CHRIS WOLD*

Japan's Resumption of Commercial Whaling and Its Duty to Cooperate with the International Whaling Commission

* Professor of Law and of Counsel, International Environmental Law Project, Lewis & Clark Law School; wold@lclark.edu. The author thanks Erica Lyman, IELP Director, for reviewing an earlier draft of this Article.

INTRODUCTION

On July 1, 2019, Japan resumed commercial whaling after withdrawing from the International Convention for the Regulation of Whaling (ICRW)[1] and the International Whaling Commission (IWC).[2] In announcing its withdrawal from the ICRW and IWC, Japan stated that it would allow commercial whaling within its

1 International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72 (entered into force Nov. 10, 1948) [hereinafter ICRW]. The Schedule is an integral part of the ICRW. *Id.* art. I(1). The Schedule was last amended at the 67th Annual Meeting of the International Whaling Commission in September 2018. *See id.* (*amended by* the Commission at the 67th Meeting (Sept. 2018) [hereinafter Schedule]).

2 The ICRW establishes the Commission in Article III. ICRW, *supra* note 1, art. III. The ICRW allows contracting governments to withdraw provided that they follow the procedural rules for doing so. The ICRW provides as follows:

> Any Contracting Government may withdraw from this Convention on June thirtieth of any year by giving notice on or before January first of the same year to the depositary Government, which upon receipt of such a notice shall at once communicate it to the other Contracting Governments. Any other Contracting Government may, in like manner, within one month of the receipt of a copy of such a notice from the depositary Government, give notice of withdrawal, so that the Convention shall cease to be in force on June thirtieth of the same year with respect to the Government giving such notice of withdrawal.

Id. art. XI (dates amended to reflect United States conventions). Japan provided its notice within the required timeframe, with its withdrawal taking effect on June 30, 2019. Letter from Rebecca Lent, IWC Secretariat, Withdrawal of Japan from the International Convention for the Regulation of Whaling, WC.CCG.1348 (Jan. 14, 2019), https://archive.iwc.int/pages/view.php?ref=7913&k= [https://perma.cc/P48M-M9Q9].

territorial seas and exclusive economic zones.[3] As a consequence, Japan would no longer authorize whaling in high seas areas of the Southern Ocean or the North Pacific. Japan further declared that it would allow the catch of minke, sei, and Bryde's whales.[4] In fact, Japan's fleet quickly caught 150 Bryde's whales and allocated another thirty-seven Bryde's whales to its self-allocated quota,[5] as well as an additional minke whale.[6]

Although Japan has withdrawn from the ICRW and IWC, it is still bound by customary international law and treaties, including the U.N. Convention on the Law of the Sea (UNCLOS),[7] to which it is a party.[8] In particular, Japan must implement its duty to cooperate, an international obligation found in both customary international law and UNCLOS.[9] Customary international law also includes a duty to conduct a transboundary environmental impact assessment (EIA)[10]

---

3 *Statement by Chief Cabinet Secretariat*, MINISTRY FOREIGN AFF. JAPAN (Dec. 26, 2018), https://www.mofa.go.jp/ecm/fsh/page4e_000969.html [https://perma.cc/4ZM7-W64B].

4 *See* Mari Yamaguchi, *Japan to Resume Commercial Whaling, but Not in Antarctic*, SEATTLE TIMES (Dec. 25, 2018, 6:45 PM), https://www.seattletimes.com/business/japan-says-it-will-leave-iwc-to-resume-commercial-whaling [https://perma.cc/RV7R-4BDD]; *Japan to Restart Commercial Whale Hunts in 2019*, VOICE AM. (Dec. 26, 2018), https://learningenglish.voanews.com/a/japan-to-restart-commercial-whale-hunts-in-2019/4717101.html [https://perma.cc/YYK3-UZPL]; Jiji Kyodo, *Japan's Commercial Whaling to Start in July for the First Time in 31 Years*, JAPAN TIMES (Jan. 25, 2019), https://www.japantimes.co.jp/news/2019/01/25/national/japans-commercial-whaling-start-july-first-time-31-years/#.XO1vMnt7mJQ [https://perma.cc/6JEH-7K6K] ("A convoy of five whaling ships, including the No. 7 Katsu Maru, which belongs to the Taiji cooperative, will depart on July 1 from Kushiro Port in Hokkaido or Hachinohe Port in Aomori Prefecture . . . .").

5 Regarding Allocation of Supplementary Quotas, Japan Fisheries Agency, http://www.jfa.maff.go.jp/e/index.html [https://perma.cc/27PD-FUZW] (unofficial translation on file with author) (last visited Mar. 13, 2020).

6 *Id.*

7 United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S 3, U.N. Doc. A/CONF.62/122 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

8 Japan became a party to UNCLOS on June 20, 1996. *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements*, U.N. OCEANS & L. SEA, https://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm [https://perma.cc/44HH-EGSY] (last updated Mar. 9, 2020).

9 *See infra* Section II.A.

10 A transboundary environmental impact assessment (EIA) is a comprehensive report analyzing the environmental impacts of a proposed project prior to conducting any activity that may adversely affect the environment, including proposed actions to mitigate those impacts. *See* U.N. ECON. COMM'N FOR EUR., BENEFITS AND COSTS OF TRANSBOUNDARY EIA 1 (2007), https://www.unece.org/fileadmin/DAM/env/eia/documents/pamphlets/Pamphlet%20-%20Benefits%20of%20transboundary%20EIA.pdf [https://perma.cc/U23H-SJ6Z].

prior to conducting any activity that may adversely affect the territory of another state or areas beyond national jurisdiction.[11] Thus, although Japan has resumed commercial whaling after withdrawing from the ICRW, it is still bound by the duty to cooperate and, because it allows hunting of whales shared with other states, it is required to prepare a transboundary EIA.[12]

To fulfill its duty to cooperate, Japan must engage meaningfully with the IWC in several important ways. The International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), and other international tribunals have all declared that the duty to cooperate, whether as customary international law or as a fundamental principle of UNCLOS, requires states to give "due regard" to the rights of other states.[13] As described in Part II, the ICJ and international tribunals have found that the duty to cooperate requires information exchange, consultation, notification, and preparation of an EIA. These elements do not necessarily represent the full extent of a state's duty to cooperate. The specific elements of the duty to cooperate depend on the nature of the rights held by other states.

Moreover, Japan must cooperate through the IWC because UNCLOS requires parties to cooperate through the "appropriate international organizations" and, as Part III concludes, the IWC is the appropriate international organization for the conservation and management of whales. The IWC is the "appropriate international organization" regardless of whether Japan whales in its exclusive economic zone or the high seas and regardless of the presence of any other organization because the IWC has a global mandate to conserve, manage, and study whales. Japan has actively embraced that mandate, including with respect to the stocks that Japan now hunts for commercial purposes.

Part IV describes how Japan must work through the IWC in order to fulfill its duty to cooperate and give "due regard" to the rights of IWC members. For example, it must participate meaningfully in meetings of the IWC and the IWC Scientific Committee, submit data on whales struck and lost as well as whales caught as bycatch, and implement the Revised Management Procedure (RMP) because the RMP represents the scientifically vetted method for calculating sustainable catch

11 *See infra* Section II.B.

12 *See infra* Section III.A.

13 *See infra* Part II.

limits.[14] Moreover, to ensure its whaling is sustainable, Japan should have prohibited whaling, at least until significant data gaps are filled in relation to the stocks that Japan hunts.

Part V explains that IWC members that are also UNCLOS parties may vindicate their rights using the binding and compulsory dispute settlement provisions of UNCLOS. This Article concludes with a list of the specific actions that Japan must undertake to fulfill its duty to cooperate with the IWC and to prepare a transboundary EIA. In addition, it concludes that Japan has violated its duty to cooperate by resuming commercial whaling without seeking the advice of the IWC's Scientific Committee, without a scientifically accepted understanding of the stock structure for sei whales, and without using the IWC's scientifically vetted algorithm for setting catch limits.[15] Japan has also violated its duty to cooperate by resuming commercial whaling without preparing a transboundary EIA.[16]

I
THE ICRW AND COMMERCIAL WHALING MORATORIUM

Since 1948, when the ICRW entered into force,[17] IWC members have pursued the ICRW's twin goals of conservation of whales and the orderly development of a whaling industry.[18] The ICRW itself establishes few rules to achieve those goals. Instead, it creates a commission, the IWC,[19] with the authority to adopt binding regulations "with respect to the conservation and utilization of whale resources."[20] These regulations may relate to a wide variety of matters, including protected and unprotected species; open and closed seasons; open and closed waters; size limits; and time, methods, and intensity of whaling.[21] These regulations, which must be adopted by a three-fourths

14 *See infra* Section IV.D.

15 *See infra* Section IV.D.

16 *See infra* Section IV.E.

17 ICRW, *supra* note 1.

18 *Id.* pmbl. A large number of articles describes the history of the ICRW, the IWC, and the regulation of whaling. *See, e.g.*, Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L. L. 21 (1991); Gare Smith, *The International Whaling Commission: An Analysis of the Past and Reflections on the Future*, 16 NAT. RESOURCES LAW. 543 (1984).

19 ICRW, *supra* note 1, art. III(1).

20 *Id.* art. V(1).

21 *Id.*

majority of IWC members,[22] are included in the ICRW's Schedule.[23] Over time, the IWC has established an array of binding regulations. These include, for example, the creation of the Southern Ocean Sanctuary,[24] catch limits,[25] size limits,[26] restrictions on the types of harpoons that can be used,[27] and rules for aboriginal subsistence whaling.[28] Paragraph 10 of the Schedule classifies whale stocks into three categories and sets quotas based on the maximum sustained yield (MSY) target for that category.[29]

Despite these binding regulations, the IWC did little to arrest the continuing decline of many whale populations; by the early 1970s, "stocks of Antarctic whales were so badly depleted that, assuming a total and effective ban on whaling, it would take fifteen years [for] fin whales to recover to the optimum and fifty years for blue whales."[30] In the early 1970s, the United States listed eight great whale species as "endangered" under the U.S. Endangered Species Act.[31] At the international level, the 1972 U.N. Conference on the Human Environment unanimously recommended a ten-year moratorium on commercial whaling.[32]

---

22 *Id.* art. III(2).

23 Schedule, *supra* note 1.

24 *Id.* ¶ 7(b) (designating coordinates for the perimeter of the "Southern Ocean Sanctuary").

25 *Id.* ¶ 10(e) (setting the catch limits for commercial purposes to zero).

26 *Id.* ¶¶ 15, 18 (establishing size limits that protect smaller, younger whales for several species).

