BALEEN OUT THE IWC: IS INTERNATIONAL LITIGATION AN EFFECTIVE STRATEGY FOR HALTING THE JAPANESE SCIENTIFIC WHALING PROGRAM?

ANDREW HUTCHINSON*

I INTRODUCTION

Whale hunting has long been a contentious issue in international maritime law. Since the inception of the global moratorium on whaling in 1986, tensions between those states wishing to resume limited commercial whaling and those wishing to prohibit it have been mounting. The recent expansion of Japan's lethal scientific whaling program in the Antarctic is one such example of this increasing tension. In response to this expanded program, two prominent animal rights groups have been urging the Australian government to commence international litigation to try and stop the scientific whale hunting. However, the question must be asked: is international litigation really the most effective way for anti-whaling states to oppose the Japanese scientific whaling program? If it is not, then what would be a more effective approach for the anti-whaling states to pursue? It is the thesis of this article that, from an international relations perspective, pursuing international adjudication of the legality of Japan's scientific whaling program would be detrimental to the aspirations of anti-whaling states. It will be argued that a multi-faceted and holistic anti-whaling strategy, based upon political, economic and social measures, would be far more effective.

Part II of this article will give a brief summary of the history of commercial whaling and its regulation. Part III will discuss the escalating tensions between pro-whaling and anti-whaling states, and will situate the scientific whaling dispute within this ongoing struggle. This section will also discuss the recent proposal to challenge the legality of lethal scientific whaling under international law. Part IV will explore the position of both the pro-whaling and anti-whaling sides in the debate and will canvass some of their key arguments. This article does not purport to determine which side is 'right' or 'correct', but instead seeks to highlight some of the strengths and weaknesses inherent in each side's stance. Part V will conduct a survey of relevant instruments and potential fora in international law in order to determine

* Fifth-year student, Bachelor of Environmental Management with Bachelor of Laws, Macquarie University.

what potential additional sources of law or methods of dispute resolution are available to resolve the scientific whaling issue. Part VI will highlight some potential ramifications for anti-whaling states should international litigation be pursued. Part VII will suggest an alternative approach based upon exerting pressure through a broad range of social, political, legal and economic actions. It is argued that this complex and long term approach is a more effective and suitable way of resolving the scientific whaling issue than a purely legal challenge.

The complexity of the whaling disagreement makes it an excellent illustration of how liberal international relations theory can engage with intricate situations and formulate effective solutions to multifaceted problems. Therefore, rather than focusing solely upon legal rights and obligations, this paper adopts a pluralist international relations methodology in order to emphasise the interplay of multiple arguments and perspectives across legal, political, economic and social dimensions.[1]

II A BRIEF HISTORY OF WHALING AND ITS REGULATION

Coastal communities, primarily around the Arctic Circle and North Atlantic, have hunted whales for hundreds of years. During the 19th century, burgeoning demand for lamp oil and fashion products drove improvements in technology that allowed for ever more efficient exploitation of cetaceans, primarily the 'great whales'.[2] The development of large 'factory ships', which could stay at sea for months at a time, ended the need to operate in close proximity to a coastal processing station.[3] This meant that whaling fleets were able to exploit whale populations with few logistical restrictions. Concern over unregulated participation in the industry,[4] and declining catch rates, prompted the major whaling nations to search for a regulatory framework that would ensure that over-hunting did not cause the collapse of the industry.[5] After some early unsuccessful attempts, the International Convention for the Regulation of Whaling (ICRW) was signed in Washington in 1946.[6]

The original intent of the convention was to conserve whale stocks so as to 'make possible the orderly development of the whaling industry'[7] rather than to protect the

---

1 This methodology, which is comprehensively expounded in Keohane and Nye 1972, views international relations as a web of diverse actors linked through multiple channels of interaction; see also John Baylis and Steve Smith (eds), *The Globalisation of World Politics: An Introduction to International Relations* (2nd ed, 2001) 170.

2 The great whales are defined as all Baleen whales and Sperm whales.

3 J N Tønnesen and A O Johnsen, *The History of Modern Whaling* (1982) 41; Douglass M Johnston, *The International Law of Fisheries: A Framework for Policy-Oriented Inquiries* (1987) 398.

4 Aptly described as the 'Whaling Olympics' by Arne Kalland and Brian Moeran, *Japanese Whaling: End of an Era?* (1992) 12.

5 Major whaling nations: Australia, New Zealand, UK, US, Peru, Chile, Japan, Norway, Iceland, Netherlands, South Korea, Russia/USSR.

6 *International Convention for the Regulation of Whaling*, opened for signature 2 December 1946, 161 UNTS 72 (entered into force 10 November 1948).

7 Ibid Preamble.

whales themselves. The ICRW established the International Whaling Commission (IWC) to promote the objectives of the convention. The IWC comprises a Secretariat, the Commission (formed of one commissioner for each party to the convention and their advisors) and the Scientific Committee. The IWC maintains the Schedule to the ICRW, which details specific regulations applying to whale fisheries. Under Article V (1) the IWC may amend the Schedule to govern, *inter alia*: hunting seasons, catch gear, fishing effort, harvestable species, quotas and geographical areas where whale hunting can or cannot occur. Amending the Schedule in this manner requires a three-quarter majority of commissioners voting.[8] Other decisions require only a simple majority vote.[9] In order to be inscribed in the Schedule, management measures must be necessary for the purposes of conservation and optimum utilisation; must be based upon scientific evidence and must take into account the interests of the whaling industry and consumers of whale products.[10]

Despite the participation of most of the major whaling states, and the heavy focus on maintaining the viability of the whaling industry, the IWC proved to be substantially less effective than hoped for during its early years. Quotas based on imprecise science were frequently revised upwards in order to be politically acceptable, and even then were often objected to, exceeded or simply ignored.[11] Although progressively more stringent and sophisticated conservation measures were introduced, the IWC presided over the commercial extinction of most target species of great whale from the 1930s to the 1970s.[12]

Although by the early 20th century most whale products had been replaced by other materials, it was not until the collapse of many whale stocks that most states began to reduce their whaling efforts.[13] The decline of whaling operations in these states coincided with the rise of the environmental movement, which seized upon the plight of the great whales as a 'totem' issue.[14] Without a counterbalancing domestic pro-whaling lobby, the increasingly organised and politically savvy environmental organisations were able to put whaling on the political agenda in a number of influential states, notably the United States, the United Kingdom and Australia.[15]

---

8 Ibid Art III(2).

9 Ibid.

10 Ibid Art V(2)(a), (b) and (d).

11 Johnston, above n 3, 403-88; John A Knauss, 'The International Whaling Commission, Its Past and Possible Future' (1997) 28 *Ocean Development and International Law* 79, 80.

12 International Whaling Commission, *A South Pacific Whale Sanctuary* Agenda Paper Submitted by the Governments of New Zealand and Australia (IWC/55/5, 2003) 5.

13 The United States, the United Kingdom and Australia ended their commercial whaling operations in 1928, 1963 and 1978 respectively.

14 Chris Stroud, 'The Ethics and Politics of Whaling' in Mark P Simmonds and Judith Hutchinson (eds), *The Conservation of Whales and Dolphins: Science and Practice* (1996) 58.

15 Steinar Andresen, 'The Making and Implementation of Whaling Policies: Does Participation Make a Difference?' in David G Victor, Kal Raustiala, and Eugene B Skolnikoff (eds), *The Implementation and Effectiveness of International Environmental Commitments Theory and Practice* (1998) 439.

During the late 1970s and early 1980s, the IWC experienced a surge in membership, primarily from anti-whaling states.[16] This new anti-whaling membership balance rapidly steered the IWC's mission away from conservation (exploitation within the parameters of survival of the species) and towards preservation (no exploitation of the species regardless of its survival risk).[17] This new focus became apparent when the IWC declared an interim global moratorium on all whaling, which came into effect in 1986.[18] However, the change in focus of the IWC did not occur without staunch political resistance from the pro-whaling states.

III THE WHALING CONTROVERSY

The IWC has long served as a battleground for the pro-whaling[19] and the anti-whaling groups.[20] Although the anti-whaling coalition has achieved some notable successes, including establishing sanctuaries in the Indian and the Southern Oceans, the pro-whaling group has not been idle. Between 1948 and 1973 the former Soviet Union exceeded its humpback and blue whale quotas by tens of thousands of animals,[21] Norway recommenced commercial whaling in 1993,[22] Japan has made liberal use of the scientific whaling exception to the moratorium[23] and Iceland withdrew from the IWC in 1992, set up its own rival organisation[24] and, after rejoining the IWC in 2002, recommenced commercial whaling in 2006.[25]

The ease with which pro-whaling states have circumvented IWC conservation measures derives from the terms of the ICRW. Member states can take advantage of several clauses in the ICRW that render IWC conservation measures non-binding. One such clause is found in Article V (3), which permits signatory states to submit objections to management regulations. The government of Japan initially lodged an objection to the moratorium on the grounds that it was scientifically unjustified,[26] but later withdrew the objection in the face of threatened trade countermeasures from the United States.[27] Another method of circumventing management regulations

---

16 Ibid 434.
17 Stroud, above n 14, 74.
18 The moratorium is given effect in section 10(e) of the Schedule to the ICRW.
19 Primarily Japan, Norway, Iceland, the USSR/Russian Federation and South Korea.
20 Primarily Australia, France, New Zealand, USA, UK, Brazil, India.
21 Randal R Reeves *et al*, *Dolphins Whales and Porpoises: 2002 – 2010 Conservation Action Plan for the World's Cetaceans* (2003) 1.
22 Norway lodged an objection to the moratorium under Art V(3) of the ICRW and is hence not legally bound by it.
23 ICRW, above n 6, Art VIII.
24 The North Atlantic Marine Mammal Commission (NAMMCO) of which Norway is also a member.
25 International Fund for Animal Welfare, 'Whalers Bloody Iceland's Waters and International Reputation with First Whale Kill' (Press Release, 21 October 2006) <http://www.ifaw.org/ifaw/ general/default.aspx?oid=196182> 2 November 2006.
26 Maria Clara Maffei, 'The International Convention for the Regulation of Whaling' (1997) 12 *The International Journal of Marine and Coastal Law* 287, 293.
27 Ibid 294.

is the 'aboriginal subsistence whaling exception' contained in the Schedule to the ICRW.[28] This clause allows communities to apply for an annual quota of whales to be hunted for traditional purposes.[29] Aboriginal subsistence quotas are currently granted to a number of indigenous groups in Arctic, North Atlantic, North Pacific and Caribbean areas.[30]

A third exemption clause is the 'scientific whaling exception' under Article VIII of the ICRW. Contracting governments are able to issue permits that allow nationals to engage in lethal research of whales regardless of any conservation measures in the Schedule. The carcasses generated by this research must be utilised as far as is practicable.[31] Japan has made use of this provision since 1987 to hunt a considerable number of whales.[32] One such research program, the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA), operates in the waters of the Southern Ocean Whale Sanctuary around Antarctica and is the focus of this paper. JARPA is now in its second phase and has been repeatedly criticised by the anti-whaling majority of the IWC,[33] NGOs, and non-IWC delegations.[34] So far this criticism has had little effect. JARPA quotas were recently expanded to almost 1,000 southern minke whales, 10 fin whales and 50 humpback whales to be taken from the Southern Ocean Whale Sanctuary annually.[35] Japan's activities are of particular concern to anti-whaling states, as it has the harvesting capacity, and the market potential, to decimate the last reasonably healthy stocks of great whales.

