowly as it constitutes an exception to the general rules set forth in the ICRW. Moreover, Article VIII has to be read in conjunction with the IWC Guidelines for the Review of Scientific Research Proposals, which were adopted for the purposes of carrying out the review provided for in Paragraph 30 of the Schedule. The Guidelines reflect criteria set out in IWC Resolution 2003-2, which require that scientific whaling under special permit should only be permitted in exceptional circumstances, meet critically important research needs, satisfy criteria established by the Scientific Committee, be consistent with the

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421. Greenberg et al., supra note 242, at 167-68.
422. "The understanding that scientific knowledge is not static, and can be subject to complex institutional and cultural and political influences, is vital for any international tribunal dealing with a scientific case." See Caroline E. Foster, The "Real Dispute" in the Southern Bluefin Tuna Case: A Scientific Dispute?, 16 INT'L J. MARINE & COASTAL L. 571, 590 (2001).
424. PARIS REPORT, supra note 321, ¶ 52.
425. See Int'l Whaling Comm'n, supra note 139; ICRW, supra note 98, ¶ 30 (the Schedule was amended in 2008 and is available at http://www.iwcoffice.org/commission/schedule.htm).
Commission's conservation policy, be conducted using non-lethal research techniques, and ensure the conservation of whales in sanctuaries.\textsuperscript{426}

Among these criteria, a particular source of contention between Japan and Australia has been whether lethal research is necessary. It is instead argued that viable research could be conducted through non-lethal methods,\textsuperscript{427} and lethal research should only be used if it is "absolutely necessary and unavoidable," as it would otherwise be in violation of Article VIII.\textsuperscript{428} The IWC first adopted resolutions expressing concern over lethal research under special permit and lethal research in the Southern Ocean Sanctuary in IWC Resolutions 1995-8 and 1995-9.\textsuperscript{429} In IWC Resolution 2003-3, the IWC stated that lethal scientific research was not necessary for the implementation of the 1994 Revised Management Plan and called on Japan to limit its research to non-lethal means.\textsuperscript{430} The IWC further recommended that the killing of cetaceans under scientific permit only be permitted "in exceptional circumstances where the questions address critically important issues which cannot be answered by the analysis of existing data and/or use of non-lethal research techniques."\textsuperscript{431} Australia has particularly advocated for the use of non-lethal methodologies and has proposed reform to the IWC in this regard.\textsuperscript{432}

\textit{b. Procedural Obligations for Lawful Scientific Whaling}

In addition to characterizing JARPA II as commercial whaling, the Paris Panel identified various procedural requirements that would have to be met for the lawful issuance of special permits under Article VIII.\textsuperscript{433} The ability of the Scientific Committee to comment on the permits indicates that those comments should be taken into account by the parties concerned, and the Scientific Committee and IWC must be accorded sufficient time to evaluate proposals and

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\item \textsuperscript{427} Harris, supra note 126, at 383.
\item \textsuperscript{428} Paris Report, supra note 321, ¶ 80 (arguing this point as an example of how the principle of effectiveness under international law should be brought to bear on the interpretation of the ICRW).
\item \textsuperscript{431} Id.
\item \textsuperscript{433} Paris Report, supra note 321, ¶ 59.
\end{itemize}
be provided with sufficient information for this purpose.\textsuperscript{434}

The IWC recommended in 2003 that Japan should not proceed with another JARPA until an in-depth review of the results of the first JARPA, including abundance estimates of minke whales in the Southern Hemisphere, had been completed.\textsuperscript{435} In 2005, 63 members of the Scientific Committee considered that they were "unable to engage in a scientifically defensible process of review of the JARPA II proposal"\textsuperscript{436} because very little internationally peer reviewed literature on JARPA had been published to be able to judge the quality of the research and its relevance to the management of whales by the IWC.\textsuperscript{437} Further, scientists believed that the research methodology contains "several unsubstantiated or incorrect assumptions," including the assumptions that whales are competing with each other, that the reduction of one species (minke whales) will lead to the increase of another species (blue whales), that minke whales are top predators, and that blue whale low abundance and recovery is due to minke and humpback whale populations.\textsuperscript{438} Finally, the Scientific Committee could not review JARPA until 2006 or 2007,\textsuperscript{439} and so JARPA II should not have proceeded until the Committee had sufficient time to review and comment on the new permits.\textsuperscript{440}