27 *Id.* ¶ 6 (forbidding use of the "cold grenade harpoon" for many commercial whaling purposes).

28 *Id.* ¶ 13 (creating standards for ASW whaling based on aboriginal needs and maximum sustainable yields).

29 *Id.* ¶¶ 10(a)–(c) (outlining the following categories: Sustained Management Stock, Initial Management Stock, and Protection Stock).

30 D'Amato & Chopra, *supra* note 18, at 12.

31 16 U.S.C.A. §§ 1531–1544 (Westlaw through Pub. L. No. 116-91); *see also* 50 C.F.R. §§ 17.11, 17.12 (2019) (providing the lists of endangered and threatened species). The lists show that the blue whale (*Balaenoptera musculus*), fin whale (*B. physalus*), bowhead whale (*Balaena mysticus*), gray whale (*Eschrichtius robustus*), humpback whale (*Megaptera novaengliae*), North Atlantic right whale (*Eubalaena glacialis*), North Pacific right whale (*E. japonica*), sei whale (*B. borealis*), southern right whale (*E. australis*), and sperm whale (*Physter catodon*) were listed as endangered in 1970. The National Marine Fisheries Service originally listed the right whale as a single species. In 2008, the National Marine Fisheries Service split the right whale into three distinct species. Endangered and Threatened Species; Endangered Status for North Pacific and North Atlantic Right Whales, 73 Fed. Reg. 12,024 (Mar. 6, 2008) (to be codified at 50 C.F.R. pt. 224).

32 U.N. Conference on the Human Environment, Report of the United Nations Conference on the Human Environment, 3, 12, U.N. Doc. A/CONF.48/14/Rev.1 (1973), https://undocs.org/pdf?symbol=en/A/CONF.48/14/Rev.1 [https://perma.cc/SBK7-29DW].

Finally recognizing the dire situation for many whale populations, the IWC adopted a moratorium on commercial whaling in 1982 to begin with the 1985–1986 pelagic whaling season and the 1986 coastal whaling season.[33] Since then, catch limits for all stocks for commercial purposes have been set to zero.[34]

Despite the moratorium, commercial whaling never ended because several IWC members opted out of the moratorium through objections[35] or reservations.[36] Japan, Norway, Peru, and the USSR, for example, lodged timely objections to the commercial whaling moratorium; thus, the moratorium did not apply to them.[37] While Norway continues to engage in commercial whaling pursuant to its objection—killing at least 432 minke whales in 2017[38]—Peru, the USSR, and Japan withdrew their objections.[39] In addition, Iceland, having failed to lodge an objection to the moratorium despite voting against the moratorium,[40] eventually ceased whaling, withdrew from the ICRW in 1992,[41] but rejoined in 2002 with a reservation.[42] The

---

33 THIRTY-THIRD REPORT OF THE INTERNATIONAL WHALING COMMISSION, INT'L WHALING COMMISSION 1, 6 (1983) [hereinafter THIRTY-THIRD REPORT].

34 Schedule, *supra* note 1, ¶ 10(e). Whaling is still permitted for "aboriginal subsistence use," provided that the provisions of the Schedule are met. *Id.* ¶ 13.

35 Under the ICRW, an amendment "shall not become effective with respect to any Government which has so objected until such date as the objection is withdrawn." ICRW, *supra* note 1, art. V(3).

36 A reservation is "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." Vienna Convention on the Law of Treaties art. 2(1)(d), May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

37 THIRTY-THIRD REPORT, *supra* note 33, para. 2; *see also* Schedule, *supra* note 1, ¶ 10(e) n.* (providing that "[t]he Governments of Japan, Norway, Peru and the Union of Soviet Socialist Republics lodged objection[s] to paragraph 10(e) [of the Schedule] within the prescribed period."); *see* ICRW, *supra* note 1, art. V(3) (describing the procedures for lodging an objection).

38 *Catches Taken: Under Objection or Under Reservation*, INT'L WHALING COMMISSION, https://iwc.int/table_objection [https://perma.cc/C3A9-SBQG] (last visited Mar. 13, 2020).

39 Schedule, *supra* note 1, ¶ 10(e) n.*.

40 Philip Shabecoff, *Commission Votes to Ban Hunting of Whales*, N.Y. TIMES (July 24, 1982), https://www.nytimes.com/1982/07/24/us/commission-votes-to-ban-hunting-of-whales.html [https://perma.cc/KFV4-NVCX] (noting that the seven IWC members in opposition were Brazil, Iceland, South Korea, Japan, Norway, Peru, and the Soviet Union).

41 *Iceland and Commercial Whaling*, INT'L WHALING COMMISSION, http://iwc.int/iceland [https://perma.cc/5H6F-G7Q7] (last visited Mar. 13, 2020).

42 Schedule, *supra* note 1, ¶ 10(e) n.* (referring to Iceland's instrument of adherence deposited on October 10, 2002, that states Iceland "adheres to the aforesaid Convention and

ICRW does not explicitly allow reservations when ratifying or acceding to the convention, but it does not preclude them.[43] As a result, many IWC members consider Iceland's reservation invalid,[44] but Iceland nevertheless resumed commercial whaling in 2006.[45]

Meanwhile, Japan continued to hunt whales pursuant to the ICRW's provision that allows an IWC member to issue "special permits" authorizing the killing of whales "for purposes of scientific research."[46] Beginning in 1987, immediately after the moratorium took effect, each year Japan took hundreds of minke whales from the Southern Ocean and hundreds more minke, Bryde's, and sei whales from the North Pacific Ocean.[47] The legal support for Japan's whaling, however, began to unravel in 2014 when the ICJ ruled that Japan's whaling in the Southern Ocean was not for "purposes of scientific research."[48] The ICJ agreed that Japan's whaling was illegal commercial whaling.[49] Japan claimed to take the ICJ's decision into account when it revised its whaling program for both the Southern Ocean and the North Pacific, but the IWC's Scientific Committee, two expert panels established by

---

Protocol with a reservation with respect to paragraph 10(e) of the Schedule attached to the Convention").

43 Vienna Convention, *supra* note 36, art. 19 ("The Vienna Convention provides:

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty;

(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

(c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.").

44 Iceland's reservation has been particularly controversial, with several IWC members lodging objections to it. Schedule, *supra* note 1, ¶ 10(e) n.* (reporting objections to Iceland's reservation by Argentina, Australia, Brazil, Chile, Finland, France, Germany, Italy, Mexico, Monaco, the Netherlands, New Zealand, Peru, San Marino, Spain, Sweden, the United Kingdom, and the United States). One reason that Iceland's reservation is so controversial is that Iceland cast the decisive vote to approve it, a decision that many regard as fundamentally flawed. *See* Chris Wold, *Implementation of Reservations Law in International Environmental Treaties: The Cases of Cuba and Iceland*, 14 COLO. J. INT'L ENVTL. L. & POL'Y 53, 91 (2003).

45 *Catches Taken: Under Objection or Under Reservation*, *supra* note 38.

46 *See* ICRW, *supra* note 1, art. VIII.

47 *Catches Taken: Special Permit*, INT'L WHALING COMMISSION, https://iwc.int/permits [https://perma.cc/K6XR-VEX4] (last visited Mar. 13, 2020).

48 Whaling in the Antarctic (Austl. v. Japan: N.Z. Intervening), Judgment, 2014 I.C.J. Rep. 226 (Mar. 31), ¶ 247(2), https://www.icj-cij.org/en/case/148/judgments [https://perma.cc/TWB5-F8SA].

49 *Id.* ¶ 247(3).

the IWC, and the IWC itself determined that Japan provided insufficient information in its whaling plans to assess them.[50]

Moreover, the Standing Committee of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[51] concluded that Japan's movement of sei whale meat from the high seas into Japan violated CITES rules prohibiting trade in specimens of Appendix I species like the sei whale[52] for primarily commercial purposes.[53] While Japan argued that its trade was not for primarily commercial purposes because its whaling was for scientific research,[54] that position was difficult to maintain since Japan did not test any of the whale meat—some 12 metric tons[55] for each of the 90 to 100 sei whales that Japan introduced each year[56]—that entered the Japanese market.[57] According to the CITES Secretariat, "It is . . . hard

50 REPORT OF THE STANDING WORKING GROUP ON SPECIAL PERMIT PROGRAMMES, INT'L WHALING COMMISSION, IWC/67/16/Rev 3 (2018) (noting that the "the Expert Panel's capacity to conduct a full review was limited by the fact that the proponent did not submit a final, fully justified proposal."); CHAIR'S REPORT OF THE 67TH MEETING, INT'L WHALING COMMISSION, § 14 (2018).

51 Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (entered into force July 1, 1975) [hereinafter CITES].

52 Convention on International Trade in Endangered Species of Wild Fauna and Flora, app. I, II and III (entered into force Oct. 4, 2017) (placing *Balaenoptera borealis* in Appendix I), https://cites.org/sites/default/files/eng/app/2017/E-Appendices-2017-10-04.pdf [https://perma.cc/X4VW-T45M].

53 Appendix I species includes those "species threatened with extinction which are or may be affected by trade." CITES, *supra* note 51, art. II(1). The movement of specimens of CITES-listed Appendix I species from the high seas into a State is called "introduction from the sea" under CITES. *Id.* art. I(e). CITES prohibits introduction from the sea of Appendix I specimens for "primarily commercial purposes." *Id.* art. III(5)(c). The CITES Standing Committee, which addresses compliance issues, concluded that Japan's trade in sei whale meat violated Article III(5)(c) of the convention and that Japan should "take immediate remedial action to comply." Summary Record, Convention on International Trade in Endangered Species of Wild Fauna and Flora, SC70 SR, 26 (Oct. 5, 2018), https://cites.org/sites/default/files/eng/com/sc/70/exsum/E-SC70-SR.pdf [https://perma.cc/BAT6-XJHT].

54 Introduction from the Sea of Sei Whales (*Balaenoptera borealis*) by Japan, Convention on International Trade in Endangered Species of Fauna and Flora, SC70 Doc. 27.3.4, ¶ 52 (Oct. 5, 2018) [hereinafter Sei Whales].