In order to utilise the existing institutional structure to its advantage, Japan has been politically active within the IWC. It has built a support base of favourable votes primarily by recruiting developing states from the Pacific and Caribbean regions.[36]

---

28 Section 13 of the Schedule to the ICRW.

29 See generally Alexander Gillespie, 'Transparency in International Environmental Law: A Case Study of the International Whaling Commission' (2001) 14 *Georgetown International Environmental Law Review* 333.

30 These peoples are: the Russian Federation (for the peoples of the Chukotka peninsula), the United States (for the Makah and indigenous people in Alaska), Greenland, St Vincent and the Grenadines.

31 ICRW, above n 6, Art VIII(2).

32 Between 1987 and 2005 (not including the expanded 2005/2006 catches) Japan has reported catching 8368 whales in various oceans under Art VIII special permits. This represents 91% of all catches under these permits since they were first used in 1985. International Whaling Commission, *Special Permits Catches since 1985*, <http://www.iwcoffice.org/_documents/table_permit.htm> 2 November 2006.

33 The most recent example in a string of IWC resolutions calling upon Japan to cease its scientific whaling is *Resolution 2005-1*, <http://www.iwcoffice.org/meetings/resolutions/resolution2005.htm> 2 November 2006.

34 Buenos Aires Declaration, available from the Whale and Dolphin Conservation Society Australasia, Solidarity on whale conservation from Southern Hemisphere countries, <http://www.wdcs.org.au/ info_details.php?select=1132118565> 2 November 2006.

35 International Whaling Commission, *Scientific Permit Whaling Information on scientific permits, review procedure guidelines and current permits in effect*, <http://www.iwcoffice.org/conservation/permits.htm#jarpa> 2 November 2006.

36 Alexander Gillespie, *Whaling Diplomacy: Defining Issues in International Environmental Law* (2005) 425-40. However, numerous commentators note that both pro-whaling and anti-

For many years this pro-whaling coalition contained enough members to block any substantive resolutions by the anti-whaling states. At the 2006 meeting, the pro-whaling group constituted the majority of IWC members for the first time since the moratorium was passed in 1986.[37] Although this pro-whaling coalition does not yet have the numbers to substantively alter the Schedule to the ICRW,[38] it has indicated that it is committed to overturning the moratorium and resuming commercial whaling.[39]

This escalation of pro-whaling activity has met with a commensurate reaction from the anti-whaling movement at both the governmental and non-government levels. In Australia domestic and trans-national NGOs have been particularly active. In 2004, the Australian chapter of the Humane Society International (HSI) brought an action against the Japanese company Kyodo Senpaku Kaisha Ltd in the Federal Court of Australia.[40] HSI sought an injunction from the court to stop the JARPA fleet from hunting whales in the Antarctic section of the Australian Whale Sanctuary. The publicity surrounding this case subjected the Australian government's anti-whaling practices to considerable public scrutiny.

Australia's approach to Antarctic policy has been characterised by a 'delicate schizophrenia'[41] deriving from its situation as a territory claimant. Australia previously legislated to apply its domestic fishery laws to the waters off the Australian Antarctic Territory, but exempted foreign nationals from the effect of these laws.[42] Then the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) created the Australian Whale Sanctuary, within which whaling was prohibited.[43] These laws apply to foreign nationals and it was these laws that HSI attempted to enforce through the Federal Court.

---

whaling states have utilised this practice in the past, for example; Simmonds and Hutchinson, above n 14, 30; Kalland and Moeran, above n 4, 13; and Andresen, above n 15, 431, 439-40.

37 Australian Antarctic Division: Department of Environment and Heritage, *2006 International Whaling Commission Meeting* (2006) http://www.aad.gov.au/default.asp?casid=21435 9 November 2006.

38 ICRW, above n 6, n 7-8.

39 'Whalers May Take Step to End Hunting Ban', *Sydney Morning Herald* (Sydney), 19 May 2006.

40 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] FCA 664. It was asserted by HSI that vessels owned by this company were used by the JARPA fleet to hunt whales.

41 Richard Herr and Bruce Davis, 'ATS Decision-making and Change: the Role of Domestic Politics in Australia' in Olav Schram Stokke and Davor Vidas (eds), *Governing the Antarctic: The Effectiveness and Legitimacy of the Antarctic Treaty System* (1996) 338.

42 Gillian D Triggs, *International law and Australian Sovereignty in Antarctica* (1986) 247-9, 261-2.

43 *Environment Protection and Biodiveristy Conservation Act 1999* (Cth) ss 225, 229, 528. The whale sanctuary incorporates the waters of the Exclusive Economic Zone, including those off the Australian Antarctic Territory.

Evidence tendered by HSI demonstrated, *prima facie*, that the JARPA fleet had breached Australian legislation by killing whales within the sanctuary.[44] However, following a submission to the court from the Commonwealth government, Allsop J ruled that the action should fail as any order of the court would be 'devoid of utility' and would not 'be in Australia's long term national interests'.[45] As well as appealing to the Federal Court of Appeal, HSI, joined by the International Fund for Animal Welfare (IFAW), has renewed pressure on the Australian government, this time to challenge the legality of JARPA under international law. IFAW commissioned Professor Donald Rothwell,[46] to provide an opinion as to the most effective way to mount this challenge.

Professor Rothwell advised IFAW that Australia could litigate under one of several potential fora, including the International Court of Justice and the International Tribunal for the Law of the Sea. Australia's main argument would likely be that JARPA constitutes an 'abuse of right' and falls outside of the scientific whaling clause of the ICRW.[47] Other likely arguments are that the provisions of the ICRW and its Schedule should be read in conformity with the precautionary principle and that the ICRW should be viewed as an evolving document which has adapted to changing interpretations and expectations over time. Although this proposal is but one possible way of framing a litigious approach to challenging the legitimacy of scientific whaling programs, it can be assumed that it represents a relatively strong formulation of the anti-whaling position under international law. As such the Rothwell/IFAW proposal will be used as a template to explore the strengths and weaknesses of utilising a litigious strategy to try and resolve the whaling controversy.

It can be seen that matters are rapidly coming to a head. In a move to try and forestall a resurgence of whaling (whether under the guise of science or openly as a commercial venture), anti-whaling NGOs are seeking an authoritative legal pronouncement in their favour. As non-government actors do not generally have standing in international law, they are putting intense pressure on anti-whaling states such as Australia to force a confrontation with the pro-whaling states. The question must be asked: is this necessarily a good idea? At the domestic level, litigation is costly, time-consuming and the outcome is uncertain. The same is equally true at the international level.[48] Further, international relations are characterised by politics and diplomacy rather than strict and technical legalism. As

---

44 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] FCA 664, per Allsop J, 62.

45 *Human Society International Inc v Kyodo Senpaku Kaisha* Ltd [2004[FCA 664, per Allsop J, 34-5.

46 International Fund for Animal Welfare, 'Australia Urged to Take Japan to International Courts on Eve of Mass Whale Killings' (Press Release, 8 November 2005).

47 Four Corners, Interview with Professor Gillian Triggs, Director for the Institute for Comparative and International Law at the University of Melbourne (Australian Broadcasting Corporation, 18 July 2005).

48 Patricia W Birnie and Alan E Boyle, *International Law and the Environment* (2nd ed, 2002) 178.

Friedheim notes, to maintain that an argument is legally correct '… misses the point: the IWC is not a court but a negotiating arena'.[49] An adjudicated decision may be legally correct but it will not take into account the complex equilibrium of economic, social and political concerns that surround the issue.

IV A SUMMARY OF THE PRO-WHALING AND ANTI-WHALING ARGUMENTS

The key difference between the pro and the anti-whaling positions can be summarised thus: pro-whaling states see whales as a 'resource'[50] whereas anti-whaling states believe that whales are 'special'[51] and should not be exploited. However, this generalisation obscures much detail. The complexities of each side's arguments can be demonstrated by examining the official position of the Japanese government and, alternately, that of the Australian government.

A *Japan*

Japan is a remarkable story of economic success in the face of strict natural limitations. Japan supports a population of approximately 128 million people on an area of less than 400,000 sq km, a population density of 341 people per sq km.[52] Much of Japan's arable land is too rugged for cultivation or has been urbanised. Thus Japan's economy has been characterised by a notable lack of primary produce and natural resources, forcing them to look offshore to meet their nutritional requirements.[53] The Japanese have a long tradition of exploiting the ocean to supply their dietary protein, and control a large distant water fishing fleet. This fleet primarily feeds a voracious domestic market with relatively small quantities sold overseas.[54] Thus international maritime law is an area of vital importance to Japan's food security.[55] From Japan's perspective, the arguments of anti-whaling states would, if successful, establish a dangerous precedent: if harvesting whales can be banned regardless of their conservation status, then what is to stop the

---

49 Robert L Friedheim, 'Moderation in the Pursuit of Justice: Explaining Japan's Failure in the International Whaling Negotiations' (1996) 27(4) *Ocean Development and International Law* 349, 366.

50 Stroud, above n 14, 64.

51 Stroud, above n 14, 65.

52 This contrasts dramatically with Australia's 20 million people spread in an area of over 7,500, 000 sq km, a population density of approximately 2 people per sq km. CIA World Factbook, <http://www.cia.gov/cia/publications/factbook/index.html > 2 November 2006.

53 Judith Berger-Eforo, 'Sanctuary for the Whales: Will this be the Demise of the International Whaling Commission or a Viable Strategy for the Twenty-First Century?' (1996) 8 *Pace International Law Review* 439, 10-11.

54 In 2002 Japan was the largest importer of seafood products by both volume (3,820,000 tonnes) and value (22% of the world market). However, its seafood exports make up approximately 1% of the world market by both value and volume. Source: United Nations Food and Agriculture Organisation: Fisheries Statistics Database, http://www.fao.org/figis/servlet/static?xml=FIDI_STAT_org.xml&dom=org&xp_nav=3,1,2&xp_banner=fi 2 November 2006.

55 Amy Catalinac and Gerald Chan, 'Japan, the West and the Whaling Issue: Understanding the Japanese Side' (2005) 17 *Japan Forum* 133, 145.

environmental movement from focusing on other species such as tuna, Pollock or shrimp?