The Paris Panel comments that Japan violated Article VIII by virtue of the fact that it failed to allow the Scientific Committee an opportunity to conduct "the full scrutiny required under the Guidelines."\textsuperscript{441} It further found that Japan has "consistently failed to adhere to the conditions under which scientific whaling must be conducted under the terms of Article VIII of the ICRW, as interpreted in the light of the object and purposes of the Convention and its context."\textsuperscript{442}

c. Possible Violations of UNCLOS

In addressing possible violations of other treaty obligations, the Paris Panel also considered obligations under UNCLOS relating to marine mammals,\textsuperscript{443} the conservation and management of living resources on the high seas,\textsuperscript{444} and certain obligations related to marine scientific research.\textsuperscript{445} Although not stating defini-
tively whether it considered Japan in violation of UNCLOS, the Paris Panel indicated that: Japan has obligations to cooperate with the IWC and with other states in the conservation and management of living resources; that Japan must take measures that are designed, on the best scientific evidence available to it, to maintain or restore whale populations at levels that can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, and taking into account IWC minimum standards for scientific whaling; and that it must conduct its research in conformity with the standards prescribed through the IWC. Professor Howard Schiffman has argued that Japan’s failure to adhere to non-binding resolutions of the IWC in relation to requirements for the issuance of special permits for scientific whaling should be indicative of a failure to cooperate.

Each of the UNCLOS obligations allow a certain amount of room to maneuver (for example, at what point is a state failing to cooperate?), which underlines the importance of a court or tribunal having the opportunity to articulate more precisely what standards are expected of states when it comes to decision making about high seas resources. Given the impasse reached within the IWC, it may well be the case that either anti-whaling or pro-whaling states would be able to accuse the other of failing to cooperate. More specifically though, Japan’s determination to continue JARPA II in the face of considerable criticism within the IWC and in defiance of procedural requirements may lend more weight to the view that Japan has not met its cooperation obligations for the conservation and management of high seas resources. Japan may be able to argue that it is entitled to maintain JARPA II in view of the obligation under Article 119 of UNCLOS to produce the maximum sustainable yield in accordance with “the best scientific evidence available.” Once again, the merits of the scientific research becomes critical.

d. Other Possible Treaty Violations

The Paris Panel further identified obligations in the Convention on Biological Diversity that are implicated by Japan’s scientific research programs. Notably, they named Article 5, which imposes a duty of cooperation, Article 6, which includes obligations related to the development of national strategies for conser-

other states’ enjoyment of those whales. Schiffman, Objectives and Objections, supra note 415, at 480.
446. PARIS REPORT, supra note 321, ¶ 111 (noting only that there are “serious questions as to Japan’s compliance”).
447. Id. ¶ 110.
448. Schiffman, Objectives & Objections, supra note 415, at 483-84.
449. Schiffman suggests that Japan could be seen in derogation of its duty to cooperate if it was to withdraw from the IWC and seek membership on a “newer consumptive friendly organization.” Howard S. Schiffman, The International Whaling Commission: Challenges from Within and Without, 10 ILSA J. INT’L & COMP. L. 367, 374 (2004) [hereinafter Schiffman, Challenges].
450. See KLEIN, supra note 318, at 192-93.
vation, and Article 8, dealing with in-situ conservation.\textsuperscript{451} In addition, the failure to conduct an appropriate impact assessment of any special permit could also raise questions of compliance as to Article 14 of the treaty.\textsuperscript{452} With respect to CITES, whales are listed in Appendix I to this treaty, which signifies that commercial trade in these species is generally prohibited.\textsuperscript{453} As such, the Paris Panel argues that "scientific whaling which is conducted on commercial scales is likely to result in an increase in such illegal trade because of the amount of whale meat and other products which will become available for such trade."\textsuperscript{454} However, it must be noted in this regard that Japan has entered a reservation to the listing of certain whale species in Appendix I.\textsuperscript{455}