55 JUNKO SAKUMA, REPORT ON SEI WHALE PRICES 5 (2017) (on file with author).

56 Sei Whales, *supra* note 54, ¶ 57.

57 *Id.* ¶ 43 ("[T]he Secretariat considers that inquiry is warranted with respect to meat and blubber of sei whales which are not utilized in the scientific research."). *See also* INTERNATIONAL ENVIRONMENTAL LAW PROJECT, LEGALITY OF JAPAN'S ISSUANCE OF INTRODUCTION FROM THE SEA (IFS) CERTIFICATES FOR SEI WHALE MEAT PRODUCTS (2017), https://awionline.org/sites/default/files/uploads/documents/temp/FINAL-Sei-whale-IFS-Brief.pdf [https://perma.cc/7Y6E-XFMX] (providing an independent analysis of the legality of Japan's whale meat trade).

to conceive" that Japan's trade in sei whale meat "pursues a predominantly scientific purpose, unless the Committee agrees that selling the specimens to finance scientific research constitutes a scientific purpose."[58] The Secretariat further noted that to conclude that Japan's trade was not for primarily commercial purposes would require the Standing Committee "to disregard a number of legal provisions."[59]

Shortly after this second international defeat, Japan announced that it would resume commercial whaling.[60] To avoid subsequent disputes concerning the IWC's moratorium, it would withdraw from the ICRW and IWC.[61] In order to comply with CITES, Japan would whale within its jurisdictional waters to avoid international trade in whale meat.[62] Earlier, after the ICJ's ruling in *Whaling in the Antarctic*, Japan withdrew from the jurisdiction of the ICJ.[63]

II
PRINCIPLES OF INTERNATIONAL LAW APPLICABLE TO JAPANESE WHALING

Despite these legal maneuverings, Japan cannot engage in whaling free of legal constraints because Japan is still bound by customary international law[64] and other treaties to which it is a party,[65] including UNCLOS. Two principles most relevant to Japanese whaling are the

58 Sei Whales, *supra* note 54, ¶ 62.

59 *Id.* ¶ 64.

60 *Statement by Chief Cabinet Secretariat*, *supra* note 3.

61 Letter from Rebecca Lent, *supra* note 2.

62 *Statement by Chief Cabinet Secretariat*, *supra* note 3.

63 *Declarations Recognizing the Jurisdiction of the Court as Compulsory (Japan)*, INT'L CT. JUST. (Oct. 6, 2015), https://www.icj-cij.org/en/declarations/jp [https://perma.cc/SJ6C-USM6] [hereinafter *Declarations of Japan*] (amending its declaration to preclude the International Court of Justice's jurisdiction in "any dispute arising out of, concerning, or relating to research on, or conservation, management or exploitation of, living resources of the sea.").

64 Numerous decisions of the International Court of Justice have concluded that customary international law binds States even in the absence of their consent. *See*, *e.g.*, Fisheries Jurisdiction Case (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 18); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U. S.), 1986 I.C.J. 14 (June 27); *see also* S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

65 A basic notion of international law is that States are bound only by those treaties to which they agree to be bound. Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 21 (May 28) https://www.icj-cij.org/files/case-related/12/012-19510528-ADV-01-00-EN.pdf [https://perma.cc/N7JJ-JRHS] ("It is well established that in its treaty relations a State cannot be bound without its consent."); *see also* Vienna Convention, *supra* note 36, art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

duty to cooperate and, because the whales Japan is hunting are shared with other States,[66] the duty to prepare a transboundary EIA.

A. UNCLOS and Its Duty to Cooperate to Protect Living Resources

UNCLOS establishes a comprehensive body of law to govern activities in the marine environment. It establishes rules relating to the conservation and use of living and nonliving marine resources,[67] pollution,[68] enforcement,[69] the establishment of jurisdictional boundaries,[70] navigation,[71] and compulsory dispute settlement,[72] among many other things.

Within its exclusive economic zone, an area up to 200 nautical miles from the state's coastline,[73] a coastal state has sovereign rights to exploit, conserve, and manage living resources, including fish.[74] The coastal state may set total allowable catches,[75] but must do so subject to "proper conservation and management measures" that are based on the best scientific information available[76] and are designed to produce MSY,[77] as well as ensure species are not overexploited,[78] and promote optimum utilization.[79] UNCLOS defines neither MSY nor optimum utilization but provides that MSY can be "qualified by relevant environmental and economic factors."[80]

The duty to cooperate is fundamental to UNCLOS. Even when acting within its sovereign rights in its exclusive economic zone, a coastal state must "exercis[e] its rights and perform[] its duties" while

66 *See infra* Section III.A.

67 UNCLOS, *supra* note 7, arts. 55–120.

68 *Id.* arts. 192–212.

69 *Id.* arts. 73, 213–22.

70 *Id.* arts. 2–16, 55–57, 76–78.

71 *Id.* arts. 34–44, 90.

72 *Id.* at Annexes V–VIII.

73 *Id.* art. 57.

74 *Id.* art. 56.

75 *Id.* art. 61(1).

76 *Id.* art. 61(2).

77 *Id.* art. 61(3).

78 *Id.* art. 61(2).

79 *Id.* art. 62(1).

80 The provision allows MSY to be qualified by "relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global." *Id.* art. 61(3).

giving "due regard to the rights and duties of other States."[81] Moreover, coastal and other states must cooperate for the conservation and management of straddling stocks—those species that move between the exclusive economic zones of two or more states or between an exclusive economic zone and the high seas.[82] Similarly, they must cooperate "directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization" of highly migratory species listed in Annex I of UNCLOS.[83] Annex I includes many whale and dolphin species, including those that Japan is hunting as part of its resumed commercial whaling operation.[84] They must also cooperate to conserve and manage anadromous[85] and catadromous species,[86] as well as to protect the marine environment.[87]

In addition, Articles 65 and 120 of UNCLOS specifically impose the duty to cooperate with respect to the conservation, management, and study of cetaceans (whales, dolphins, and porpoises).[88] Article 65 recognizes that coastal states individually or acting through international organizations may "prohibit, limit or regulate the exploitation of marine mammals more strictly than provided" by MSY

---

81 *Id.* art. 56(2).

82 *Id.* art. 63.

83 *Id.* art. 64(1).

84 *Id.* at Annex I (This list includes all cetaceans in the following families: Family Physeteridae; Family Balaenopteridae; Family Balaenidae; Family Eschrichtiidae; Family Monodontidae; Family Ziphiidae; and Family Delphinidae.).

85 *Id.* art. 66. Anadromous species are those, like salmon, that spawn in freshwater and spend the majority of their lives in the marine environment. *What Is an Anadromous Fish? A Catadromous Fish?*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., https://www.nefsc.noaa.gov/faq/faq-archive/fishfaq1a.html#q6 [https://perma.cc/ML72-NGVR] (last visited Mar. 13, 2020).

86 UNCLOS, *supra* note 7, art. 67. Catadromous species are those, like many eels, that live their adult lives in freshwater but spawn in the marine environment. *What Is an Anadromous Fish? A Catadromous Fish?*, *supra* note 85.

87 UNCLOS, *supra* note 7, art. 197 ("States shall co-operate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.").

88 *Id.* arts. 65, 120 (providing that states shall "work through the appropriate international organizations for [the] conservation management and study" of cetaceans); *see also* Ted L. McDorman, *Canada and Whaling: An Analysis of Article 65 of the Law of the Sea Convention*, 29 OCEAN DEV. & INT'L L. 179, 184 (1998) (calling the phrase "work through" in article 65 a "refinement" of the duty to cooperate that "provide[s] a degree of explicitness or guidance for the duty to cooperate").

or optimum utilization.[89] With regard to the duty to cooperate, Article 65 requires states to "co-operate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study."[90] While Article 65 applies to marine mammals within exclusive economic zones, Article 120 extends the duty of cooperation to marine mammals in the high seas.[91]

B. The Duty to Cooperate as a Bedrock International Law Principle

Given the complexity of managing the array of activities that occur in the marine environment, UNCLOS's embrace of the duty to cooperate is not surprising. In fact, the duty to cooperate is the "bedrock of international law."[92] As the U.N. Declaration of Principles on International Law declares

> States have the duty to co-operate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences.[93]

Due to its importance in avoiding and resolving international problems, the duty to cooperate finds expression in all spheres of international law,[94] as well as "virtually all" international environmental agreements.[95] Consequently, the ICJ, ITLOS, and other international

---

89 UNCLOS, *supra* note 7, art. 65 ("Nothing in this Part restricts the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part.").

90 *Id.*

91 *Id.* art. 120 ("Article 65 also applies to the conservation and management of marine mammals in the high seas.").

92 Patricia Wouters, *'Dynamic Cooperation' in International Law and the Shadow of State Sovereignty in the Context of Transboundary Waters*, 3 ENVTL. LIABILITY 88, 88 (2013).

93 G.A. Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, (Oct. 24, 1970).

94 *See, e.g.*, *id.* (stating that "States have the duty to cooperate with one another . . . to promote international economic stability and progress").

95 PHILIPPE SANDS ET AL., PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 215 (4th ed. 2018); *see also, e.g.*, Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, 1513 U.N.T.S. 293 (entered into force Sept. 22, 1988); Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 1522 U.N.T.S. 3, S. TREATY DOC. NO. 10, 100th Cong. 1st Sess. (1987), 26 I.L.M. 1541; 30 I.L.M. 537 (entered into force Jan.

tribunals have recognized the duty to cooperate as customary international law.[96]

1. Purpose and Nature of the Duty to Cooperate

The ICJ and international tribunals have consistently concluded that the essential purpose of the duty to cooperate is to protect the rights of states that might be affected by another state's activities. Given the importance of protecting the rights of other states, the ICJ and international tribunals have interpreted the duty to cooperate as including a number of specific components, including the duty to negotiate, consult, share information, monitor impacts of activities, and conduct environmental impact assessments.[97]

In the *Fisheries Jurisdiction Cases*, for example, which involved disputes over fisheries access, the ICJ concluded that the disputing states "ha[d] an obligation to take full account of each other's rights and of any fishery conservation measures the necessity of which is shown to exist in those waters."[98] While this dispute arose prior to the adoption of UNCLOS, it did occur during negotiations of a new Law of the Sea regime.[99] In that context, the ICJ noted that "the former

---

1, 1989), https://www.ozone.unep.org/treaties/montreal-protocol [https://perma.cc/3C37-YK6M]; Stockholm Declaration of the United Conference on the Human Environment, June 16, 1972, 11 I.L.M. 1416, Principle 24 (1972), http://www.un-documents.net/unchedec.htm [https://perma.cc/LQV7-6DFC] [hereinafter Stockholm Declaration]; Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/26 (vol. I), June 14, 1992, *reprinted in* 31 I.L.M. 874 (1992), https://cil.nus.edu.sg/databasecil/1992-rio-declaration-on-environment-and-development [hereinafter Rio Declaration]; CITES, *supra* note 51, pmbl. ("Recognizing . . . that international co-operation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade . . . ."); The Convention on Biological Diversity (CBD) provides that the conservation of biological diversity is a common concern. Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79 (1992) (entered into force Dec. 29, 1993), available at https://www.cbd.int/convention/text/ [https://perma.cc/L9DB-N67P].