Given this tradition of marine exploitation, the Japanese see whales as a resource that can, and in many opinions should, be harvested.[56] Japan has repeatedly argued that forcing anti-whaling views upon other states is a blatant example of 'cultural imperialism'.[57] Certainly the resource needs to be managed to ensure that it remains at commercially viable levels and, if possible, the negative environmental impacts of the fishery should be minimised, but at its heart the Japanese view of whales is that they are an exploitable resource. This position can be summarised as 'conservationist'.[58] Conservation is emerging as the global norm. Most major international environmental treaties and the vast majority of domestic natural resource legislation incorporate this concept in one way or another.[59]

Under a conservation rationale, management strategies should be informed by the best available science. Correspondingly, Japan has sought to bolster its arguments with scientific evidence that certain whale stocks could support commercial whaling.[60] Although these findings are not flawless, they are becoming increasingly difficult for the anti-whaling movement to refute.[61]

The Japanese position is also based upon a well founded legal argument. The ICRW was initially set up in order to preserve the whaling industry.[62] Upon a plain reading of the text, sustainable exploitation of whale populations, not their total

---

56 Ibid 153; Stroud, above n 14, 56.

57 Stroud, above n 14, 59; Kalland and Moeran, above n 4, 187-95.

58 Conservation and related catch-phrases such as 'wise use' and 'optimum utilisation' justify exploitation of natural resources so long as this exploitation does not exceed the regenerative capacity of the resource or otherwise cause unacceptable environmental outcomes: Ronnie Harding (ed), *Environmental Decision-Making: the Roles of Scientists, Engineers and the Public* (1998) 67-70.

59 For example: *The United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 21 ILM 1261 (entered into force 16 November 1994), herein after referred to as UNCLOS, 64, 119; Annex II, (herein after referred to as Agenda 21) in Vol I of the *Report of the United Nations Conference on Environment and Development* (Rio de Janeiro, 3-14 June 1992) UN Doc. A/CONF.151/26/Rev 1, 471 (Section C) hereinafter referred to as the Rio Declaration; Food and Agriculture Organisation of the United Nations, *Code of Conduct for Responsible Fisheries* (1995) Preface and Art 7.1.1.

60 Cinnamon Carlarne, 'Saving the Whales in the New Millennium: Institutions, Recent Developments and the Future of International Whaling Policies' (2005) 24 *Virginia Environmental Law Journal* 2, 6.

61 For instance it has been accepted by the Scientific Committee of the IWC since 1991 that, between the waters of the Antarctic, north Pacific and northeast Atlantic, populations of minke whales are likely to exceed 873,000. As such a catch of 2,000 minke whales a year would constitute approximately 0.2% of the adult population: David D Caron, 'The International Whaling Commission and the North Atlantic Marine Mammal Commission: The Institutional Risks of Coercion in Consensual Structures' (1995) 89 *American Journal of International Law* 154, 160; Andresen, above n 15, 454.

62 ICRW, above n 6, preamble.

preservation, is the intent of the instrument.[63] Although the IWC is empowered to undertake a wide range of measures in order to maintain whale stocks, the intention of these measures was to facilitate the overarching goal of maintaining an exploitable resource. Therefore a moratorium on whaling cannot be justified if scientific evidence clearly indicates that whale populations could be harvested without endangering the species.[64]

The arguments comprising the Japanese position are, however, not without their flaws. Whale hunting and whale meat only formed a significant part of the Japanese diet during the years immediately following World War II.[65] Since the 1950's, Japanese domestic consumption has significantly declined and whale meat is now sold only in a few restaurants and supermarkets.[66] Recent surveys indicate that it is not popular with the current generation.[67] Japan's markets have proved easily permeable to large quantities of illegally harvested whale meat.[68] Finally, as will be discussed in the next part of this paper, the scientific arguments for the viability of recommencing limited commercial whaling are subject to criticism based upon the precautionary principle.

B *Australia*

In Australia, it is widely maintained that cetaceans are unusually intelligent and sensitive animals.[69] This supposition is based on the fact that many cetacean brains are proportionately larger than that of humans, and have a thicker neo-cortex than humans.[70] These findings indicate that cetaceans may have a superior sensory system to humans. Linked to this assertion is the argument that there is no humane way to kill cetaceans, particularly not the larger whales, which are the focus of the whaling industry.[71] Although the logical jump from the size of a cetacean's brain and neocortex to its superior intellect and capacity for suffering is questionable, there is little doubt that the current methods for killing whales do not comply with

---

63 William T Burke, 'Editorial Comment: Legal Aspects of the IWC Decision on the Southern Ocean Sanctuary' (1997) 28(3) *Ocean Development and International Law* 313, 323-4.

64 See ICRW, above n 6, Art V(2).

65 Stroud, above n 14, 61.

66 Ipsos MORI, *Majority of Japanese Public Does Not Support Whaling or Consume Whale Meat* (Press Release, 14 March 2000) <http://www.mori.com/polls/1999/whaling.shtml> 3 November 2006.

67 Ibid.

68 DNA tests indicate that Japanese markets regularly sell species other than those taken under scientific permits: Gillespie, above n 36, 326-30; also C Scott Baker *et al*, 'Scientific Whaling: Source of Illegal Products for Market?' (2000) 290 *Science* 1695.

69 See generally Commonwealth of Australia: National Task Force on Whaling, *A Universal Metaphor: Australia's Opposition to Commercial Whaling* (1997).

70 Anthony D'Amato and Sudhir K Chopra, 'Whales: Their Emerging Right to Life' (1991) 85 *American Journal of International Law* 21, 21-22.

71 It is not uncommon for the relatively small minke whales to take one hour to die after being hit by a grenade harpoon (Stroud, above n 14, 66), and there have been documented cases where whales taken in aboriginal subsistence hunts have taken more than twenty-four hours to die. Ibid, 24.

contemporary global standards for the humane treatment of animals.[72] These linked arguments, that whales are special and that there is no feasible way to humanely slaughter them, comprise a key platform of Australia's anti-whaling position.[73]

Another anti-whaling argument is based upon the growing popularity of non-consumptive uses for whales, particularly the 'whale-watching' industry.[74] The success of this industry demonstrates the feasibility of generating economic gain from whales without killing them. Further, developing states argue that they have a right to benefit from the whales that visit their waters and that whale harvesting states are attempting to deprive developing coastal states of a valuable source of income.[75] Whale watching is a highly de-centralised industry with the potential to bring economic growth to rural coastal towns.[76] As such it provides an economically viable alternative for traditional communities, previously engaged in whale harvesting, to maintain aspects of their cultural heritage.

Australia's scientific objections to whaling are predicated on a precautionary approach.[77] Despite the moratorium, many populations of commercially targeted whales have not yet recovered to even 1% of their pre-exploitation levels.[78] Cetaceans are notoriously difficult to study and the state of scientific understanding of most populations of whales is woefully inadequate.[79] The IWC's much touted Revised Management Procedure algorithm (RMP)[80] claims to take these factors into

---

72 Stroud, above n 14, 66-71, and see also Gillespie, above n 36, 108-110.

73 Commonwealth of Australia, above n 69, 35-46. For an excellent discussion of this argument, and its growing implications for international law, see generally D'Amato and Chopra, above n 70. See also David Day, *The Whale War* (1987).

74 This rapidly growing industry, was worth over US $1 billion globally in 1998, and was active in 87 countries and territories, including Japan, Norway and Iceland: Erich Hoyt, 'Whale Watching 2001: Worldwide Tourism Numbers, Expenditures and Expanding Socioeconomic Benefits' (2001) *International Fund for Animal Welfare*.

75 Buenos Aires Declaration, above n 34.

76 Hoyt, above n 74.

77 Principle 15 of the Rio Declaration, above n 59, defines such an approach as: 'Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation'.

78 For example southern hemisphere blue whales: Australian Department of Environment and Heritage website, *Blue, Fin and Sei Whale Recovery Plan 2005-2010*, <http://www.deh.gov.au/biodiversity/threatened/publications/recovery/balaenoptera-sp/index.html> 3 November 2006.

79 Reeves *et al*, above n 21; William C Burns, 'From the Harpoon to the Heat: Climate Change and the International Whaling Commission in the 21st Century' (2001) 13 *Georgetown International Environmental Law Review* 335, 350-2.

80 The RMP is an algorithm used to calculate conservative whale harvest quotas based on limited data input. See IWC website, *Revised Management Procedure,* <http://www.iwcoffice.org/conservation/rmp.htm> 3 November 2006. The Revised Management Scheme (RMS) is a means to implement the RMP and includes: data standards, survey guidelines and an inspection and observation scheme See IWC website, *Revised Management Scheme,* http://www.iwcoffice.org/conservation/rms.htm 3 November 2006.

account when calculating quotas. However substantial criticisms of the procedure remain unaddressed.[81]

Perhaps the weakest strand in the anti-whaling argument is that based solely on international law. Under Article V(2)(a) and (b), conservation measures promulgated by the IWC must be based upon scientific findings. Yet the scientific justification for the moratorium and sanctuaries has long been the subject of heated debate within the IWC.[82] Further, the anti-whaling coalition has a long history of disregarding the advice of the IWC scientific committee.[83] Thus Japan has argued that the indefinite continuance of the moratorium and the existence of the international sanctuaries are *ultra vires*, and that the anti-whaling majority are attempting to force the IWC into a role it was neither intended nor desired to fulfil.[84] Anti-whaling states respond that the convention is an evolving document and that global standards for marine mammal regulation have changed.[85] This argument is both strongly opposed by the pro-whaling states,[86] and belied by the fact that anti-whaling states have been unable to secure the necessary consensus to amend the Schedule to permanently prohibit whaling.

---

81 A full exposition of the problems with the RMP is given in William C Burns, 'The Forty-Ninth Meeting of the International Whaling Commission: Charting the Future of Cetaceans in the Twenty-First Century' (1997) *Colorado Journal of International Environmental Law and Policy* 67.

82 Anti whaling states have maintained that Sanctuaries are a valuable instrument in preserving whale stocks from a precautionary perspective as they will buffer any unforseen problems with the RMP. In contrast pro whaling states have pointed out that sanctuaries are inadequately policed and while they prevent commercial whaling they do not prevent scientific whaling, deaths from ship strikes and other anthropogenic causes of cetacean mortality. Finally some pro whaling states have argued that sanctuaries may actually be detrimental to the recovery of the larger baleen whales as the smaller and faster breeding minke whales will exploit the niche left vacant by the depleted species of blue and humpback caused by over harvesting. See Gillespie, above n 36, 255-7; and Andresen, above n 15, 443.

83 This was pointedly demonstrated when the chairman of the scientific committee, Dr Philip Hammond, resigned in protest in 1993. High North Alliance, *The Letter of Resignation from the Chairman of the Scientific Committee of the International Whaling Commission (IWC), Dr Philip Hammond, UK, 26 May 1993,* <http://www.highnorth.no/Library/Management_Regimes/IWC/le-fr-th.htm> 3 November 2006.