Further treaty obligations that may be put at issue through JARPA II are those that are part of the Antarctic Treaty System, namely CCAMLR and the PEPAT.\textsuperscript{456} JARPA II is conducted in an area that is within the scope of the CCAMLR.\textsuperscript{457} There is an initial difficulty in raising an argument against Japan under the CCAMLR because Article VI provides that "[n]othing in this Convention shall derogate from the rights and obligations of Contracting Parties" under the ICRW. The Paris Panel instead took the approach of using CCAMLR to buttress its arguments regarding the conservation objectives of the ICRW, given that both treaties share conservation principles.\textsuperscript{458} It is argued "that if scientific whaling undermines, or risks undermining, conservation work carried out under the CCAMLR, that in itself provides evidence that the purported scientific whaling is in breach of the conservation obligations of the ICRW itself, since the two instruments share common objectives."\textsuperscript{459} Ultimately, many of the arguments regarding the application of various treaty obligations tie back to the interpretation and application of the ICRW, and it is the characterization of JARPA II as lawful or not under that treaty that is likely to be decisive as to whether Japan has breached any other international obligations.

\begin{itemize}
\item \textsuperscript{451} PARIS REPORT, supra note 321, ¶ 115-16.
\item \textsuperscript{452} Id. ¶ 117, 119.
\item \textsuperscript{453} Article II(1) reads: "Appendix I shall include all species threatened with extinction which are or may be affected by trade. Trade in specimens of these species must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances." CITES, supra note 117, art. II(1).
\item \textsuperscript{454} PARIS REPORT, supra note 321, ¶ 126.
\item \textsuperscript{456} Arguments relating to PEPAT are addressed in the confidential report of the Sydney Panel and are not otherwise considered here given the author's role on the Sydney Panel.
\item \textsuperscript{457} The Convention applies to the Antarctic marine living resources of the area south of 60 deg south latitude and to the Antarctic marine living resources of the area between that latitude and the Antarctic Convergence which form part of the Antarctic marine ecosystem. Convention on the Conservation of Antarctic Marine Living Resources, supra note 333, art 1.
\item \textsuperscript{458} PARIS REPORT, supra note 321, ¶ 132.
\item \textsuperscript{459} Id. ¶ 134.
\end{itemize}
e. Likely Outcome on the Merits?

It remains a matter of speculation as to whether a court or tribunal would reach a conclusion on the lawfulness of JARPA II, partially because it will depend on the strength of the evidence available and how well it is presented before the court or tribunal. Also, as mentioned previously, a definitive ruling as to the legality, or otherwise, of JARPA II may not be possible because of the jurisdictional limitations of the relevant court or tribunal. It would certainly be a “win” for Australia, and other anti-whaling states, if JARPA II was declared illegal for violating the ICRW or for showing Japan is not fulfilling obligations under UNCLOS. Equally, it would be a clear “loss” of the case, from an anti-whaling perspective, if JARPA II was found to be completely lawful.

Labeling a win or loss is not an entirely appropriate exercise when it comes to international litigation. What constitutes a “win” is rarely a zero-sum determination and it is often the case that what counts as a “win,” especially in disputes concerning international environmental law, may be a matter of interpretation. It may well be the case that each party would be able to point to different parts of the judgment as reflecting a win for one and a loss for the other. Something in between a win or loss could involve a finding that Japan had not followed correct procedure for commencing JARPA II, that it was entitled to conduct scientific whaling but that the specific program conceived was not lawful, and that JARPA II was lawful but Japan was failing obligations to cooperate in the manner it was being conducted. A decision that the court or tribunal lacked jurisdiction may also be viewed as ambiguous in the win/loss assessment—again, one reason for that would be that each side may well be able to read into such a decision a vindication of their position.

E. Expectations for Litigation over JARPA II

Japan’s legal arguments on JARPA II are strongest when a very black-and-white, positivist approach to treaty interpretation is followed. The strict wording of Article VIII and the distinction drawn between the “hard” obligations and rights enshrined in the treaty versus the non-binding “soft” law at issue support Japan’s position. Coupled with the fact that Japan holds the bulk of the evidence that will be essential in determining how to characterize JARPA II as scientific or commercial whaling, it is not unreasonable for Australia to hesitate in instituting legal proceedings. Australia would particularly need to pause before taking this case before the ICJ in view of the decision in Gabčíkovo-Nagymaros.