96 *See, e.g.*, Lac Lanoux Arbitration (Fr. v. Spain) 12 R.I.A.A. 281, 296 (Perm. Ct. Arb. 1957); Gabčíkovo-Nagymaros Project, Judgment, 1997 I.C.J. Rep. 7, at 20 (Sept. 25) ("Only by international co-operation could action be taken to alleviate these problems."); SANDS ET AL., *supra* note 95.

97 As one international scholar succinctly states, the duty to cooperate "has . . . been translated into more specific commitments," including environmental impact assessment, information exchange, consultation, and notification. SANDS ET AL., *supra* note 95, at 215–16.

98 Fisheries Jurisdiction (U.K. v. Ice.), Merits, 1974 I.C.J. Rep. 3, ¶ 72 (July 25); *see also* Fisheries Jurisdiction (Ger. v. Ice.), Merits, 1974 I.C.J. Reports 175, ¶ 64 (July 25).

99 The *Fisheries Jurisdiction* cases took place during the early 1970s, with the I.C.J.'s opinion published in 1974. Meanwhile, the UNCLOS negotiations began in 1973 and ended in 1982. *The United Nations Convention on the Law of the Sea – A Historical Perspective*

laissez-faire treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all."[100] Consequently, the disputing states were required to share information and take into account relevant international agreements.[101]

Moreover, the ICJ explained that states undertaking an activity have a duty to negotiate and consult in good faith.[102] The duty to consult and negotiate "flows from the very nature of the respective rights of the Parties" and "negotiations are required in order to define or delimit the extent of those rights . . . ."[103] The ICJ concluded that the duty to consult and negotiate "corresponds to the Principles and provisions of the Charter of the United Nations concerning peaceful settlement of disputes."[104]

Tribunals have reached similar conclusions when interpreting UNCLOS. In the *Chagos* arbitration,[105] the tribunal reviewed a number of UNCLOS provisions relating to sovereignty and sovereign rights—Article 2(3) on the territorial sea, Article 34(2) on international straits, Article 56(2) on the exclusive economic zone, Article 78(2) on the continental shelf, and Article 87(2) on the high seas.[106] The tribunal noted that all of these provisions require states to exercise their rights under the Convention "subject to, or with regard to, the rights and duties of other States or rules of international law beyond the Convention itself."[107] It further stated that giving "due regard" to the

---

(1998), U.N. OCEANS & L. SEA, https://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm [https://perma.cc/7VYY-9E5P] (last visited Mar. 13, 2020).

100 Fisheries Jurisdiction (U.K. v. Ice.), Merits, 1974 I.C.J. Rep. 3, ¶ 72 (July 25); *accord* Fisheries Jurisdiction (Ger. v. Ice.), Merits, 1974 I.C.J. Rep. 175, ¶ 64 (July 25).

101 Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. Rep. 3; *accord* Fisheries Jurisdiction (Ger. v. Ice.), 1974 I.C.J. Rep. 175.

102 Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. Rep. 3, ¶¶ 73–75; *accord* Fisheries Jurisdiction (Ger. v. Ice.), 1974 I.C.J. Rep. 175, ¶ 65.

103 Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. Rep. 3, ¶¶ 74, 75; *accord* Fisheries Jurisdiction (Ger. v. Ice.), 1974 I.C.J. Rep. 175, ¶¶ 66, 67.

104 Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. Rep. 3, ¶ 75; *accord* Fisheries Jurisdiction (Ger. v. Ice.), 1974 I.C.J. Rep. 175, ¶ 67; *accord* North Sea Continental Shelf (Ger. v. Den. / Ger. v. Neth.), 1969 I.C.J. Rep. 3, ¶ 86 (Feb. 20) (stating that the obligation to consult and negotiate "constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes").

105 Chagos Arbitration, Mauritius v. U.K., 2011-03 (Perm. Ct. Arb. 2015), https://pca-cpa.org/en/cases/11/ [https://perma.cc/MP22-VRMS].

106 *Id.* ¶ 503.

107 *Id.*

rights of other states should be interpreted based on "the circumstances and by the nature of those rights."[108] The tribunal declined to find in this formulation "any universal rule of conduct" but stated that such a rule would "depend upon the nature of the rights held by [the affected states], their importance, the extent of anticipated impairment, the nature and importance of the activities contemplated by the [project proponent], and the availability of alternative approaches."[109] These conditions would involve, "[i]n the majority of cases," "at least some consultation with the rights-holding State."[110]

Similarly, in the *MOX Plant* case, ITLOS was asked to resolve a dispute between Ireland and the United Kingdom concerning potential discharges of radioactive material into the Irish Sea from the operation of a MOX (mixed oxides) plant at Sellafield.[111] Although ITLOS did not find the discharges serious enough to require changes to the operation of the plant, it did conclude that the duty to cooperate was implicated: "The duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law and that rights arise therefrom which the Tribunal may consider appropriate to preserve under article 290 of the [UNCLOS]."[112]

As a result, it directed the two disputing parties to cooperate by entering into consultations to exchange information with regard to possible consequences for the Irish Sea arising out of the commissioning of the MOX plant, monitor risks or the effects of the operation of the MOX plant for the Irish Sea, and devise, as

---

108 *Id.* ¶ 519.

109 *Id.*

110 *Id.*; *see also id.* ¶¶ 521–522 (noting the importance of consultation).

111 MOX Plant (Ir. v. U.K.), Provisional Measures, Order, 2001 ITLOS Rep. 95 (Dec. 3).

112 *Id.* ¶ 82. In his separate opinion, Judge Rüdiger Wolfrum states that

> the obligation to cooperate is the overriding principle of international environmental law, in particular when the interests of neighbouring States are at stake. The duty to cooperate denotes an important shift in the general orientation of the international legal order. It balances the principle of sovereignty of States and thus ensures that community interests are taken into account vis-à-vis individualistic State interests. It is a matter of prudence and caution as well as in keeping with the overriding nature of the obligation to co-operate that the parties should engage therein as prescribed in paragraph 89 of the Order.

MOX Plant (Ir. v. U.K.), Separate Opinion (Wolfrum, J.), 2001 ITLOS Rep. 111, 135–36 (Dec. 3), https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/published/C10-O-3_dec_01-SO_W.pdf [https://perma.cc/4DEE-TFAA].

appropriate, measures to prevent pollution of the marine environment that might result from the operation of the MOX plant.[113]

In the *Land Reclamation* case, Malaysia challenged a land reclamation project in Singapore's territorial waters as causing environmental impacts to waters in Malaysia.[114] The tribunal concluded that insufficient cooperation had taken place and ordered the disputing parties, as a means to effectuate their duty to cooperate, to conduct an environmental assessment of the project and exchange information on the risks and effects of the project.[115] It also ordered them to "consult with a view to reaching a prompt agreement on such temporary measures" concerning land reclamation at one specific site.[116] In reflecting on the balance between sovereignty and the rights of other states, two of the judges observed that "[t]he right of a State to use marine areas and natural resources subject to its sovereignty or jurisdiction is broad but not unlimited. It is qualified by the duty to have due regard to the rights of other States and to the protection and preservation of the marine environment."[117] To protect the rights of both Malaysia and Singapore in this dispute, the duty to cooperate required "a common base of information and evaluation regarding the effects of the land reclamation project that can command the confidence of both parties" and consultation with a view to reaching a prompt agreement on such temporary measures.[118]

2. The Duty to Cooperate When Sovereign Rights Are Exercised

Significantly, the duty to cooperate exists regardless of whether a state's activities engage that state's sovereignty or sovereign rights. As the tribunal in the *Lac Lanoux* arbitration[119] concluded, territorial sovereignty "must bend before all international obligations, whatever their origin, but only before such obligations."[120] In this case, involving the use of water resources shared by France and Spain, the tribunal

113 MOX Plant, 2001 ITLOS Rep. 95, ¶ 89.

114 Land Reclamation by Singapore in and around the Straits of Johor (Malay. v. Sing.), Provisional Measures, 2003 ITLOS Rep. 10 (Oct. 8).

115 *Id.* ¶ 106(1)(a)–(b).

116 *Id.* ¶ 106(1)(c).

117 *Id.* (Hossain, J. and Oxman, J., *ad hoc* opinion), at 34.

118 *Id.*

119 Lac Lanoux Arbitration (Fr. v. Spain) 12 R.I.A.A. 281, 296 (Perm. Ct. Arb. 1957).

120 *Id.* at 301 (As written in the Lac Lanoux Arbitration statement, "La souveraineté territoriale joue à la manière d'une présomption. Elle doit fléchir devant toutes les obligations internationales, quelle qu'en soit la source, mais elle ne fléchit que devant elles.").

concluded that France's upstream activities did not violate relevant treaties; however, it also concluded that France had an independent duty to provide information to and consult with Spain and to take Spanish interests into account in planning and carrying out the project.[121]

Similarly, the arbitral tribunal in *Island of Palmas*[122] concluded that even if territorial sovereignty involves an exclusive right to execute the functions of a state, "[t]his right has as corollary a duty: the obligation to protect within the territory the rights of other States."[123] The tribunal emphasized that "[t]erritorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States."[124]

Consistent with these decisions, tribunals interpreting UNCLOS have concluded that the duty to cooperate exists regardless of where an activity occurs. For example, the tribunal in the *Land Reclamation* case reached its conclusions even though Singapore's activities took place in territorial waters.[125] In the *Chagos* arbitration, the tribunal made its conclusions while interpreting the duty to cooperate with respect to areas subject to sovereignty and exclusive jurisdiction.[126]

In *Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission* (*SRFC Advisory Opinion*), ITLOS specifically discussed the nature and scope of the duty to cooperate in the context of shared natural resources.[127] Noting that UNCLOS Article 63 for straddling stocks and Article 64 for high migratory stocks impose a duty of cooperation with appropriate organizations, ITLOS stated that the duty to cooperate requires coastal states fishing for straddling and highly migratory stocks to take measures "consistent and compatible with those taken by the appropriate regional organization . . . both

---

121 *Id.* at 315–16.

122 Island of Palmas (Neth. v. U.S.), 2 R.I.A.A. 829 (Perm. Ct. Arb. 1928).

123 *Id.* at 839; *see also* JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 204 (8th ed. 2012) (explaining that States have sovereignty over their territory; "[t]he legal competence of states and the rules for their protection depend on and assume the existence of this stable, physically identified (and normally legally delimited) base.").