84 Yasuo Lino and Dan Goodman, 'Japan's Position in the International Whaling Commission' in William C Burns and Alexander Gillespie (eds), *The Future of Cetaceans in a Changing World* (2003) 13-16, 26.

85 This view is primarily based upon the work of Professor Patricia Birnie in her 1995 submission to the IWC, Patricia Birnie, Submission to the IWC, *Opinion on the Legality of the Designation of the Southern Ocean Whale Sanctuary by the International Whaling Commission*, IWC/47/41 Agenda Item 13, 1995. Available from <http://www.highnorth.no/library/Management_Regimes/IWC/op-on-th.htm> 5 November 2006.

86 Pro whaling states have relied upon the work of Professor Burke in his 1995 submission to the IWC that refutes the arguments of Birnie, ibid: William T Burke, *Memorandum of Opinion on the Legality of the Designation of the Southern Ocean Sanctuary by the International Whaling Commission* 6 April 1995. Reprinted as an editorial comment in (1996) 27 *Ocean Development and International Law* 315.

As mentioned above,[87] mounting evidence suggests that certain whale populations could support a return to limited commercial whaling. Anti-whaling states argue that the ICRW and IWC management regulations should be interpreted in light of the precautionary principle.[88] However, neither the ICRW nor the Schedule refer to the precautionary principle. Further, despite being included in numerous declarations of international law, the principle has never been explicitly applied in an international dispute.[89] Thus its legal status is far from certain.

It has been suggested that JARPA could constitute an abuse of right under the ICRW.[90] However, the text of the ICRW supports a liberal interpretation of scientific whaling. On a plain reading of Article VIII (1), permits for scientific whaling are exempt from the text of the convention, and full discretion is vested in the state issuing the permits.[91] Any limitations on Article VIII would have to be implied from the wording of the convention or from other sources, such as customary international law or the United Nations Convention on the Law of the Sea, something that a decision maker may be unwilling to do. Finally, it has been noted that: '[i]t is far from clear … that the abuse of right doctrine has sufficiently evolved from a policy abstraction to a concrete rule of decision or juridical standard that limits State prerogatives'.[92]

Both the Japanese and Australian positions are complex and are based upon sophisticated legal, political, economic, environmental and socio-cultural arguments. It can be seen that Australia and the anti-whaling states seem to have the advantage of numbers, political influence and growing public support for the protection of whales. However Japan and the pro-whaling states seem to have a more cohesive and persuasive legal argument based upon the text of the convention, the global best practice standard of 'conservation' as opposed to 'preservation', and the benefit of scientific findings, at least with respect to some whale stocks. As

87 See Carlarne, above n 60; Caron, above n 61.

88 Commonwealth of Australia, above n 69, 46-52.

89 The principle's uncertain status was demonstrated recently when ITLOS, in deciding upon the application for provisional measures in the *Southern Bluefin Tuna (Austl v Japan; NZ v Japan), Provisional Measures Order*, Case Nos 3, 4, (1999) 38 ILM 1624, 1632 (ITLOS 27 August 1999), failed to explicitly apply the principle, despite a set of circumstances which would have sufficiently warranted it. Alexander Yankov, 'Current Fisheries Disputes and the International Tribunal for the Law of the Sea' in Nordquist and Moore (eds), *Current Marine Environmental Issues and the International Tribunal for the Law of the Sea* (2001) 229.

90 Gillian Triggs, 'Japanese Scientific Whaling: An Abuse of Right or Optimum Utilisation?' (2005) 5 *Asia Pacific Journal of Environmental Law* 33.

91 Phrases in Art VIII of the ICRW such as 'Notwithstanding anything contained in this convention ...', '… subject to such restrictions … as the Contracting Government thinks fit …' and '[activities undertaken] in accordance with this Art shall be exempt from the operation of this Convention' demonstrate the unfettered nature of the scientific research activities.

92 Eldon V C Greenberg, Paul S Hoff and Michael I Goulding, 'Japan's Whale Research Program and International Law' (2002) 32 *California Western International Law Journal* 151, 153.

neither group seems willing to compromise,[93] the contours of these arguments should dictate the choice of strategies considered by each group.

V POTENTIAL AVENUES FOR RESOLUTION

This section surveys the relevant international institutions through which it may be possible to resolve the scientific whaling dispute should a litigious strategy be pursued. It will also examine some of the key instruments which may inform such a dispute. Although the precise phrasing of the dispute may have to vary so as to satisfy the requirements of a particular forum or activate the provisions of a specific instrument, the central element of challenging the legality of JARPA would remain constant.

A *The ICRW and the IWC*

The ICRW has no dispute resolution provisions and no formal ability to internally enforce compliance with its conservation measures. Contracting parties are required to enforce IWC measures within their own jurisdictions.[94] The IWC depends primarily on two mechanisms to enforce its regulations:

1. Through the 'Name and Shame' technique, the IWC can make recommendations calling upon contracting parties to conform to IWC regulations.[95]
2. The members of the IWC can act individually or collectively enforce IWC regulations within the boundaries of international law.

The first mechanism is of only limited effectiveness, as has been repeatedly demonstrated by the IWC's calls for Japan to cease its lethal research program.[96] The second mechanism is potentially far more effective, especially when exercised by powerful states.[97] While unilateral action can prove to be highly effective,[98] it is

---

93 The failure of both sides to compromise was demonstrated by the rejection of the 'Canny proposal', Opening Statement of the Government of Ireland, IWC/49/OS/Ireland (1997) by both pro- and anti-whaling states. Numerous authors have highlighted the urgent need for compromise: Oran R Young *et al*, 'Subsistence, Sustainability, and Sea Mammals: Reconstructing the International Whaling Regime' (1994) 23(1) *Ocean and Coastal Management* 117; Sidney Holt, 'Is the IWC Finished as an Instrument for the Conservation of Whales and the Regulation of Whaling?' (2003) 46(7) *Marine Pollution Bulletin* 924; and William C Burns, 'The Berlin Initiative on Strengthening the Conservation Agenda of the International Whaling Commission: Toward a New Era for Cetaceans?' (2004) 13(1) *Review of European Community and International Environmental Law* 72, 83.

94 ICRW, above n 6, Art IX(1).

95 ICRW, above n 6, Art VI.

96 See IWC, above, n 33.

97 For example, in 1974 the United States certified Japan and the USSR under the *Pelly Amendment to the Fishermen's Protective Act* 22 USC (1978) for objecting to IWC quotas. The threat of trade measures flowing from this certification was sufficient to enforce compliance with IWC quotas the following year. See Steve Charnovitz, 'Environmental Trade

not always suitable as many states have neither the resource base, nor the political will, to act unilaterally. Care must also be exercised as this type of action may contravene the provisions of the General Agreement on Tariffs and Trade (GATT)[99] – as discussed below in Part V.

B *Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES)*[100]

After the IWC, CITES is the next most logical instrument which may inform resolution of the whaling dispute. CITES was established in 1973 in response to the realisation that unregulated international trade in wildlife and plant species was driving some of these species towards extinction.[101] The convention creates a framework under which contracting parties implement trade restrictions (mainly by way of licensing systems) through domestic legislation. Although CITES does provide a dispute resolution procedure, the measures available are consent based.[102] Therefore these procedures are of less practical significance than the protections available under the system of Appendices that the convention administers.

Endangered species are listed in one of three Appendices. Trade in specimens, products or parts of species listed in Appendix I (species threatened with extinction) is prohibited other than in exceptional circumstances.[103] Less severe trade restrictions apply for species listed in Appendix II (species whose survival is compromised by trade).[104] Appendix III contains species that are protected in at least one country, which has asked other parties for assistance in controlling the trade.[105] Listing a species on Appendices I or II, or moving a listed species between Appendices I or II, requires the votes of a two-thirds majority of the Conference of the Parties.[106] The species must also meet the biological criteria set down for that Appendix.[107] Species may be unilaterally added to Appendix III.[108]

Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices' (1996) 9 *American University Journal of International Law and Policy* 751, 763.

98 Burns, above n 79.

99 General Agreement on Tariffs and Trade, 55 UNTS 194 (entered into force 1 January 1948). During the 1994 Uruguay round, GATT underwent significant change and was incorporated into the General Agreement on Tariffs and Trade, opened for signature 15 April 1994, 33 ILM 1154, (entered into force 1 January 1995), herein after referred to as GATT.

100 Convention on International Trade in Endangered Species of Wild Fauna and Flora, opened for signature in Washington, 3 March 1973, 12 ILM 1085 (entered into force 1 July 1975), herein after referred to as CITES).

101 *What is CITES?* (2006) CITES Website <http://www.cites.org/eng/disc/what.shtml> 5 November 2006.

102 CITES, above n 100, Art XVIII.

103 CITES, above n 100, Art III.

104 CITES, above n 100, Art IV.

105 CITES, above n 100, Art V.

106 CITES, above n 100, Art XV(1)(b).

107 Conf 9.24 (Rev CoP13), '*Criteria for amendment of Appendices I and II*: *amended at the 12th and 13th Conference of the Parties'* (1994) CITES Website <http://www.cites.org/eng/res/09/09-24R13.shtml> 5 November 2006.

108 CITES, above n 100, Art XVI.

For a number of years, CITES has played a supporting role to the IWC by listing most great whales in Appendix I and the rest of the order of *cetacea* in Appendix II.[109] However, this stance was recently challenged by a concerted push to remove certain species of whale from Appendix I and allow a regulated trade in them.[110] Support and opposition for these proposals has been split roughly along the IWC pro-whaling and anti-whaling lines.[111] The pro-whaling states presented evidence to the effect that the anti-whaling states were blocking the promulgation of science-based quotas in the IWC.[112] This evidence was then used to justify moving several whale species from Appendix I to Appendix II. Although the proposals for opening up trade in whales were (narrowly) defeated, the Secretariat of CITES urged the IWC to recommence work on issuing quotas with all possible speed.[113] These developments indicate that if the whaling deadlock cannot be resolved, and a rival organisation emerges to challenge the primacy of the IWC as the appropriate cetacean management authority, CITES could well remove its support from the IWC and engage with the new organisation. Therefore, although it is important for the anti-whaling states to maintain the protection of Appendix I for whales, CITES cannot be relied upon as a primary method of resolving the whaling issue.