460. Friedheim has noted that Japan has emphasized its legal rights in negotiations at the IWC in the past, arguing that Japan has been less successful within the organization as a result because of its emphasis on legalism as opposed to adopting a bargaining stance. See Robert L. Friedheim, Moderation in the Pursuit of Justice: Explaining Japan’s Failure in the International Whaling Negotiations, 27 Ocean Dev. & Int’l L. 349, 366 (1996).
where the Court generally endorsed strict adherence to treaty obligations and the traditional law of treaties over the promotion of contemporary environmental considerations and understandings tempering the treaty’s application and interpretation.\textsuperscript{461} The potential jurisdictional arguments and the doubtful availability of provisional measures may further advise against resorting to the ICJ for the resolution of this dispute.

Australia may be better advised to pursue its case under UNCLOS, which would allow for consideration of the ICRW without its strict or direct application, within the context of obligations to cooperate and to work with the appropriate international organization. There would be greater scope in this approach to consider the relevance and influence of recommendations of the IWC in assessing Japan’s conduct. The scientific evidence would remain of critical importance and heed should again be taken of Japan’s superior litigating position in this respect. However, under UNCLOS, there would not be a need for a precise finding that JARPA II is commercial rather than scientific whaling but that the differences of scientific opinion about various aspects of the program and Japan’s continuation of JARPA II, irrespective of this controversy, supports a finding that there has been a failure to cooperate. Australia’s experience from \textit{Southern Bluefin Tuna} further supports the likelihood that a provisional measures order may be forthcoming from ITLOS when there is direct account of the need to prevent serious harm to the marine environment.\textsuperscript{462} Finally, as the forum to decide the merits of the dispute under UNCLOS would be an ad hoc arbitral tribunal, Australia would be better positioned to influence the composition of the bench and ensure that the party-appointed arbitrators are at least open to the possibility that environmental concerns are given some consideration or weight in assessing state conduct under the relevant treaties.\textsuperscript{463}

\section*{V. Post-Litigation: Longer Term Consequences for Australia and Japan}

As litigation is often one aspect of a wider dispute, and the legal questions usually feed into broader diplomatic and political dynamics, it is important to consider not only what findings of law may be possible, or probable, but also how the litigation may influence the broader dispute. Once again, consideration may be given to the lessons for Australia from the \textit{Southern Bluefin Tuna} case as a means of assessing what may be the longer term effects of litigation between Australia and Japan over JARPA II. This Part examines the various outcomes

\begin{itemize}
\item \textsuperscript{462} As specified in Article 290. UNCLOS, supra note 303, art. 290.
\item \textsuperscript{463} For example, Judge Weeramantry, who has ties with Australia through a former position at an Australian university, was an advocate for environmental perspectives in the \textit{Gabčíkovo-Nagymaros} case and the 1995 \textit{Nuclear Tests} case.
\end{itemize}
from the litigation over SBT and whether there is still impact from that case to be considered almost ten years on. It then compares these outcomes to the possible future effects of litigation over whales and reflects more generally on the nature of litigation in dealing with disputes over marine resources.

A. AFTER SOUTHERN BLUEFIN TUNA

Although the litigation itself left a variety of legal questions unanswered, several commentators have taken the view that the process itself contributed to the restoration of cooperative relationships in various ways. Counsel for New Zealand in the case, Bill Mansfield, noted in a Letter to the Editor of the American Journal of International Law how the Southern Bluefin Tuna proceedings had been of use for the following reasons:

In my opinion, the case demonstrates, in four ways, that the initiation of these procedures can be a useful and effective step in resolving the disputes concerned. First, it constitutes a significant development in relations between the disputants. It also engages the attention of higher levels of government and ensures that the issues involved will be examined in a broader context than may have been the case previously. This effect alone may bring about a greater impetus to settle the disagreement and assures resort to the highest levels of knowledge and experience regarding techniques that may assist in that resolution.