124 Island of Palmas, 2 R.I.A.A. at 839.

125 Land Reclamation by Singapore in and around the Straits of Johor (Malay. v. Sing.), Provisional Measures, 2003 ITLOS Rep. 10 (Oct. 8), ¶ 2 (noting that the dispute related to reclamation activities in the Straits of Johor); *see also* UNCLOS, *supra* note 7, art. 34(2) (explaining that straits are by definition territorial waters).

126 *See* Chagos Arbitration, Mauritius v. U.K., 2011-03 (Perm. Ct. Arb. 2015), ¶ 503.

127 Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2015 ITLOS Rep. 4, ¶ 207 (Apr. 2) [hereinafter SRFC Advisory Opinion].

within and beyond the exclusive economic zones."[128] In addition, the duty to cooperate arises irrespective of a coastal state's sovereign right to exploit the natural resources of its exclusive economic zone because states other than the coastal state have "corresponding rights" in highly migratory species.[129] Moreover, the duty to give due regard to the rights of other states, even when acting within one's own exclusive economic zone, flows not only from the duty to cooperate but also the express provisions of UNCLOS Articles 56 and 58, as well as the "fundamental principle underlined in [A]rticles 192 and 193" to protect and preserve the marine environment.[130]

ITLOS further observed that the duty to cooperate under Article 64 is a "due diligence" obligation that requires the states concerned to consult with one another in good faith, pursuant to Article 300 of UNCLOS, which provides that "States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right."[131] These consultations "should be meaningful in the sense that substantial effort should be made by all States concerned, with a view to adopting effective measures necessary to coordinate and ensure the conservation and development of shared stocks."[132] To ensure that the interests of other states are not undermined, coastal states "must consult each other when setting up management measures for those shared stocks to coordinate and ensure the conservation and development of such stocks"[133] and take into account the whole range of the species.[134]

---

128 *Id.*

129 *Id.* ¶ 205.

130 *Id.* ¶ 216; *see also* UNCLOS, *supra* note 7, art. 56(2) ("In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention."); *see also id.* art. 58(3) ("In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.").

131 UNCLOS, *supra* note 7, art. 300; *see also* Whaling in the Antarctic (Austl. v. Japan: N.Z. Intervening), Judgment, 2014 I.C.J. Rep. 226 (Mar. 31), ¶ 83 (the ICJ observing that "the States parties to the ICRW have a duty to co-operate with the IWC and the Scientific Committee and thus should give due regard to recommendations calling for an assessment of the feasibility of non-lethal alternatives" to killing whales).

132 SRFC Advisory Opinion, *supra* note 127, ¶ 210.

133 *Id.* ¶ 212.

134 *See id.* ¶ 214.

ITLOS emphasized that the duty to cooperate to conserve and manage highly migratory species (as well as straddling stocks) applies to "each and every State Party concerned"[135] and that this duty applies irrespective of the right, found in Article 56, of a coastal state to exploit natural resources in its exclusive economic zone.[136] ITLOS concluded that under Article 64, parties to a regional fisheries management organization "have the right . . . to require cooperation from non-Member States whose nationals fish for [a highly migratory species] in the region, 'directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species.'"[137]

C. The Duty to Prepare a Transboundary Environmental Impact Assessment

Both the ICJ and ITLOS have concluded that activities of a state that may adversely affect the environment or resources of another state trigger the need to prepare a transboundary EIA. In *Pulp Mills*, the ICJ declared that an EIA is required for activities that "may be liable to cause transboundary harm."[138] The ICJ noted that EIA "has gained so much acceptance among States that it may now be considered a requirement under general international law . . . where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource."[139]

This case concerned the construction of pulp mills along a shared waterway, the River Uruguay, but the Court's analysis has broader application. The Court stated that

> due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.[140]

---

135 *Id.* ¶ 215.

136 *Id.* ¶ 216.

137 *Id.* ¶ 218.

138 Pulp Mills on the River Uruguay (*Pulp Mills*) (Arg. v. Uru.), 2010 I.C.J. 14, ¶ 204, (Apr. 20) https://www.icj-cij.org/files/case-related/135/135-20100420-JUD-01-00-EN.pdf [https://perma.cc/XPV9-SVBD].

139 *Id.*

140 *Id.*

The ICJ acknowledged that the EIA must be performed consistently with domestic law because international law did not prescribe the specific elements of an EIA.[141] Nonetheless, the state performing the EIA must "hav[e] regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment."[142] In the context of Japan's commercial whaling, consequently, Japan was required to prepare a transboundary EIA[143] and consult with potentially affected states and IWC members prior to whaling.[144]

Similarly, ITLOS directed Singapore to carry out an EIA when its reclamation activities in the Straits of Johor had the potential to adversely affect areas within Malaysia's territorial marine waters.[145] Whereas ITLOS placed its transboundary EIA requirement in the context of the duty to cooperate, the ICJ did not.[146] Instead, the ICJ expressly made its conclusion by finding the duty within "general international law."[147] Moreover, the Court prefaced its conclusion by recalling its advisory opinion in *Legality of the Threat or Use of Nuclear Weapons*.[148] In that opinion, the ICJ recognized that "[t]he existence of the general obligations of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment."[149] Thus, the Court

---

141 *Id.* ¶ 205.

142 *Id.*

143 *Id.*

144 *Id.* ¶ 119, 206.

145 Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, 2003 ITLOS Rep. 10 (Oct. 8), ¶ 106.

146 *Pulp Mills*, 2010 I.C.J. ¶ 204.

147 *Id.*

148 *Id.* ¶ 193 (citing Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 29 (July 8), https://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf [https://perma.cc/DGP5-PMWS]). The Court iterated this statement in Gabčíkovo-Nagymaros Project, Judgment, 1997 I.C.J. Rep. 7, at 20 (Sept. 25), ¶ 53.

149 Legality of the Threat or Use of Nuclear Weapons, *supra* note 148, ¶ 29. The formulation of the ICJ's decision is also consistent with the *Rio Declaration* and *Stockholm Declaration*, both of which put the duty in the context of harm to areas beyond national jurisdiction. Principle 2 of the Rio Declaration provides

> States have . . . the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that

placed the duty to prepare an EIA in the larger context of the duty not to cause transboundary harm and, importantly, described transboundary harm both in terms of interstate harm and harm to areas beyond national jurisdiction.

III
THE DUTY TO COOPERATE THROUGH THE IWC AS THE "APPROPRIATE INTERNATIONAL ORGANIZATION"

As various decisions of the ICJ and international tribunals make clear, the duty to cooperate requires states to give due regard to the rights and duties of states when they undertake various activities. In addition, in *SRFC Advisory Opinion*, ITLOS specifically concluded that Articles 61, 63, and 64 of UNCLOS establish a "cooperation regime" for the conservation, management, and optimum utilization of shared fisheries resources.[150] The manner in which states give due regard to the rights of other states for shared fisheries resources is through the appropriate organization.

The same conclusion holds for cetaceans. States have sovereign rights to exploit living marine resources in their exclusive economic zones under Article 56(1) of UNCLOS, but they also have corresponding duties to conserve and manage them under Article 61. Moreover, Articles 65 and 120 direct UNCLOS parties to cooperate through the "appropriate international organizations" for the conservation, management, and study of cetaceans.[151] As with Articles 63 and 64, Articles 65 and 120 establish a cooperation regime through which states give due regard to the rights of other states.[152]

The nature of Japan's duty to cooperate and the requirement to cooperate through the IWC does not change if the conservation and management of the whales that Japan hunts is considered with respect to highly migratory fish stocks under Article 64 or cetaceans under Articles 65 and 120. Articles 65 and 120 specify that, with respect to cetaceans, the duty to cooperate (1) "shall" be implemented through the appropriate international organizations and (2) applies both in the exclusive economic zone (Article 65) and the high seas (Article 120).

> activities within their jurisdiction or control do not cause damage to the environment of other States *or of areas beyond the limits of national jurisdiction*.

Rio Declaration, *supra* note 95, at Principle 2 (emphasis added); *see also* Stockholm Declaration, *supra* note 95, at Principle 21.

150 SRFC Advisory Opinion, *supra* note 127, ¶¶ 201, 203, 213.

151 UNCLOS, *supra* note 7, arts. 65, 120.

152 *See id.* arts. 63, 64, 65, 120.

These provisions expressly incorporate the duty to cooperate ("States shall cooperate") for conservation of marine mammals and specify how that cooperation must take place: Parties shall "work through" the appropriate international organizations for the conservation, management, and study of cetaceans.[153]

Similarly, Article 64 also requires parties to cooperate "directly or through appropriate international organizations" to conserve and promote the objective of optimum utilization of highly migratory species that are included in UNCLOS Annex I.[154] Annex I expressly includes many cetaceans, including the minke, sei, and Bryde's whales[155] that Japan hunts.

Most scholars assume that the inclusion of cetacean species in Annex I is a mistake originating from UNCLOS's long, complex negotiation and that Article 65 controls.[156] The extensive discussion of cetacean conservation, management, and study under Article 65 also supports the view that the inclusion of some cetaceans as "highly migratory" for purposes of Article 64 is a mistake. Despite this extensive discussion, the available negotiating texts do not show any delegate making a connection between Articles 64 and 65.[157]

---

153 *Id.* art. 65.

154 *Id.* art. 64, Annex I.

155 *Id.* Annex I (listing the following cetaceans as highly migratory: Family Physeteridae; Family Balaenopteridae; Family Balaenidae; Family Eschrichtiidae; Family Monodontidae; Family Ziphiidae; and Family Delphinidae. Sperm whales are in the family Physeteridae. The minke whale, the sei whale, the blue whale, the fin whale, the humpback whale, and Bryde's whale are in the family Balaenopteridae. The gray whale is in the family Eschrichtiidae. Right whales and bowhead whales are in the family Balaenidae.).