C *The International Court of Justice (ICJ)*

The ICJ, or 'World Court', is the primary judicial organ of the United Nations.[114] It is the only court with universal general jurisdiction,[115] allowing it to decide cases on any aspect of international law. Any state is entitled to appear before the Court,[116] but the Court may only decide cases over which it has jurisdiction. The two main types of jurisdiction are:

1. Advisory jurisdiction, where certain United Nations bodies may request the ICJ to issue a detailed legal opinion on a matter without ruling upon it.[117]
2. Contentious jurisdiction, where one or more parties bring a dispute before the court and a binding judgement is issued.[118]

---

109 See Gillespie, above n 36, 334-8.
110 Gillespie, above n 36, 339-41.
111 See Carlarne, above n 60, 11-12.
112 Carlarne, above n 60, 11-12.
113 A letter dated July 4, 2000 from Secretary General for the CITES to Chairman of the IWC, circulated at the IWC's 52nd meeting in Adelaide, excerpted in Alexander Gillespie, 'Forum Shopping Within International Environmental Law: the IWC, CITES and the Management of Cetaceans' (2002) 33(1) *Ocean Development & International Law* 17, 41; see also Lino and Goodman, above n 84, 6.
114 *Charter of the United Nations* (1945) Art 92.
115 His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, 'The proliferation of international judicial bodies: The outlook for the international legal order', (speech to the Sixth Committee of the General Assembly of the United Nations, 27 October 2000).
116 *Statute of the International Court of Justice*, Arts 34 and 35.
117 *Statute of the International Court of* Justice, Arts 65-8.
118 *Statute of the International Court of* Justice, Arts 36.

Advisory opinions may be issued by the Court at the request of one of several United Nations organs or agencies.[119] These opinions, in which relevant states will usually be invited to submit information, are not binding but carry significant weight due to the reputation of the ICJ. An advisory opinion on the legality of JARPA could be obtained at the request of the General Assembly of the United Nations.

Before the Court can find that it has contentious jurisdiction, the parties to the dispute must consent to the ICJ trying the case. The method of consent may vary, with the accepted means listed in Article 36 of the ICJ Statute. One way in which a state accepts the jurisdiction of the ICJ is through an Optional Declaration under Article 36 (2) of the ICJ Statute. These declarations may be limited in scope, have reservations made to them or be restricted to disputes of certain subject matter.[120] A state is entitled to rely on the reservations or limitations of another party to a dispute in order to defeat the jurisdiction of the ICJ.[121] In the present case, both Australia and Japan have lodged Optional Declarations with the ICJ, neither of which would preclude the ICJ from exercising its jurisdiction over the whaling issue.[122] The ICJ also has the power to suggest provisional measures, similar to common law interlocutory injunctions.[123] These could have the effect of halting whaling activities while the issue was resolved before the court. Therefore the ICJ is a potential forum in which to challenge the legality of JARPA.

D *The United Nations Convention on the Law of the Sea (UNCLOS)*[124]

UNCLOS creates a system of maritime zones under which coastal states exercise sovereignty, or sovereign rights, over the waters proximate to their coastlines.[125] The waters that do not fall under the jurisdiction of any one state are known as the high seas.[126] Although they are a global commons, states still have obligations with respect to these waters. Under Part VII, Section 2, of UNCLOS, states have a duty

---

119 *Charter of the United Nations* Art 96; *Statute of the International Court of Justice* Art 65.

120 Sam Blay, Ryszard Piotrowicz and Martin Tsamenyi (eds), *Public International Law: An Australian Perspective* (2nd ed, 2005) 149.

121 Ibid.

122 Optional Declarations can be viewed at: International Court of Justice <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicUNmembers.html> 5 November 2006.

123 *Statute of the International Court of Justice* Art 41. Collier and Lowe have identified that there is some debate over whether these measures are binding or not. General consensus appears to be that they are not binding: John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (1999) 175.

124 UNCLOS, above n 59.

125 The zones set out in UNCLOS are: the territorial waters (up to 12nm from coastal baselines), the contiguous zone (up to 24nm from coastal baselines), and the Exclusive Economic Zone (up to 200nm from coastal baselines). The coastal state exercises sovereignty over its territorial water: Art 2 (1), but only has control over the contiguous zone for limited purposes: Art 33. In its Exclusive Economic Zone a coastal state has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources of those waters: art 56. Other states have the right to engage in navigation, overpass and other peaceful purposes within a coastal state's EEZ: Art 58.

126 UNCLOS, above n 59, Arts 86-120.

to cooperate with other states in order to conserve the living resources of the high seas.[127] Additionally, Article 65 of UNCLOS stipulates that '… in the case of cetaceans [states] shall in particular work through the appropriate international organisations for their conservation, management and study.' Article 120 provides that Article 65 also applies to the high seas. Both Australia and Japan are parties to UNCLOS, and can avail themselves of its dispute settlement procedure.

The dispute resolution procedure in Part XV of UNCLOS involves a number of steps. Part XV will only apply if the parties cannot agree on a dispute settlement method, or that method fails, and the parties did not preclude recourse to further procedures.[128] At any time the parties may agree upon a peaceful method of dispute settlement.[129] The dispute may also be referred to a procedure under a general, regional or bilateral agreement, as long as this procedure results in a binding settlement.[130] An exchange of views must occur with a focus on settling the matter through negotiation or other peaceful means.[131] The parties may agree to submit the matter to conciliation either under Annex V section 1 or another procedure.[132] Should these measures fail, then the dispute will fall within the compulsory provisions of Part XV, section 2.[133]

The compulsory provisions provide parties with a choice of two courts and two arbitral tribunals to resolve the dispute. Parties to UNCLOS may lodge a declaration under Article 27 specifying either: the International Tribunal for the Law of the Sea (ITLOS), the ICJ, arbitration under Annex VII or arbitration under Annex VIII as their preferred method of compulsory dispute settlement.[134] Compulsory proceedings may be unilaterally initiated if all parties in the dispute have chosen the same forum. If the parties disagree, or have not specifically selected a forum, then Article 287 (3) and (5) provides that the parties shall be deemed to have accepted arbitration under Annex VII.

Australia could argue that Japan has breached its obligations to cooperate by continuing JARPA against the will of the IWC.[135] Further, if JARPA could be demonstrated to constitute an abuse of right then this would contravene Article 300 of UNCLOS. Therefore the scientific whaling dispute would arise under both the ICRW and UNCLOS. A similar situation occurred in the *Southern Bluefin Tuna* dispute where the arbitral tribunal decided that a single dispute had arisen under both a fisheries agreement and UNCLOS.[136] The tribunal subsequently set out to

---

127 Ibid, Arts 116-9.
128 UNCLOS, above n 59, Art 281.
129 UNCLOS, above n 59, Art 280.
130 UNCLOS, above n 59, Art 282.
131 UNCLOS, above n 59, Art 283.
132 UNCLOS, above n 59, Art 284.
133 UNCLOS, above n 59, Art 286.
134 UNCLOS, above n 59, Art 287.
135 See IWC, above n 33.
136 *Southern Bluefin Tuna (Australia. & New Zealand v Japan), Jurisdiction and Admissibility Award* (2000) 39 ILM 1359, 1387-8.

determine if the dispute settlement procedures under the fishery agreement precluded recourse to Part XV, section 2, of UNCLOS.[137] It was ultimately decided that the fishery agreement excluded unilateral procedures by virtue of Article 282 (1) of UNCLOS.[138] However, the ICRW has no dispute settlement provisions and would not defeat the jurisdiction of Part XV of UNCLOS. Therefore UNCLOS is a suitable instrument through which to pursue resolution of the scientific whaling dispute.

E *The Convention on Biological Diversity (CBD)*[139]

This convention deals with two main issues: the preservation of biological diversity and the sharing of benefits from the exploitation of biodiversity.[140] The overriding goals of this instrument are sustainable use and conservation.[141] The CBD imposes duties on its members to cooperate through appropriate international organisations to ensure that these goals are met.[142] Therefore, as both Australia and Japan are contracting parties to the CBD, there is some scope to utilise the provisions of the CBD to challenge JARPA on the grounds that the program reduces marine biodiversity by endangering certain whale species. However, a number of factors make this approach ultimately inappropriate for such a challenge.

Parties bringing disputes under this instrument must first seek to resolve the issue through negotiation.[143] Should this measure fail, the parties may seek the good offices or mediation of a third party.[144] Contracting parties to the CBD have the option of lodging a declaration under Article 27 (3) indicating that, should the dispute settlement processes mentioned above fail, they accept the compulsory jurisdiction of either an arbitral tribunal set up under the CBD, or the ICJ.[145] If the parties to the dispute have not lodged such a declaration, accepting the same or any settlement procedure, then the parties will be subject to compulsory conciliation under Schedule II of the CBD unless they otherwise agree.[146]

It follows that the dispute settlement procedures available under the CBD add nothing new to those already available through UNCLOS. As the compulsory dispute settlement provisions of the CBD require explicit consent, the process offered under this instrument is weaker than that under UNCLOS. Further, many of the provisions of the CBD that impose conservation obligations upon contracting

---

137 Natalie S Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (2005) 37.
138 See UNCLOS, above n 134, 63.
139 *United Nations Convention on Biological Diversity*, opened for signature 5 June 1992, 31 ILM 882 (entered into force 29 December 1993), herein after referred to as the CBD.
140 Ibid, Preamble and Art 1.
141 Ibid.
142 Ibid, Art 5.
143 Ibid, Art 27(1).
144 Ibid, Art 27(2).
145 Ibid, Art 27(3).
146 Ibid, Art 27(4).

parties do so only 'as far as possible and appropriate'.[147] This clause would make it extremely difficult to prove that Japan had breached its binding legal obligations under the CBD. Therefore the CBD is not a suitable avenue through which to address the scientific whaling issue.

F *The Convention on the Conservation of Migratory Species of Wild Animals (The Bonn Convention)*[148]

This treaty, formed under the United Nations Environment Program, aims to protect terrestrial, marine and avian migratory species throughout their range.[149] It does so by listing species in one of two Annexes: Annex I for endangered migratory species and Annex II for those that would benefit from conservation measures.[150] The Bonn Convention acts as a framework treaty under which states are encouraged to create the necessary regional agreements to protect listed species.[151] Examples of this process acting to protect cetaceans are: the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area;[152] and the Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas.[153]

This treaty, though providing an interesting example of how regional alternatives to the IWC might operate, does not offer much assistance with resolving the scientific whaling dispute for two reasons. First Japan is not a signatory to the convention. Second, the convention's dispute resolution procedures are non-binding; and merely provide that parties unable to reach agreement through negotiation may agree to arbitration.[154] For these reasons the Bonn Convention is not an appropriate instrument through which to pursue resolution of the scientific whaling issue.

G *The Antarctic Treaty System (ATS)*

The primary purpose of the ATS is to provide a management structure for the Antarctic region while at the same time negotiating a workable compromise between those states that claim territories on the continent and those that dispute or refuse to acknowledge those claims. The ATS strikes this balance through the 'freezing provision' of the Antarctic Treaty.[155] This provision is essentially an agreement to disagree and places all territorial disputes in stasis while the treaty has

---

147 Ibid, Arts 5, 6(b), 7, 8, 9, 10, 11 and 14(1).

148 *Convention on the Conservation of Migratory Species of Wild Animals*, opened for signature 23 June 1979 19 ILM 15 (entered into force 1 November 1983).