Second, the submission of the dispute to settlement procedures immediately levels the playing field between the parties. They become aware that their actions will be considered against objective legal standards rather than their relative power with respect to the issue.

Third, the sense of a watching eye can help to ensure that parties will avoid actions that might escalate the dispute and it will generally act as a moderating influence on their behavior.

Fourth, the process of preparing and arguing a case before international tribunals forces the parties to analyze the issues and the differences between them in greater detail, from a wider range of perspectives, and with the involvement of additional people. It also brings those issues and differences into public focus.

Similar factors could be brought to bear in any litigation between Australia and Japan over whales. This section examines the aftermath of the Southern Bluefin Tuna litigation as a means of potentially forecasting the outcomes of any whaling litigation.

The litigation between Japan and Australia and New Zealand over SBT had a range of effects in relation to resolving the immediate dispute concerning the EFP

and accompanying port ban measures Australia and New Zealand had put in place, as well as a more general matter in the relationship between the state parties to the CCSBT. These aspects are discussed in this section to lay the groundwork for a comparison with possible outcomes arising from litigation between Australia and Japan over whales. It is also noted that another dispute has arisen between Australia and Japan in relation to SBT with the revelation in 2006 that Japan had been over-fishing tuna from Australian waters for the previous twenty years. On this occasion, it appears that this dispute is being handled through the processes available within the SBT Commission and potentially may be viewed as another outcome of Australia's experience litigating against Japan.

As no decision on the merits was reached in *Southern Bluefin Tuna*, there was no definitive ruling as to the legality or otherwise of the EFP. Japan acknowledged as much in its public response to the ruling. The litigation has nonetheless been benefited with breaking the political deadlock over the issue of the EFP. One positive step in this regard was Japan's willingness not to conduct a further unilateral EFP. The CCSBT states were thus able to conduct high level negotiations on the appropriate nature and extent of experimental fishing, which could be achieved through the engagement of independent external scientists to devise a scientific program that would best contribute to reducing the uncertainties in relation to the stock. This result is seemingly comparable to what Japan sought in the provisional measures stage of the dispute.

One benefit that Japan appears to have derived from the litigation was that it successfully sought a compensatory quota for the catch quota it did not otherwise fulfill to partially cover the EFP. Japan demanded 711 tons of SBT for the 2001-02 season and Australia finally consented to a one-off quota of 356 tons out of its EEZ to Japan. An Australian government official, reflecting in their private capacity, gives the impression that Australia felt compelled to acquiesce to Japanese demands in this regard in light of their embarrassment about the litigation result. Australia and New Zealand also lifted the call-port bans it had

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469. *Id.; see also* Sato, *supra* note 45, at 218; Cameron, *supra* note 168, at 260-61.
470. *See supra* note 369 and accompanying text.
472. *Id.* at 218 (noting also that New Zealand tacitly accepted the Australian decision). *See also* Press Release, Hon Wilson Tuckey, Minister for Fisheries, Forestry and Conservation, *Tuckey Announces End to Southern Bluefin Tuna Dispute with Japan* (May 29, 2001).
473. "The halving of this amount, however, could not avoid carrying implications about how Australia and New Zealand viewed the merits of their dispute; essentially they had written off their claims. The author's impression at the time was that, even before the award, for senior officials the dispute had become a political
imposed on Japan during the dispute.474

While this agreement was reached, there continued to be disagreement over core stock management issues.475 The parties remained divided on "the level of risk the regime should permit" and whether the total allowable catch had to be based purely on scientific information or whether socio-economic issues could be taken into account as well.476 Agreement on the total allowable catch was reached in 2001, but agreement on national allocations was then only achieved in 2003, which was the first time agreement was achieved since 1997.477

The parties to the CCSBT have taken further steps to strengthen the organization following the disagreement over the EFP and national catch quotas by seeking other states and entities that fish SBT to become members, or at least cooperating non-members.478 Through the extension of membership, Japan’s criticism that Australia and New Zealand were unduly targeting Japan through the litigation when other state parties to UNCLOS were also fishing the stock could be met. The increased membership enhances efforts at conservation and management, particularly through enabling better monitoring and enforcement regimes.