156 *Id.* arts. 61, 62, 64. The negotiating history does not illuminate why some cetaceans are also referenced in Article 64. Article 64 relates to highly migratory species included in Annex I of the Convention. It requires Parties to cooperate through appropriate international organizations for the conservation and optimal utilization. However, the concepts of conservation, maximum sustainable yield, and optimum utilization already apply to all living resources of the exclusive economic zone and high seas. *Id.* arts. 61, 62, 117–19. The weight of scholarship views the inclusion of some cetaceans in Annex I as highly migratory species as a mistake deriving from a complex negotiation. William T. Burke, *The Law of the Sea Convention Provisions on Conditions of Access to Fisheries Subject to National Jurisdiction*, 63 OR. L. REV. 73, 115 (1984) (stating that the inclusion of cetaceans in Article 64 represents a "technical error arising from the fact that at one time articles 64 and 65 were one article"); CAMERON S. G. JEFFERIES, MARINE MAMMAL CONSERVATION AND THE LAW OF THE SEA 183, 191 (2016). *But see* Kimberly S. Davis, *International Management of Cetaceans Under the New Law of the Sea Convention*, 3 BOS. U. INT'L L.J. 477, 500 (1985) (stating that Article 65 modifies the basic structure of Article 64 for listed cetaceans).

157 *See generally* UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY VOLUME II, 660, 662 (Myron H. Nordquist et al. eds., 1993) [hereinafter UNCLOS: A COMMENTARY]; United Nations Convention on the Law of the Sea, Mar. 11,

Even if it is not a mistake, the nature of Japan's duty to cooperate does not change. Article 64, on the one hand, and Articles 65 and 120, on the other, require cooperation through the appropriate international organizations.[158] Further, neither requires a specific management regime. Article 64 requires cooperation "with a view to . . . promoting optimum utilization," but it does not require optimum utilization.[159] Article 65 expressly provides that UNCLOS parties may prohibit, limit, or regulate marine mammals more strictly than provided by MSY and optimum utilization.[160] But Article 65, while not mandating optimum utilization, does not preclude it; nor does it require regulation stricter than MSY and optimum utilization. Articles 61 and 62, which apply to all marine living resources including cetaceans, contemplate optimum utilization and maximum sustainable yield.[161] In any event, the ICRW has the twin goals of conservation and utilization,[162] and it has been fulfilling those goals through its binding regulations, and consequently, Japan should cooperate through the IWC as the appropriate international organization to pursue those goals.

Moreover, ITLOS has already interpreted the duty to cooperate under Article 64 as requiring a party to take measures "consistent and compatible" with those adopted by the appropriate international organization.[163] As ITLOS has made clear, the nature of the duty to cooperate is a function of the rights of the respective parties.[164] Thus, even if UNCLOS grants parties sovereign rights to explore, exploit, conserve, and manage the living resources in their exclusive economic zones under Article 56, those rights are framed not only by the duty to cooperate with the appropriate international organization and the rights

---

2004, S. TREATY DOC. NO. 108-10 (2004), https://www.congress.gov/108/crpt/erpt10/CRPT-108erpt10.pdf [hereinafter UNCLOS S. TREATY] (recalling the negotiating history of Article 65). Many but not all documents forming the travaux préparatoires can be found at the following citation. *United Nations Conference on the Law of the Sea*, U.N. DIPLOMATIC CONF., https://legal.un.org/diplomaticconferences/1958_los [https://perma.cc/P2DW-6CJR] (last visited Mar. 13, 2020).

158 UNCLOS, *supra* note 7, arts. 65, 120.

159 *Id.* art. 65.

160 *Id.*

161 *Id.* arts. 61, 62.

162 ICRW, *supra* note 1, prmb., art. V.

163 SRFC Advisory Opinion, *supra* note 127, ¶ 207(iii).

164 *Id.* ¶¶ 213–216.

held by members of such organization but also by the rights held by states in shared resources, such as whales.[165]

A. The IWC Is the "Appropriate International Organization"

Without question, the IWC is the "appropriate international organization" for the conservation, management, and study of cetaceans under Article 65 or for ensuring conservation and promoting the objective of optimum utilization of highly migratory cetaceans under Article 64. Indeed, the IWC is the only organization that conserves, manages, and studies, as well as ensures the optimum utilization of, whales on a global basis.[166]

Concerning the study of cetaceans, the IWC has been engaged in long-term efforts to develop population estimates for IWC-managed species. With respect to minke, sei, and Bryde's whales in the North Pacific, as well as other species of whale, it has been engaged in long-term efforts to understand the structure of the stocks.[167] The IWC's Scientific Committee meets annually to assess the conservation status of the stocks, the ecosystem functions provided by cetaceans,[168] and many other issues of vital importance to the conservation and management of cetaceans.[169]

To fulfill its duty to conserve and manage cetaceans, the IWC meets biennially to discuss the work of the Scientific Committee and to develop new rules for the conservation and management of cetaceans.[170] It has adopted rules for the conservation and management

---

165 *Id.* ¶ 216 (providing that in exercising its rights and performing duties under this Convention in an exclusive economic zone under articles 56(2) and 58(3), the State shall "have due regard to the rights and duties" of other States and shall act in a manner compatible with the provisions of this Convention and the law of the relevant coastal State).

166 ICRW, *supra* note 1, art. I(2) (applying the ICRW "to all waters in which whaling is prosecuted by such factory ships, land stations, and whale catchers").

167 *See generally Scientific Committee Reports*, INT'L WHALING COMMISSION, https://iwc.int/reports [https://perma.cc/D3RX-RUCH] (last visited Mar. 13, 2020).

168 INT'L WHALING COMMISSION, Resolution on Advancing the Commission's Work on the Role of Cetaceans in the Ecosystem Functioning, Res. 2018-2 (Sept. 2018) https://archive.iwc.int/pages/download.php?ref=7607&size=&ext=pdf&k=&alternative=-1&usage=-1&usagecomment= [https://perma.cc/SPE9-GDJ9].

169 *See Scientific Committee Home Page*, INT'L WHALING COMMISSION, https://iwc.int/scmain [https://perma.cc/7RCN-V5GT] (last visited Mar. 13, 2020).

170 ICRW, *supra* note 1, arts. V–VI (setting out authority of the IWC); INT'L WHALING COMMISSION, Rules of Procedure and Financial Regulations, § B(1) (Sept. 2018) [hereinafter IWC, Rules of Procedure] (requiring biennial meetings after amendment by the Commission at the 67th meeting).

of whales in order to protect whales from entanglement,[171] noise,[172] and other anthropogenic threats, such as bycatch.[173]

Moreover, the IWC seeks to ensure the sustainability (or optimal utilization if the words of Article 64 of UNCLOS are used) of any whaling. The IWC has adopted binding regulations relating to factory ship operations, land station operations, and the types of harpoons that may be used.[174] It has adopted rules and catch limits for aboriginal subsistence whaling based on subsistence need and the sustainability of the catch.[175] It has adopted rules for whaling for purposes of scientific research under Article VIII of the ICRW.[176] With respect to commercial whaling, it has adopted the Revised Management Procedure (RMP), based on the advice of the Scientific Committee, to calculate sustainable catch levels of baleen whales.[177] It has established size and catch limits.[178] It has established inspection and information requirements.[179] No other international organization has a mandate to cover this range of activities concerning the conservation, management, and study of whales, as well as the regulation of whaling on a global basis. No other international organization has so comprehensively conserved, managed, and studied cetaceans.

Japan has argued that the continuation of the moratorium on commercial whaling is antagonistic to sustainable use of whale resources.[180] In fact, the inability of the Scientific Committee to provide

---

171 *See, e.g.*, INT'L WHALING COMMISSION, Resolution on Ghost Gear Entanglement Among Cetaceans, Res. 2018-3 (Sept. 2018).

172 *See, e.g.*, INT'L WHALING COMMISSION, Resolution on Anthropogenic Underwater Noise, Res. 2018-4 (Sept. 2018).

173 *See, e.g.*, *Conservation and Management*, *Bycatch*, INT'L WHALING COMMISSION, https://iwc.int/bycatch [https://perma.cc/T739-A2SU] (last visited Mar. 13, 2020) (including a Bycatch Mitigation Initiative in its work program).

174 Schedule, *supra* note 1, ¶¶ 2–8.

175 *Id.* ¶ 13.

176 INT'L WHALING COMMISSION, Resolution on Special Permits for Scientific Research, Res. 1986-2 (1986), https://archive.iwc.int/pages/download.php?ref=2061&size=&ext=pdf&k=&alternative=3171&usage=-1&usagecomment= [https://perma.cc/5N36-JF8B] (recommending that when considering a proposed special permit under Article VIII, a State party should take into account whether "the objectives of the research are not practically and scientifically feasible through non-lethal research techniques").

177 *The Revised Management Procedure—A Detailed Account*, INT'L WHALING COMMISSION, https://iwc.int/rmp2 [https://perma.cc/VLW3-M9UN] (last visited Mar. 13, 2020).

178 Schedule, *supra* note 1, ¶¶ 10, 15–18.

179 *Id.* ¶¶ 21–29.

180 THE WAY FORWARD OF THE IWC: IWC REFORM PROPOSAL IN A DRAFT RESOLUTION AND PROPOSED SCHEDULE AMENDMENT, JAPAN, INT'L WHALING

population estimates for many stocks[181] indicates that the IWC, by maintaining the moratorium, is seeking to ensure that any catch limits are sustainable in order to prevent the continuing decline of whale populations that have been decimated by commercial whaling.[182] The amount of uncertainty is particularly acute with respect to those stocks that Japan hunts, and the IWC's Scientific Committee has been trying to answer questions relating to the structure of the stocks that Japan is now hunting:

- North Pacific sei whales (*Balaenoptera borealis*) are found on the high seas as well as the waters of Canada, Russia, and the United States.[183] The species is currently undergoing a comprehensive assessment to determine, among other things, whether the population constitutes one or even five separate stocks.[184] The Scientific Committee believes that the evidence for five stocks "is weak"[185] and "agrees that the genetic and mark-recapture data currently available are consistent with a sei whales single stock in the pelagic region of the North Pacific,"[186] but the question remains unresolved. The Scientific Committee has further noted the challenges of distinguishing sei whales from Bryde's whales (*Balaenoptera brydei*).[187] In 2016, it reduced the population estimate for North Pacific sei whales due to misreporting of other species as sei whales during the

---

COMMISSION, IWC 67/08, at 4 (July 12, 2018) (proposing a draft resolution and proposed amendment to the Schedule by Japan).

181 *See Whales Population Estimates*, INT'L WHALING COMMISSION, https://iwc.int/estimate [https://perma.cc/5M9E-QZRF] (last visited Mar. 13, 2020).