149 Gillespie, above n 113, 28-30.

150 The Bonn Convention, above n 148, Arts III and IV.

151 The Bonn Convention, above n 148, Arts V and VI.

152 Opened for signature 24 November 1996, 36 ILM 777 (entered into force 1 June 2001).

153 Opened for signature 17 March 1992, 1772 UNTS 217, (entered into force 29 March 1994).

154 The Bonn Convention, above n 148, Art XIII.

155 *Antarctic Treaty*, opened for signature 1 December 1959, 402 UNTS 71 (entered into force 23 June 1961) Art IV.

currency.[156] Both Japan and Australia are Consultative Parties to the Antarctic Treaty, and Australia is a territory claimant.

In addition to the original Antarctic Treaty, the ATS includes recommendations adopted at meetings of the Consultative Parties, the Convention on the Conservation of Marine Living Resources (CCAMLR),[157] the Convention on the Conservation of Antarctic Seals,[158] and the Protocol on Environmental Protection to the Antarctic Treaty (The Protocol).[159] Of the various elements of the ATS, only CCAMLR and the Protocol are directly relevant to the whaling issue.

CCAMLR was drafted in Canberra in 1980 and came into effect in 1982. It developed out of concerns that the rapidly expanding krill fishery would have detrimental effects on the Antarctic marine ecosystem.[160] The central tenet of CCAMLR is its ecosystem-based approach to conservation and rational use.[161] This approach dictates that where an activity is planned, not only will the effects of the activity on target species be considered, but so too will the potential impacts of the activity on the ecological links between species. The CCAMLR approach represents a more sophisticated method of resource management than the optimum utilisation approach of the ICRW.[162]

The Protocol was drafted in Madrid in 1991 in the aftermath of the failed attempts to develop a legal regime for mining in Antarctica.[163] The central focus of the Protocol is on providing a stringent system of Environmental Impact Assessments for any activities that may potentially impact upon the delicate Antarctic environment.[164] The Protocol preserves the duties and obligations of parties to CCAMLR and also levies a duty of consultation and cooperation between CCAMLR parties.[165]

While both CCAMLR and the Protocol logically extend to the regulation of whales, in practice ATS bodies have been careful not to interfere with the role of the IWC.[166] Part of the reason for this deference is the delicate balance of consensus

---

156 Philippe Gautier, 'The Maritime Area of the Antarctic and the New Law of the Sea' in Joe Verhoeven, Philippe Sands and Maxwell Bruce, *The Antarctic Environment and International Law* (1992) 122; and also see generally Donald R Rothwell, 'The Antarctic Treaty: 1961-1991 and Beyond' (1992) 14 *Sydney Law Review* 62.

157 Opened for signature 20 May 1980, 19 ILM 841, (entered into force 7 April 1982).CCAMLR.

158 Opened for signature 1 June 1972, 11 ILM 251, (entered into force 11 March 1978).

159 Opened for signature 4 October 1991, 30 ILM 1455, (entered into force 14 January 1998).

160 Jonathan I Charney, *The New Nationalism and the Use of Common Spaces: Issues in Marine Pollution and the Exploitation of Antarctica* (1982) 240-1.

161 CCAMLR, above n 157, Art II.

162 Cf CCAMLR, above n 157, Art II with the ICRW, above n 6, Art V (2).

163 Davor Vidas, *Implementing the Environmental Protection Regime for the Antarctic* (2000) 1-9.

164 Primarily set out in Arts III, VIII and Annex I to The Protocol, above n 159.

165 Ibid, Arts 4, 5.

166 CCAMLR, above n 157, Art VI specifically gives pre-eminence to the ICRW. This cautious approach was further demonstrated when the CCAMLR scientific committee politely evaded an invitation to comment upon the French proposal for a Southern Ocean Whale Sanctuary.

upon which the ATS rests, and the fact that most of the key pro and anti-whaling states are Consultative Parties to the ATS.[167] Another factor behind this compartmentalisation of management roles is the sustained criticism levelled at the ATS by many non-member states. These states have objected to the fact that the Antarctic, regarded by some as a global commons, is regulated by an exclusive body that operates outside of the United Nations framework.[168] These criticisms have made the Antarctic Consultative Parties wary of interfering with other international instruments.

For whatever reason, both CCAMLR and the Protocol expressly uphold the primacy of rights and obligations flowing from the ICRW. Therefore the ATS is not a potential avenue through which to resolve the scientific whaling dispute.

It can be seen that a variety of binding and non-binding options are available to assist with the resolution of the whaling issue. Part VI of this article will analyse some of the potential outcomes that may flow from pursuing a determination of the legality of JARPA under international law.

PART VI – CONSEQUENCES OF CONFRONTATION

As discussed above, the legal merits of the Japanese case could be seen as equally, if not more, compelling than those of the Australian case.[169] The Australian position is based on the doctrine of 'abuse of right', the precautionary principle and an interpretation of the ICRW as an evolving document. The weaknesses of these arguments have already been highlighted in Part IV of this article. By comparison, the Japanese position is based on a plain interpretation of the language of the ICRW.[170] These considerations suggest that the outcome of the dispute is, at best,

---

Olav Stokke, 'The effectiveness of CCAMLR' in Stokke and Vidas, above n 41, 126-8, and Davis, 'The Legitimacy of CCAMLR' in Stokke and Vidas, above n 41, 240.

167 Such as Australia, the United States, the United Kingdom, Japan, Norway and the Russian Federation.

168 Peter J Beck, *The International Politics of Antarctica* (1986) 270-99; see also Peter J Beck, 'Another Sterile Ritual? The United Nations and Antarctica 1987' (1988) 24 *Polar Record* 207; Peter J Beck, 'Antarctica, Vina del Mar and the 1990 UN Debate' (1991) 27 *Polar Record* 211; Peter J Beck, 'The 1991 UN Session: the Environmental Protocol Fails to Satisfy the Antarctic Treaty System's Critics' (1992) 28 *Polar Record* 307; Peter J Beck, 'The United Nations and Antarctica, 1992: Still Searching for that Elusive Convergence of View' (1993) 29 *Polar Record* 313.

169 This view of the relative merits of the cases is shared by both the Australian government and also the New Zealand IWC Commissioner and former Prime Minister, Sir Geoffrey Palmer. Department of Environment and Heritage, Commonwealth of Australia, *Whale Spectacle Starts off Australia's Coastline*, (Press Release No C0115/06, 2 June 2006) <http://www.deh.gov.au/minister/env/2006/mr02jun06.html> 5 November 2006.

170 Such a reading is required by art 31 of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 8 ILM 679 (entered into force 27 January 1980) herein after referred to as the VCLT. Expansive language can be found in ICRW, above n 6, preamble paras 2: 'natural resources', 4: 'numbers of whales which may be captured', 5: 'economic and nutritional' uses, 6: 'stocks able to sustain exploitation', 8: 'orderly development of the whaling industry" and other examples throughout the text, particularly in Arts V (2) and VIII.

uncertain and that any one of a number of outcomes may ultimately be reached. Based upon the conclusions of Part V, it is assumed that the dispute will ultimately be decided either through adjudication in the ICJ, the ITLOS or through arbitration under UNCLOS. The effects of four possible decisions are considered below in order to demonstrate the potential consequences of pursuing a litigious strategy.

A *JARPA is Found to be Legal*

The decision maker may rule that JARPA is entirely legal under the current provisions of the ICRW and the Schedule. This decision would essentially render the moratorium pointless by confirming the legitimacy of the loophole currently exploited by Japan. States wishing to issue scientific whale quotas would have authoritative backing to do so at their own discretion. Amending the Schedule so as to limit JARPA would require the support of three quarters of IWC commissioners which, given that the anti-whaling states are currently struggling to regain a simple majority, is presently unfeasible. Attempts to create a new international instrument to protect whales would not have the support of pro-whaling states and would be futile. Thus it would be left to anti-whaling states, both within and outside of the IWC, to adopt unilateral or multilateral measures in order to pressure Japan into curtailing JARPA.

One such measure, suggested by HSI, would be for Australia to enforce control over the Australian Whale Sanctuary off the coast off the AAT.[171] However, this option is politically unfeasible due to the nature of the Antarctic Treaty System and the fragility of Australia's claim to the AAT.[172] As mentioned above, the ATS is predicated on an agreement to disagree.[173] States are prohibited from undertaking any activities that would expand or consolidate their territorial claims while the treaty is in force.[174] Although several parliamentary committees have recommended that Australia should more actively enforce its laws against foreign nationals in its Antarctic Territory and Exclusive Economic Zone (EEZ),[175] other commentators have suggested that doing so would endanger the equilibrium maintained by the ATS.[176] It is unlikely that the other Antarctic Consultative Parties (Japan amongst them), would countenance Australia's unilateral action. Finally, even if Australia did act unilaterally to exclude JARPA from its Antarctic EEZ, then JARPA could

---

171 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] FCA 1510.

172 Australia's claim is explicitly recognised by only four states: France, the UK, Norway and New Zealand. Triggs, above n 42, 269-74, see also Sir Arthur Watts, *International Law and the Antarctic Treaty System* (1992) 118-124 for the tenuous nature of Antarctic territory claims generally.

173 *Antarctic Treaty*, above n 155, Art IV.

174 *Antartic Treaty*, above n 155, Art IV.

175 The most recent examples are recommendations 1-4 and 10 of Commonwealth of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Australian Law in Antarctica: The Report of the Second Phase of an Inquiry into the Legal Regimes of Australia's External Territories and the Jervis Bay Territory* (1992).

176 Davis in Stokke and Vidas, above n 163, 239 and also see generally Triggs, above n 42.

simply hunt whales in the waters offshore from the rest of Antarctica, much of which is unclaimed or disputed, thus rendering Australia's unilateral action futile.

This example demonstrates the inadequacy of attempting to regulate highly migratory whales by establishing sanctuaries solely in state controlled waters. The legal regime of the high seas covers a substantial portion of the world's oceans. These waters are considered part of the global commons and all states have the right to harvest high seas marine resources subject to a general obligation to conserve them.[177] Even if a substantial number of coastal states could be persuaded to designate their waters as whale sanctuaries, pro-whaling states would still be able to catch whales in non-sanctuary waters or on the high seas. Thus a regional or global body, such as the IWC, is the only practicable way to manage impacts upon whales.

B *The Issues for Determination are Expanded*

Given that one of the primary fora available to determine the scientific whaling dispute is the ICJ, the possibility that this Court may consider issues beyond the legality of JARPA must be considered. Japan has expressed its dissatisfaction with many aspects of the IWC's conduct over the last twenty years. It is possible that the Japanese government would also seek to review the legality of other issues, such as the reasons for delaying implementation of the Revised Management Scheme (RMS), and the legality of the sanctuaries established in the Southern and Indian Oceans.

Japan has long complained that the anti-whaling states have delayed the development and implementation of the RMS without proper cause.[178] Alternately, anti-whaling objections to the RMS have focused on its inadequate inspection and compliance provisions.[179] Even if the issues of inspection and compliance could be resolved to the satisfaction of anti-whaling states, the fact remains that the RMS is still a system for calculating whale quotas. It would be a bitter irony if, by forcing a confrontation over JARPA, the anti-whaling states hastened the resumption of commercial whaling.