A recent challenge to Australia and Japan’s interaction over SBT was the revelation in 2006 that Japan had illegally taken approximately AUS$2 billion worth of tuna from Australian waters over the past twenty years.479 The managing director of the Australian Fisheries Management Authority alleged that Japan had taken three times their legal amount of SBT each year, effectively killing the stock commercially.480 Australia made this report to the SBT Commission, although it was not public at the time.481 A report by the SBT Commission noted that if Japan had fished within its allocated catch, then the stock of SBT would be at least five times larger.482 An Australian investigation discovered that tens of thousands of tons of SBT had bypassed Japan’s auction system and been sold directly to retailers, which had the effect of vastly under-estimating the total catch that was actually taken by Japan.483

embarrassment, leaving those dealing directly with Japan after the award with no support for resisting its demands.” Serdy, supra note 328, at 716 n.12.

474. See Sato, supra note 45, at 218.

475. Stephens, supra note 308, at 183-84.

476. Cameron, supra note 168, at 272.

477. Stephens, supra note 308, at 185. See also Cameron, supra note 168, at 253.

478. See Orcellana, supra note 319, at 477-95. See also Cameron, supra note 168, at 262.


480. McGregor, supra note 196.

481. Id.

482. Bradford, supra note 479.

483. Andrew Darby & Penelope Debelle, Bluefin Tuna Scandal: Japan's Back Door Revealed, THE SYDNEY
Australia was reported to have “led the case against Japan, arguing it caught more than 100,000 tonnes of fish without properly declaring it.” As a result, the SBT Commission decided to halve Japan’s national allocation for a five year period. In addition, the SBT Commission reached agreement for the first time since 1994 that the total allowable catch should be reduced, and as a result, South Korea and Taiwan also accepted reductions in their quota for a three year period. While Australia’s national allocation remained unchanged, it undertook to review this amount, if required, due to further deterioration of the SBT stock. Japan has stated it would comply with the reduced quota from the SBT Commission. When the Australian Fisheries Minister was questioned about the likelihood that Japan would in fact maintain a reduced quota, the Minister responded:

We’ve got to accept them at their word. But the most important breakthrough was the Japanese acknowledgement that there had been an overcatch and now their acceptance of taking a substantial penalty that is indicative of a country that is willing to acknowledge that things went wrong, they do have to make up, and I think in those circumstances we can be relatively certain that they will cooperate.

In this instance, it therefore appears that the state parties to the CCSBT were prepared to resolve their differences regarding this breach of the treaty through the processes available in the SBT Commission. Although Australia would seemingly have had a claim for reparations against Japan, the dispute could be resolved through the forum of the SBT Commission rather than needing to turn to adversarial processes. This result is consistent with the expectation that states will always seek to settle differences through negotiations in the first instance. This approach was particularly appropriate here given that Japan had admitted its wrongdoing. For international environmental law disputes, the reliance on negotiations and addressing differences through international fora is common

486. Id.
487. Cameron, supra note 168, at 274.
488. McLeod, supra note 484.
489. Bradford, supra note 479.
490. Cameron has criticized the levels set by the SBT Commission since they were achieved through negotiations and were set well above the limits recommended by the Scientific Committee. Cameron, supra note 168, at 278. As such, Cameron believes that the continued emphasis on consensus decision making means that the SBT Commission is effectively prevented from adopting appropriate conservation and management measures. Id.
practice.\textsuperscript{491} In these circumstances, there was no need for Australia to consider pursuing litigation. It may be the case that Australia's previous experience in litigating against Japan over SBT (and particularly seeking to do so outside the framework of the SBT Commission) cautioned against any such tactic in 2006.