182 *Whales Population Status*, INT'L WHALING COMMISSION, https://iwc.int/status [https://perma.cc/EM3C-2P8J] (last visited Mar. 13, 2020) (noting that a number of species, including sei, right, humpback, gray, and other whale species were "heavily exploited" during the commercial whaling era and their populations have not recovered); *see also* Rio Declaration, *supra* note 95, at Principle 15 (implementing the precautionary principle in the moratorium). The precautionary principle provides that "[w]here 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." *Id.*

183 REPORT OF THE SUB-COMMITTEE ON IN-DEPTH ASSESSMENTS, INT'L WHALING COMMISSION, Annex G, § 4 (2017), https://archive.iwc.int/pages/download.php?ref=6410&size=&ext=pdf&k=&alternative=3301&usage=-1&usagecomment= [https://perma.cc/7VZH-D8US].

184 REPORT OF THE 67TH MEETING OF THE SCIENTIFIC COMMITTEE, INT'L WHALING COMMISSION, IWC/67/Rep01, § 9.1.2 (May 5, 2018), https://archive.iwc.int/pages/download.php?ref=6940&size=&ext=pdf&k=&alternative=-1&usage=-1&usagecomment= [https://perma.cc/JP4T-VHTQ].

185 REPORT OF THE SCIENTIFIC COMMITTEE, INT'L WHALING COMMISSION, IWC/66/Rep01, § 10.6.1.3, (2016), https://archive.iwc.int/pages/view.php?ref=6127&k= [https://perma.cc/6YCK-MEF6]; *see also id.* § 12.1.2 (noting that research has not identified genetic heterogeneity among sei whales).

186 *Id.* § 12.1.2.

187 *Id.* § 10.6.1.2.

commercial whaling era.[188] In other words, significant uncertainty exists with regard to this stock of sei whales.

- The precise range of Bryde's whale is not known because of incomplete information relating to stock structure.[189] At a minimum, however, the stock is shared with the United States and perhaps with some Pacific Island States, such as the Federated States of Micronesia and Palau.[190]

- The IWC recognizes three stocks of minke whales in the North Pacific (*Balaenoptera acutorostrata scammoni*), two of which can be found in Japan. However, as the Scientific Committee noted in 2018, the stock structure of the North Pacific minke whale "has been a matter of controversial debate without agreement," but that analyses "consistently inferred two genetic clusters": the J-stock and the O-stock.[191] However, even at the genetic level, individual whales may be wrongly assigned to the incorrect stock.[192] The range of the "J-stock" includes the Yellow Sea, East China Sea, and Sea of Japan and, thus, the waters of Japan, China, and the Republic of Korea.[193] The second, known as the "O stock," lives in the waters of Japan, Korea, and Russia.[194] Genetic analyses indicate that the ranges of the "O" and "J" stocks overlap; the two stocks "share the same feeding ground and they are mixed in the Okhotsk Sea and Japanese coasts" but uncertainties remain. While earlier research suggested that the J-stock whales occurred within the Sea of Japan and the O-stock in the Pacific Ocean, the newer analyses present a "more complicated" picture; genetic evidence now shows that "J-stock type whales are found along the Pacific coast of Japan, and there are other indications of possible genetic differences within the Sea of Japan between the Korean coast and the Japanese coast." This report concludes that "a

---

188 *Id.*

189 *Id.* § 12.1.2.

190 *See* WESTERN NORTH PACIFIC BRYDE'S WHALE *IMPLEMENTATION*: REPORT OF THE FIRST INTERSESSIONAL WORKSHOP, J. CETACEAN RES. MGMT. 9 (SUPPL.) 407, 408 (2007).

191 REPORT OF THE 67TH MEETING OF THE SCIENTIFIC COMMITTEE, *supra* note 184, ¶ 4.5.

192 *Id.*

193 *Whales Population Status*, *supra* note 182.

194 NAOHISA KANDA ET AL., GENETIC ANALYSIS OF WESTERN NORTH PACIFIC MINKE WHALES FROM KOREA AND JAPAN BASED ON MICROSATELLITE DNA 1, SC/62/NPM11 (2010), https://www.icrwhale.org/pdf/SC-62-NPM11.pdf [https://perma.cc/J9CL-AR9V] ("In summary, we accept the previous view that main stocks inhabiting the Korean and Japanese waters were the J and O stock."); Mutsuo Goto, Mioko Taguchi & Luis A. Pastene, *Distribution and Movement of 'O' and 'J' Stock Common Minke Whales in Waters Around Japan Based on Genetic Assignment Methods*, *in* TECHNICAL REPORTS OF THE INSTITUTE OF CETACEAN RESEARCH 37 (2017), https://www.icrwhale.org/pdf/TEREP00137-43.pdf [https://perma.cc/TA4G-863D]; TAKASHI HAKAMADA, EXAMINATION OF THE EFFECTS ON WHALE STOCKS OF FUTURE JARPN II CATCHES 3, SC/J09/JR36, https://www.icrwhale.org/pdf/SC-J09-JR36.pdf [https://perma.cc/9EQG-VSRV].

> comparison between the two coasts of Japan is complicated (in part because of the lack of data and the possible mixing between 'J' and 'O' stocks in Pacific coastal waters), but it is plausible that there are different 'J-stocks' on either coast of Japan, and some evidence suggests this is the case" and that "it is plausible there is a coastal 'O-stock' on the Pacific coast of Japan that is different from the 'O-stock' in pelagic waters, and some evidence suggests this is the case."

In other words, significant questions remain unanswered, and the Scientific Committee is working to answer them. If Japan continues commercial whaling on these stocks without cooperating with the IWC, it risks undermining the work of the IWC and its Scientific Committee to conserve, manage, and study these stocks. In doing so, it poses significant risks to the rights of IWC members, particularly those that share these stocks. Because of the large data gaps for these and other species, the continuing moratorium on commercial whaling is consistent with the IWC's obligation "to provide for the proper conservation of whale stocks"[195] and their proper regulation to prevent endangerment.[196] Moreover, it is consistent with the IWC's authority to amend the Schedule for the "conservation and utilization" of whales "based on scientific findings."[197]

In addition, because the stocks that Japan hunts are shared stocks, even if Japan restricts its whaling to its territorial seas and exclusive economic zone, its whaling will affect the rights of other states in those stocks. Japan has not indicated that it would hunt other species, but the other species found in Japan's waters that Japan could possibly hunt are also shared stocks:

- The North Pacific fin whale (*Balaenoptera physalus*), which is considered a single stock or subspecies,[198] is found in Japan as well as the United States in both Hawaii and California.[199]

---

195 ICRW, *supra* note 1, pmbl.

196 *Id.*

197 *Id.* art. V(1)–(2).

198 Frederick I. Archer et al., *Mitogenomic Phylogenetics of Fin Whales (*Balaenoptera physalus spp*.): Genetic Evidence for Revision of Subspecies*, 8 PLOS ONE e63396 (2013), https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0063396 [https://perma.cc/FW4K-Z6PQ].

199 *See* Sally A. Mizroch et al., *Distribution and Movements of Fin Whales in the North Pacific Ocean*, 39 MAMMAL REV. 193 (2009) (stating that the North Pacific fin whale is found "from the Chukchi Sea south to 35° N on the Sanriku coast of Honshu, to the Subarctic Boundary (ca. 42° N) in the western and central Pacific, and to 32° N off the coast of California").

- The Western North Pacific stock of humpback whales (*Megaptera novaeangliae*) inhabits the waters of Japan, the Philippines, Taiwan, and the Marshall Islands.[200]
- The critically endangered population of Western North Pacific gray whales (*Eschrichtius robustus*) is shared among Japan, Russia, the Republic of Korea, Mexico, and the United States.[201]
- The North Pacific right whale (*Eubalaena japonica*) inhabits the waters of Japan, Russia, and the United States.[202]

As such, it is critical—and required—that Japan cooperate with the IWC. It is the one international organization with decades of experience conserving, managing, and studying these stocks, and the one international organization with the geographic scope to cover the full range of the stocks.

As discussed in Section II.B.2, the ICJ and ITLOS have made clear that the duty to cooperate exists regardless of where the activity occurs, including territorial waters. The relevant question is whether the activity affects the rights of other states, not the location of the activity. Consequently, Japan must cooperate through the IWC even if it limits its whaling to its exclusive economic zone.

In summary, whether viewed in the context of Article 64 or Article 65, Japan must cooperate through the IWC because the IWC is the appropriate international organization. As a consequence, the rules and regulations of the IWC provide a source for determining the rights that must be considered as part of the duty to cooperate.

B. Japan Cannot Fulfill Its Duty to Cooperate Through Another International Organization

With respect to cetaceans, Article 65 requires parties to fulfill their duty to cooperate through "the appropriate international organizations." The use of the plural "organizations," however, does not allow Japan to use an organization different from the IWC to fulfill

---

200 *See* M. M. Muto et al., *Humpback Whale (*Megaptera novaeangliae*): Western North Pacific Stock*, ALASKA MARINE MAMMAL STOCK ASSESSMENTS, 2018 205, 205–06 (2018), https://www.fisheries.noaa.gov/webdam/download/92736479 [https://perma.cc/P88N-E3GC]; *see* Jo Marie V. Acebes, J.D. Darling & Manami Yamaguchi, *Status and Distribution of Humpback Whales* (Megaptera novaeangliae) *in Northern Luzon, Philippines*, 9 J. CETACEAN RES. MGMT. 37, 37 (2007).

201 *Western North Pacific Gray Whale*, INT'L WHALING COMMISSION, https://iwc.int/western-gray-whale-cmp [https://perma.cc/7XVL-UY2F] (last visited Mar. 13, 2020).

202 *North Pacific Right Whale*, U.S. MARINE MAMMAL COMMISSION, https://www.mmc.gov/priority-topics/species-of-concern/north-pacific-right-whale [https://perma.cc/B2TP-YR5N] (last visited Mar. 13, 2020).

its duty to cooperate. As described in Section 1 below, the ordinary meaning of Article 65 and the UNCLOS negotiating history compel this answer. In any event, as described in Section 2 below, no other international organization covers the geographic area covered by Japan's whaling or, if it does, it is an organization that does not manage whales.

1. A New Organization Specific to Japanese Whaling

Even if Japan creates a new organization applicable to the whales it hunts in the North Pacific, it must still cooperate through the IWC. First, Article 31 of the Vienna Convention on the Law of Treaties provides that treaties shall be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty.[203] The ordinary meaning directs us to interpret "the" and "organizations" to mean that parties must cooperate through all appropriate organizations. The use of "the" and not "an" before "appropriate international organizations" indicates that the UNCLOS negotiators did not intend parties to pick and choose the appropriate organization or that participation in one appropriate organization obviates the need to participate in other appropriate organizations.