Another issue that would likely be raised by the Japanese government is the legality of the Southern and Indian Ocean sanctuaries. As noted above in Part IV, the lack of scientific justification for the sanctuaries leaves their legality exposed to criticism. Should the RMS be finalised and the moratorium lifted, maintenance of the sanctuaries would be an important fall-back objective for the anti-whaling states. Therefore the risk that the legitimacy of the sanctuaries could be called into question is another factor which the anti-whaling states must consider when contemplating the efficacy of a litigious strategy.

---

177 See UNCLOS, above at n 59.

178 Lino and Goodman, above n 84, 23; See also Burns, above n 93, 75.

179 See Simmonds and Hutchinson, above n 14, 36; Gillespie, above n 36, 344.

C *JARPA is found to be legal within limits*

A decision maker may arrive at an intermediate decision and rule that JARPA is legal within certain limits. It may be held that JARPA has expanded beyond the scope of Article VIII of the ICRW, or that such a limit may be found in the future. Although such a ruling, however formulated, may be of some benefit to the anti-whaling cause, two questions must be asked. First, what is the likelihood of obtaining such a verdict? Secondly, do the benefits of such a ruling justify the risk of obtaining it?

Without guessing at the possible limitations which a decision maker may impose, some general observations can be made. First, the number of whales taken annually by JARPA is relatively small in contrast to the size of the stock.[180] Second the scale of JARPA is commensurate with aboriginal subsistence whale quotas issued by the IWC.[181] Finally, an intermediate ruling on the whaling issue would do no more than reach a compromise that is undesirable for all parties. Japan would still seek ways to expand its whaling operations and the anti-whaling states would still object to the practice of taking whales. Given the uncertainty of obtaining an intermediate result, and its limited practical benefits, it cannot be said that the possibility of an intermediate decision makes pursuing international adjudication a strategically sound option for anti-whaling states.

D *JARPA is Held to be Illegal*

Should JARPA be ruled illegal under international law, Japan would have the option of either remaining within the IWC and protesting against the moratorium, or leaving the IWC and joining or forming an alternative organisation. The first outcome is unlikely. The strong influence wielded by the Japanese pro-whaling lobby,[182] and the concerns of resource security noted in Part IV of this article, have underpinned seventy years of tenacious Japanese support for whale harvesting. Further, allowing the whaling fleet to be grounded indefinitely could spell the end of the Japanese whaling industry. As Friedheim notes, the moratorium has brought the global whaling industry to its lowest ebb.[183] A total cessation of whaling, even temporarily, could make re-commencing operations unfeasible.[184]

---

180 Between 1991 and 1997 the IWC estimated the population of Southern Ocean minke whales to be approximately 268, 000. International Whaling Commission, *Report of the Scientific Committee* (IWC/53/4, 2001) 36. JARPA took 850 minke whales in its 2005/2006 expedition, or approximately 0.003% of the estimated population.

181 The Faroe Islands engage in an annual driving hunt of approximately 850 long-finned pilot whales and have done so for over 400 years. *Whales and Whaling in the Faroe Islands*, Department of Foreign Affairs, Office of the Prime Minister of the Faroe Islands <http://www.whaling.fo/index.htm> 5 November 2006.

182 Catalinac and Chan, above n 55, 146.

183 Friedheim, above n 49, 359-60.

184 Stroud, above n 14, 70.

It is more likely that Japan would pursue the second option; joining or creating an alternative regime. Japan has considered forming a regional organisation with other North Pacific states, such as South Korea, China and the Russian Federation, as an alternative to the IWC.[185] Such a development would be of serious concern for the anti-whaling movement due to the market size and harvesting capacity of these states.[186] If Japan chose to leave the IWC and join this new organisation then other pro-whaling states, such as Norway and Iceland, may follow.[187] Once the IWC ceases to regulate the major whaling states its legitimacy as the 'appropriate organisation' under Article 65 of UNCLOS will be substantially undermined.[188]

This analysis demonstrates that forcing the JARPA issue to a confrontation on legal grounds is not a strategically sound idea for the anti-whaling movement. The outcome of such a confrontation is uncertain and the consequences flowing from the decision, whether it is for or against JARPA, or in the nature of a compromise, run counter to the long term interests of the anti-whaling coalition. The following section suggests an approach that may be more effective in achieving the goals of the anti-whaling coalition than pursuing a solely litigious strategy.

PART VII – 'ISOSTATIC PRESSURE' – A MULTI-FACETED APPROACH

If direct legal confrontation with Japan is not in the best interests of the anti-whaling states, then what approach should be pursued? In Part IV it was shown that the whaling debate incorporates legal, political, economic, socio-cultural and environmental dimensions. Pursuing an adjudicated resolution, or acting solely through a treaty, compartmentalises the dispute and isolates it from its context.[189] As Dixon notes: '[i]t is a fallacy to regard international law as the only controller of state conduct'[190] and a resolution attained solely by reference to the law will not reflect the complexity of the interlinking arguments nor the dynamic relationships of power and influence surrounding the issue. Any solution which does not engage with all levels of the issue will not be effective in the long term.

This article suggests that by utilising a wide range of economic, political, legal and socio-cultural strategies, the anti-whaling states can exert a form of 'isostatic pressure' on Japan. This approach requires anti-whaling states to apply uniform and incrementally increasing pressure on all aspects of the whaling issue simultaneously from a number of directions. An all or nothing linear attack, relying solely upon international adjudication, may result in a legal ruling that is substantially out of step with socio-cultural values, scientific understanding or political realities. By

---

185 Caron, above n 61, 173-4, see also Lino and Goodman, above n 84, 31.

186 See Simmonds and Hutchinson, above n 14, 45; also Gillespie, above n 36, 326-30.

187 Knauss, above n 11, 83.

188 Howard Scott Schiffman, 'The Protection of Whales in International law: A Perspective for the Next Century' (1996) 22 *Brooklyn Journal of International Law* 303, 333.

189 See Birnie and Boyle, above n 48, 220-4 and 232.

190 Martin Dixon, 'The Nature of International Law and the International System' in *Textbook on International Law* (3rd ed, 1996) 252.

contrast an isostatic approach, although requiring significant political will, aims to isolate and restrain the target from expanding, while at the same time cutting away its supporting foundations. This strategy will bring about permanent change as opposed to a short-lived strategic legal victory.

This section will outline some examples of the many strategies available to anti-whaling states to pressure Japan into abandoning its lethal scientific whale research. The examples will be drawn from legal, political, scientific, economic and socio-cultural/activist strategies to give a sense of the breadth of focus required for an isostatic approach.

A *Legal Strategies*

Given Japan's significant consumption of seafood, their market for marine produce represents an area of significant leverage. This leverage may be exerted in one of two ways: by excluding access to nationally controlled fisheries (trade countermeasures); or by restricting imports and exports to, or from, that state (trade sanctions). These options must be utilised with care as they potentially violate the rules of the GATT, which regulate the use of trade as a foreign policy tool. Most pro and anti-whaling states are parties to GATT.[191]

Some anti-whaling states control extensive fisheries, many of which are either accessed by Japanese fleets or ultimately traded to the Japanese market.[192] Restricting access to these resources is technically within the rights of coastal states and such measures can provide significant bargaining power with a maritime state such as Japan.[193] However, the GATT rule of 'Most Favoured Nation' prohibits contracting parties from discriminating against other contracting parties through trade measures.[194] Since the Uruguay Round in 1994, some exceptions have been added to GATT. Notably, Article XX (g) allows parties to adopt measures designed to conserve exhaustible natural resources.[195] Although Article XX (g) would seem to allow unilateral trade measures designed to enforce compliance with IWC regulations, previous GATT dispute resolution panels have interpreted this provision quite narrowly.[196] While these decisions are not binding upon subsequent

---

191 Participation in GATT and the World Trade Organisation stood at 149 members as of Decmber 11 2005. Members include Norway, Japan, Mexico, Australia and the United States amongst others. World Trade Organisation**,** ***Members and Observers***, World Trade Organisation Website <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> 5 November 2006.

192 Such as Australia, Brazil, Chile, Mexico, South Africa and the United States.

193 As was demonstrated by the US threatened use of the Pelly Amendment. See Charnovitz, above n 97.

194 GATT, above n 99, Arts I, XI and XIII.

195 Provided that these measures do not discriminate between parties engaged in the offending conduct or constitute a disguised restriction on international trade: GATT, above n 99, Art XX.

196 See for example the WTO Appellate Body Report, United States – Standards for Reformulated and Conventional Gasoline (1996) 35 ILM 603; and the WTO Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products (1999) 38 ILM121.

dispute panels, considerable uncertainty persists as to whether any course of action involving trade sanctions or countermeasures would comply with GATT rules.[197]

If the GATT regulations can be successfully navigated, the use of trade to exert pressure on Japan could be highly effective.[198] The fact that many anti-whaling states may prove unwilling to jeopardise trade relationships with Japan could be mitigated by acting multilaterally. A large coalition of concerned states acting in unison would disperse retaliatory measures and pre-empt accusations of arbitrary behaviour.

In addition, states have the sovereign right to control access to their ports.[199] The majority of states in the southern hemisphere, and all of those close to the Antarctic, are firmly in the anti-whaling camp.[200] This situation suggests the possibility of making scientific whaling more difficult and costly by closing ports and re-fuelling stations to the JARPA fleet. This measure would need to be undertaken multilaterally in order to be effective. One weakness of this strategy is the fact that many of the Pacific island states are aligned with the pro-whaling faction and some could perhaps provide alternative ports for the Japanese fleet. However, utilising alternative ports would still involve additional cost and delay for JARPA and hence the strategy remains a valid option.

B *Political Strategies*

The anti-whaling states have a number of political and diplomatic strategies available to them in order to curtail JARPA. Maintaining an anti-whaling majority within the IWC should be prioritised as this allows anti-whaling states to continue a holding pattern that blocks pro-whaling initiatives and safeguards the moratorium. In addition, every effort should be made to try and enlist pro-whaling allies into the anti-whaling coalition. Primary targets for this strategy should be Russia, China and South Korea. Bringing these states to the anti-whaling side would pre-empt the creation of the rival regional whaling organisation touted by Japan.[201]

Efforts should also be made to widen the circle of anti-whaling states outside of the IWC, particularly by enlisting developing states. Developing states have unique perspectives regarding natural resource management generally and the whaling issue in particular. These perspectives are often not shared by developed states such as Australia or Japan.[202] By incorporating the arguments of developing states, the

---

197 Charnovitz, above n 97, 796.

198 Charnovitz, above n 97, n 757-8 that although 'conventional wisdom' holds that trade countermeasures are not effective at enforcing environmental obligations, there is little empirical evidence to support this view. He then goes on to find (773) that US threats of trade countermeasures under the Pelly amendment (see above n 97) have had a 58% success rate.