B. OUTCOMES FROM WHALING LITIGATION

The outcomes of litigation over JARPA II will of course depend to some extent on the final decision of any court or tribunal. Does Australia "win" because JARPA II is declared to be in violation of international law? Does Japan "win" because JARPA II is not in violation of international law? Or does each state "win" in various ways, and so also "lose" in various ways? Irrespective of whether there is a "win" for Australia or a "win" for Japan, the matter will inevitably go back before the IWC. It could be argued that if Japan lost (in terms of a ruling that JARPA II was unlawful under Article VIII of the ICRW), it would withdraw from the ICRW. Japan has certainly threatened to do so in the past,\textsuperscript{492} but it continues to recognize that its interests are better served within the organization than outside of it.\textsuperscript{493} From the commentary on Japan's domestic political system, it seems likely that the MAFF would wish Japan to stay within the IWC to ensure that it continues to have a powerful voice on the whaling issue.\textsuperscript{494}

The benefits of litigation would be seen if the judgment provides enough guidance on various questions of interpretation and application so as to break the present impasse in the IWC and indicate how certain differences should be resolved. In particular, some of the most problematic aspects of JARPA II, including the number and species of whales proposed to be taken, as well as its lethal nature, might be resolved. There may be enough of a "win" for both sides that negotiations could be undertaken constructively. Similar to the situation with the EFP, the very process of the litigation may provide the impetus to break the impasse in relation to the particular scientific program at issue.

Important to bear in mind here is the fact that litigation should not be viewed, as it often is, as a last resort method of dispute settlement that should be assiduously avoided.\textsuperscript{495} Instead, the nature of international litigation is often

\begin{itemize}
\item \textsuperscript{491} See generally CESARE P.R. ROMANO, \textit{THE PEACEFUL SETTLEMENT OF INTERNATIONAL ENVIRONMENTAL DISPUTES: A PRAGMATIC APPROACH} (2000).
\item \textsuperscript{492} See Ishii & Okubo, \textit{supra} note 35, at 84 (referring to "the repeated call for withdrawal from the IWC mainly by members of the Diet").
\item \textsuperscript{493} "Should whaling states reject the IWC entirely to seek newer consumptive friendly organizations this would be viewed with great disfavor by states with which they share common interests in many other areas." Schiffman, \textit{Challenges, supra} note 449, at 374.
\item \textsuperscript{494} See Ishii & Okubo, \textit{supra} note 35, at 84 (arguing that Japan has not devised a serious strategy to make withdrawal politically feasible).
\item \textsuperscript{495} Andrew Serdy appears to take this view: "Litigation is a high-risk venture. At best it is a zero-sum game and often the outcome is lose-lose." Serdy, \textit{supra} note 328, at 715.
\end{itemize}
facilitative and does not follow the strict adversarial model that is prevalent in domestic (and particularly common law) systems.\textsuperscript{496} Certainly with respect to dispute settlement under UNCLOS, the decisions issued by ITLOS thus far tend to support a preference for balanced solutions designed to ameliorate the parties' relationship.\textsuperscript{497} These perspectives tend to support the view that litigation may improve the current deadlock at the IWC and will provide guidance on how certain differences should be resolved.

In this regard, Professor Bernard Oxman has highlighted an important feature of the *Southern Bluefin Tuna* litigation that may well be relevant for litigation against Japan over whaling:

... there is something to be said for the message sent by the combined actions of the two tribunals in the case: where conservation is at risk, the parties will be placed under the supervision of a binding provisional measures order that is likely to restrain fishing for at least one season; this will be done on the understanding that, if the parties show significant progress in resolving matters on their own, the tribunal may withdraw from the matter by the time it is ready to decide preliminary objections or other issues on the merits; this, in turn, will be done on the understanding that the parties continue to make progress and do not revert to the status quo ante. The legal justification for such an approach is that the tribunals are seeking to enforce both the substantive norms of the [UNCLOS] (conservation and management) and its procedural allocations of primary responsibility for achieving those goals (adoption of conservation and management measures through arrangements or organizations established by the states concerned).\textsuperscript{498}

In the case of whaling, the court or tribunal will be willing to provide enough of a role to enable the parties to take the steps necessary to resolve their differences, as opposed to throwing the situation completely out of kilter through the elevation of one party's position over the other.\textsuperscript{499}

\textsuperscript{496} The views of Johnston seem more apt for describing the nature of international litigation, as he argues: "... the willingness of a tribunal, especially one of a specialized nature, to 'assist the parties in resolving their dispute amicably' should be applauded. This facilitative function of modern international adjudication should in no way be relegated to a lower position than the more traditional resolutive and declaratory functions." D. M. Johnston, *Fishery Diplomacy and Science and the Judicial Function*, 10 Y.B. INT'L ENVT'L L. 33, 38 (1999), cited in Stephens, supra note 308, at 187.