199 See Birnie and Boyle, above n 48, 677-9.

200 For instance the signatories to the Buenos Aires declaration, above n 34.

201 See Lino and Goodman, above n 84.

202 See IWC, above n 35.

dispute will be broadened to include more diverse perspectives. Additionally, allegations of cultural imperialism will be mitigated.

One aspect of IWC operations which seems to have been ignored, to the detriment of the anti-whaling movement, is the issue of funding. In order to retain its position as the competent cetacean regulation authority under UNCLOS, the IWC must be active in its role. However, as no commercial quotas have been set during the moratorium, the IWC must focus on other aspects of cetacean management in order to justify its status. Although numerous areas of study have been suggested, funding for the IWC has been a fraction of what is required to effectively address these issues.[203] Significant funding increases are required if the IWC is to retain its competence under UNCLOS.

One strategy that has previously been rejected by the anti-whaling majority of the IWC involves issuing aboriginal whaling quotas to Japan. Between 1986 and 1999 Japan attempted to gain an aboriginal whaling quota for its coastal communities engaged in small type coastal whaling, but was refused by the IWC.[204] It is possible that the anti-whaling majority erred in refusing this quota for two reasons.

First, the rejection of Japan's proposal could not be justified given the aboriginal whaling quotas which had been issued at that time.[205] Second, in refusing the Japanese small type quota, the anti-whaling states denied themselves an immensely valuable tactical opportunity. A strong argument advanced by pro-whaling states is that anti-whaling states are attempting to force their cultural ideals upon other states. Neutralising the cultural imperialism argument would force Japan to rely

---

203 Burns, above n 79, 349, notes that the IWC allocated only US$200 000 to address the impacts of eight major environmental impacts upon cetaceans: 50th Meeting of the International Whaling Commission, *Resolution on Environmental Change and Cetaceans,* IWC Resolution 1998-6 (1986).

204 Report of the Forty-First Meeting of the International Commission on Whaling 19, 14, Office of the Commission (1989).

205 Between 1990 and 1992 the IWC rejected the pro-whaling proposal for the formation of a separate category of whaling known as Small Type Coastal Whaling (STCW). This proposal would have seen limited resumption of minke whale harvesting from an estimated population of 25,000. Prior to this, aboriginal quotas for bowhead whales were issued to the Alaskan Inuit for up to 32 whales landed and 79 whales struck but lost (1977). These quotas came from a population of as low as 600 whales. Although quotas have been somewhat diminished, efficiency has increased and the whale populations are slowly recovering, the bowhead whale is still considered one of the most endangered whales in the world. See Alexander Gillespie, 'Aboriginal Subsistence Whaling: A Critique of the Inter-Relationship between International Law and the International Whaling Commission' (2001) 12 *Colorado Journal of International Environmental Law and Policy* 77, 129-33. In addition it was noted by the IWC that 'community-based whaling in Japan [had] many characteristics in common with ... aboriginal/subsistence whaling'. Report of the Forty-Fifth Meeting of the International Commission on Whaling 52, 3, Office of the Commission (1993). Kalland and Moeran, above n 4, provide a powerful exposition of the fundamental role played by community based whaling in rural Japanese villages. Together these facts strongly suggest that the IWC's refusal to designate small type coastal whaling as a cultural exemption from the moratorium may have been based more on politics than an objective assessment of the situation.

solely on economic, legal and scientific justifications.[206] An argument based upon a state's right to an unnecessary luxury lacks the moral appeal of an argument based upon notions of aboriginal autonomy or cultural diversity.

C *Scientific Strategies*

As mentioned in Part IV, scientific justifications for the feasibility of limited commercial whaling are becoming increasingly difficult to refute.[207] Should a return to commercial whaling become inevitable then it will be important to ensure that the RMS, which guides management decisions, has the proper safeguards in place. Anti-whaling states must continue to insist that stringent controls on the permeability of markets, the independent observer scheme, DNA testing of meat and the procedures for identifying target species, are fully confirmed and implemented prior to the issuing of commercial quotas. This will ideally prevent the excesses of previous years from being repeated should commercial whaling be reinitiated.[208]

Another scientific tactic, which is currently being pursued by Australia, is to demonstrate that non-lethal research can generate the same data as produced by JARPA. Australian researchers have gathered data on many biological parameters by analysing small quantities of whale DNA and faecal matter.[209] Although this strategy alone will not bring about the demise of JARPA, it will weaken the justifications for its continued operation. Should the matter ever come to a legal confrontation, proof that the JARPA was unnecessary could strengthen an abuse of right argument.

An additional strategy employed by the anti-whaling faction has been to broaden the focus of the IWC. Anti-whaling states have expanded the range of matters considered by the IWC to include environmental factors, (including global warming) and anthropogenic factors contributing to mortality.[210] Proposals have also been advanced to try and incorporate the management of small cetacean species, not traditionally the object of large scale commercial operations, into the scope of the IWC.[211] These proposals have occupied much of the debating time of IWC meetings, which may otherwise have been brought to bear on the resumption

---

206 Caron, above n 61, 174.

207 Caron, above n 61, 174..

208 See generally Burns, above n 81.

209 Department of Environment and Heritage, Commonwealth of Australia, *New Australian Research Shows Japan's Scientific Whaling is a Sham,* (Press Release No C052/06 28 March 2006) <http://www.deh.gov.au/minister/env/2006/mr28mar206.html > 5 November 2006.

210 See International Whaling Commission, *The Berlin Initiative on Strengthening the Conservation Agenda of the International Whaling Commission* (IWC/55/4 Rev, 2003) herein after the Berlin Initiative, available at http://www.iwcoffice.org/Resolutions2003/ Resolution%202003.htm in William C Burns, 'The Berlin Initiative on Strengthening the Conservation Agenda of the International Whaling Commission: Toward a New Era for Cetaceans?' (2004) 13 *Review of European Community and International Environmental Law* 72, 83.

211 The Berlin Initiative, above n 210.

of commercial whaling. Although the legitimacy of incorporating some of these areas of focus within IWC operations is questionable, the strategy has merit from an anti-whaling perspective.

D *Economic Strategies*

Perhaps the most powerful weapon available to the anti-whaling states is the whale watching industry. The benefits of this industry are legion. First, whale watching often benefits exactly the communities that suffer most when whaling operations cease.[212] These communities are usually the most vociferous proponents of whaling and so providing them with an economic substitute should be an anti-whaling priority. Second, the whale watching industry is decentralised and labour intensive, as tourists require accommodation, food, guides and boat/car hire. Therefore, whale watching creates more jobs and delivers a more equitable distribution of revenue than is possible from commercial whaling operations.[213] Third, with encouragement, the whale watching industry can generate a powerful anti-whaling constituency wielding cultural, economic and political influence in the host state. Representatives of this industry will likely be active lobbyists, not only on a domestic scale, but also, as the industry matures, at the international level as the industry matures. This support will be invaluable to the anti-whaling movement, particularly if it arises from within pro-whaling states, and should therefore be encouraged at all costs.[214]

E *Activist Strategies*

NGOs are unique organisations that have played a pivotal role in the whaling debate. Whether interfering with the whale harvesting operations,[215] broadcasting gruesome footage of the slaughter and flensing process, or organising consumer boycotts,[216] anti-whaling NGOs have demonstrated that they are an integral component of the anti-whaling movement. These organisations have the ability to marshal funding, stoke the fires of political will and develop anti-whaling support in ways that complement the efforts of anti-whaling governments.[217] It is clear that NGOs must continue to play a critical role in the whaling debate if the anti-whaling states wish to succeed in their objectives.

---

212 See generally Hoyt, above n 74.

213 See generally Hoyt, above n 74.

214 For a discussion of the potential to bring non-consumptive uses of cetaceans within the formal scope of the IWC see Patricia Birnie (ed), *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching* (1985) vol II, 656-60.

215 For example see 'Look up, Whale Warriors - The Air Attack is Coming', *Sydney Morning Herald*, (Sydney) 10 January 2006.

216 For a good discussion on the potential power of consumer preference see David J Ross, 'Making GATT Dolphin-Safe: Trade and the Environment' (1992) 2 *Duke Journal of Comparative and International Law* 345, 364-5.

217 See Birnie and Boyle, above n 48, 216-17; Andresen, above n 15, 439-40.

The strategies suggested above represent a small sample of the many legal, political, economic and socio-cultural options that are available to the anti-whaling states. Each action operates in multiple dimensions and is more effective when complemented by other actions. For example: developing the whale-watching industry provides a viable alternative to whale consumption and adds an economic justification to the anti-whaling position. At the same time, it creates a personal connection between people and whales, thus fostering an anti-whaling community. This community can then become a constituency that will lobby for anti-whaling political action. Additionally, developing states can use the industry to raise issues of fair access to the resources of the global commons under international law. Thus the strategy of promoting the whale-watching industry generates economic, political, socio-cultural and legal pressure on pro-whaling states.

When this strategy is supplemented by other activities that highlight the unnecessary and economically unfeasible nature of whaling; cut off legal and political support for whaling; dismantle the scientific basis for whaling; and offer lucrative alternatives to whaling, anti-whaling states will stand a far better chance of stopping scientific whaling and precluding a return to commercial whaling than they would through international litigation. Implementing a broad range of strategies with the aim of exerting isostatic pressure constitutes a more holistic and effective approach to the issue than is possible through a purely legal challenge.

PART VIII CONCLUSION

This article has pursued two objectives: first, it has discussed the proposal to resolve the whaling controversy through international litigation and given an exposition of the various drawbacks of this strategy in light of the complexity of the whaling issue. It has demonstrated that, regardless of the outcome, a legal confrontation over JARPA will likely have deleterious consequences for the anti-whaling movement. Therefore the anti-whaling states would be well advised to find an alternative strategy to international litigation if they wish to further their objectives. Accordingly, the second objective of this article has been to outline an alternative strategy that could more effectively achieve the goals of the anti-whaling movement.

Anti-whaling states should adopt a strategy of isostatic pressure, based upon a liberal international relations interpretation of the scientific whaling issue. This strategy would involve a multifaceted approach predicated on a broad spectrum of political, economic, socio-cultural and legal strategies at both the state and the non-state level. This approach should be focussed on blocking the resumption of commercial whaling, providing alternatives to the consumptive use of cetaceans and bringing about culture change by developing powerful domestic anti-whaling constituencies within pro-whaling states.

By pursuing this strategy, anti-whaling states may exert enough pressure upon Japan for it to abandon JARPA, but not so much as to force the IWC to a crisis

point that could result in the creation of an alternative management regime. Ultimately, anti-whaling states must remember that the number of whales taken by JARPA is relatively small, whereas the potential impacts of commercial whaling are enormous. Accordingly, the anti-whaling movement must exercise the patience, fortitude and political will necessary to bring about cultural change, rather than hastily committing to litigious tactics.