\textsuperscript{497} See KLEIN, supra note 318, at 79-85 (discussing the facilitative role played by the ITLOS through the prescription of various provisional measures). See also Rosemary Rayfuse, *The Future Of Compulsory Dispute Settlement under the Law of the Sea Convention*, 36 VICTORIA U. WELLINGTON L. REV. 683, 709 (2005) ("the most significant qualitative contribution of the Part XV regime to date appears to have been in providing a *modus operandi* for institutionalised compulsion and supervision of political negotiations, rather than a judicial dispute settlement mechanism deciding disputes in accordance with international law").

\textsuperscript{498} Oxman, supra note 46, at 310 (citation omitted).

\textsuperscript{499} Stephens does not favor this approach, arguing "Encouraging the parties to a dispute to reach a compromise may well produce more harmonious international relations but it will not necessarily lead to optimal environmental outcomes... Where the breach of obligations imposed by international environmental law leads to environmental damage then it seems preferable for a court to reach a clear conclusion." Stephens,
For these reasons, Australia does not have much to fear from litigation. While litigation always entails risks, the potential losses for Australia seem less likely than the potential gains—Australia will be able to respond to strong public sentiment on the issue and not jeopardize an important economic industry, as well as maintain a leadership role on the issue in the IWC. Moreover, a further lesson from the experience of pursuing litigation against Japan over SBT has been that Australia and Japan’s overall bilateral relationship is strong enough to weather these differences over the conservation and utilization of marine life. Even with the threat of litigation featuring in Australia and Japan’s current interactions, Australia has maintained that its broader relationship with Japan is not harmed by the disagreement over Japan’s whaling activities. It seems unlikely that this would change as a result of pursuing litigation.

VI. CONCLUSION

For the moment, though, it appears that Australia will not be pursuing the litigation option. Despite the Australian Labor Party’s pre-election position on the need to institute legal proceedings against Japan and comments during the most recent whaling season to this effect once in government, Prime Minister Kevin Rudd emphasized prior to his June 2008 trip to Japan that diplomacy must be given a chance. This view reflects the fact the discussions are currently underway in the IWC on ways to reform the organization and a working group was formed to this end at the annual meeting held in June 2008. Ultimately, the continued vitality and proper functioning of international organizations becomes vital as a tool for resolving disagreements between state parties. Some commentators have argued that reform of the IWC will enable improved conservation of whales. Moreover, Australia has also put forward proposals to overhaul some of the most offensive aspects of scientific whaling, including the unilateral aspect of decisionmaking when it comes to issuing special permits and the use of lethal research. It is obvious that Australia will want to see whether these efforts

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500. "Importantly, our two countries were continuing to engage on [the whaling] issue and it had not impacted on the broader bilateral relationship." Press Release, Simon Crean, Minister for Trade, Australia and Japan Reaffirm Commitment to Strong Trade and Economic Relationship (Jan. 25, 2008), available at http://www.trademinister.gov.au/releases/2008/sc_011.html; See also Mulgan, supra note 6, at 2 ("Hard-nosed commercial realism has always prevailed on both sides").


503. Dispute settlement experts have been brought into the IWC as a means of finding ways around the current impasse. See CALESTOUS JUMA, THE FUTURE OF THE INTERNATIONAL WHALING COMMISSION, IWC Doc. IWC/60/12rev (2008), available at http://www.iwcoffice.org/_documents/commission/IWC60docs/60-12rev.pdf.

504. See, e.g., Decker, supra note 89, at 276-78; Kobayashi, supra note 89, at 205.

make any difference before pursuing a more adversarial course of conduct. Australia may need to reconsider this position if little or no progress on reform is made at the IWC, and the Japanese whaling fleet is again about to set sail for Antarctic waters. As the Australian Attorney General has stated: "Governments should not be afraid of taking legal action through international courts where that is the appropriate course."\(^{506}\)

\(^{506}\) Speech of the Australian Attorney-General, supra note 336.