In fact, when Canada argued that, under Article 65, "there is no obligation on any State to 'work through' more than one appropriate international organization,"[204] scholars were quick to criticize that view as "implausible"[205] and "not . . . consistent with Article 65."[206] Another

---

203 The Vienna Convention directs States to interpret treaties "in good faith in accordance with the ordinary meaning to be given the terms of the treaty in their context and in light of its object and purposes." Vienna Convention, *supra* note 36, art. 31.

204 *Statement by the Delegation of Canada*, NINTH SESSION THIRD U.N. CONF. L. SEA, A/Conf.62/WS/4 (Apr. 2, 1980), https://legal.un.org/docs/?path=../diplomaticconferences/1973_los/docs/english/vol_13/a_conf62_ws_4.pdf&lang=E [https://perma.cc/Q4XK-8MPT]. This history can also be found in JEFFERIES, *supra* note 156, at 183.

205 Davis, *supra* note 156, at 505–06 (stating that "the Canadian statement is implausible" and "must be rejected as contrary to the plain meaning of article 65, unsupported by supplementary means of treaty interpretation, and contrary to the basic tenet of the Convention of uniform international management of migratory and highly migratory species.").

206 Professor William Burke writes that

> [t]he argument that whales are not subject to the ICRW is difficult to follow, in light of the straightforward provision in [UNCLOS]. Perhaps it stems from the belief that [UNCLOS] overrides the ICRW and reinstalls coastal state authority over whales. This position does not seem consistent with [A]rticle 65, which indicates the clear expectation regarding cetaceans that states shall work through the appropriate international organizations for their conservation, management and study.

scholar concluded that the interpretation "defeat[s] the objectives of this Article."[207] Canada's view is clearly inconsistent with the ordinary meaning of Article 65,[208] which requires parties to work though "*the* appropriate international organizations." The use of "the" instead of "an" indicates that UNCLOS negotiators rejected a cooperation regime based on the ability of parties to choose which organization they deemed appropriate and that participation in one appropriate organization does not obviate the need to participate in other appropriate organizations. That language requires, as scholars report, "positive action in good faith" with the IWC.[209] In any event, despite being a non-member of the IWC, Canada recognizes the IWC as the appropriate international organization to work through with respect to the bowhead whales hunted by First Nations in Canada.[210]

Second, a small, regional body does not qualify as an "appropriate *international* organization." UNCLOS includes a number of provisions relating to cooperation through appropriate organizations. At times, it requires cooperation through "sub-regional and regional" organizations, as when it describes the duty to cooperate with respect to straddling stocks[211] and anadromous stocks.[212] At other times, as with marine mammals and highly migratory species, it directs cooperation through "international" organizations.[213] Treaty interpreters must give terms their ordinary meaning and, in doing so, give meaning to differences in language.[214]

WILLIAM T. BURKE, THE NEW INTERNATIONAL LAW OF FISHERIES: UNCLOS 1982 AND BEYOND 268 (1994). UNCLOS also provides that it does not alter the rights and obligations of Parties arising from compatible agreements. UNCLOS, *supra* note 7, art. 311.

207 McDorman, *supra* note 88, at 183 (citing Patricia W. Birnie, *International Protection of Whales*, Y.B. WORLD AFF. 240, 259 (1983)).

208 Vienna Convention, *supra* note 36, art. 31.

209 McDorman, *supra* note 88, at 187; BURKE, *supra* note 206, at 268.

210 *See* McDorman, *supra* note 88, at 185, 187 (citing Dan Goodman, *Land Claim Agreements and the Management of Whaling in the Canadian Arctic*, *in* THE PROCEEDINGS OF THE 11TH SYMPOSIUM: DEVELOPMENT OF NORTHERN PEOPLES 39 (1999)). Canada's recognition of the IWC as the appropriate international organization for management of whales is consistent with the mandate of the ICRW and IWC to manage whales and whaling on a global basis. The ICRW applies in "all waters" where whaling is prosecuted. ICRW, *supra* note 1, art. I(2).

211 UNCLOS, *supra* note 7, art. 63.

212 UNCLOS, *supra* note 7, art. 66(5).

213 UNCLOS, *supra* note 7, arts. 64, 65.

214 Vienna Convention, *supra* note 36, art. 31. In the *Reformulated Gasoline* case, the Appellate Body of the World Trade Organization was asked to interpret the phrase "relating to," which the panel had interpreted to mean "necessary." After noting that exceptions of Article XX began with different terms, including "essential," "necessary," and "relating to,"

A document prepared by the United Nations Office of Legal Affairs (OLA), which lists the IWC and two other organizations as appropriate for Article 65 purposes, does not contradict this conclusion.[215] The OLA makes no distinction between cetaceans and other marine mammals, and it describes the table as indicative, not authoritative.[216] Moreover, neither the Food & Agriculture Organization of the United Nations (FAO) nor the United Nations Environment Programme (UNEP), the two other organizations included in the table, regulate whaling.[217] The inclusion of FAO, however, is consistent with the view that other international organizations might regulate bycatch of cetaceans in fisheries;[218] the negotiating history described below suggests that management of bycatch is the reason for the use of the plural "organizations" in Article 65.

Third, Article 32 of the Vienna Convention expressly allows resort to supplementary materials, such as the negotiating history, "in order to confirm the meaning resulting from the application of article 31."[219] The negotiating history, in fact, supports the view that the IWC is *the* appropriate international organization for the conservation, management, and study of cetaceans. Earlier versions of Article 65

among others, the Appellate Body concluded in light of Article 31 of the Vienna Convention that "[i]t does not seem reasonable to suppose that the WTO Members intended to require, in respect of each and every category, the same kind or degree of connection or relationship between the measure under appraisal and the state interest or policy sought to be promoted or realized." Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, 18, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996).

215 LAW OF THE SEA BULLETIN ISSUE, OCEAN AFF. & L. SEA 31, 79, 82 (Aug. 23, 1996), https://www.un-ilibrary.org/international-law-and-justice/law-of-the-sea-bulletin/volume-1996/issue-31_4edb8f3d-en [https://perma.cc/U95G-TPP3].

216 *Id.* at 79.

217 UNEP "sets the global environmental agenda, promotes the coherent implementation of the environmental dimension of sustainable development within the United Nations system, and serves as an authoritative advocate for the global environment." *About UN Environment Programme*, U.N. ENV'T PROGRAMME, https://www.unenvironment.org/about-un-environment [https://perma.cc/84LT-DJV5] (last visited Mar. 13, 2020). However, it does not have a role in managing natural resources. The FAO's constitution directs it to "collect, analyse, interpret and disseminate information relating to nutrition, food and agriculture," including "fisheries, marine products, forestry and primary forestry products," but it has no mandate with respect to whales and whaling. Constitution of the Food and Agriculture Organization of the United Nations, art. I, Oct. 16, 1945, 60 Stat. 1886.

218 FAO has a long history of addressing bycatch issues. *See, e.g.*, FAO FISHERIES TECHNICAL PAPER NO. 339: A GLOBAL ASSESSMENT OF FISHERIES BYCATCH AND DISCARDS, FOOD & AGRIC. ORG. U.N. (1994); EXPORT WORKSHOP ON MEANS AND METHODS FOR REDUCING MARINE MAMMAL MORTALITY IN FISHING AND AQUACULTURE OPERATIONS, FOOD & AGRIC. ORG. U.N. (2018).

219 Vienna Convention, *supra* note 36, art. 32.

referred only to the "appropriate international organization,"[220] with organization in the singular. However, a delegate from Japan proposed to change organization from the singular to the plural in order to allow regional fisheries management organizations to manage bycatch of cetaceans.[221] This view is supported by a U.S. State Department letter stating that "[c]ertain regional organizations, which are concerned with the regulation of fishing, may also appropriately play a role as cetaceans are occasionally taken as incidental catch to fishing activities."[222] In other words, UNCLOS uses the plural "organizations" to reflect the view that the IWC would manage the direct take of cetaceans while other organizations would or could manage bycatch.

Second, Article 65, which refers to all marine mammals, was drafted at a time when several international treaties related to marine mammal conservation and management were already operational, including the IWC, the 1957 Interim North Pacific Fur Seal Treaty,[223] the 1972 Convention on the Conservation of Antarctic Seals,[224] and the 1973 Agreement on Conservation of Polar Bears.[225] Thus, the use of the plural "organizations" in Article 65 is not surprising.

Consistent with these two arguments, floor statements by several parties specifically supported the IWC as the appropriate international organization[226] for Article 65 purposes or supported Article 65

---

220 UNCLOS: A COMMENTARY, *supra* note 157, at 660, 662; UNCLOS S. TREATY, *supra* note 157, at 153 (statement of Patricia Forkan).

221 UNCLOS S. TREATY, *supra* note 157, at 153.

222 A U.S. Department of State official interprets Article 65 as follows:

> The appropriate/primary international organization referred to in Article 65 is the International Whaling Commission or a successor organization. Certain regional organizations, which are concerned with the regulation of fishing, may also appropriately play a role as cetaceans are occasionally taken as incidental catch to fishing activities. It is further understood that the minimum international standards for the protection of cetaceans apply throughout the migratory range of such cetaceans whether within or beyond the exclusive economic zone.

UNCLOS S. TREATY, *supra* note 157, at 174 (statement of Patricia Forkan, Exec. Vice President, Humane Society of the United States, *citing* the interpretation drafted by George Taft et al. at the last session of the Law of the Sea Conference (Aug. 22, 1980)).

223 Interim Convention on the Conservation of North Pacific Fur Seals, Feb. 9, 1957, 8 U.S.T. 2283, 314 U.N.T.S. 4546 (expired Oct. 14, 1984). This 1957 agreement replaced the Convention between the United States and Other Powers Providing for the Preservation and Protection of Fur Seals, signed on July 7, 1911.

224 Convention on the Conservation of Antarctic Seals, June 1, 1972, 29 U.S.T. 441, 1080 U.N.T.S. 16,529 (entered into force Mar. 11, 1978).

225 Agreement on the Conservation of Polar Bears, Nov. 15, 1973, 27 U.S.T. 3918.

226 Netherlands stated, "We acknowledge the great importance of marine mammal conservation, particularly through the IWC." UNCLOS S. TREATY, *supra* note 157, at 155

generally without commenting on the issue.[227] A 1980 letter from a U.S. negotiator expressed this understanding of Article 65:

> [Article 65] preserves and enhances the role of the International Whaling Commission (or a successor organization). It recognizes the role of regional organizations in the protection of marine mammals, which are often taken incidental to fishing operations. In sum, the article is a basic and sound framework with which States and international organizations may pursue the future protection of these wonderful creatures for generations to come.[228]

In other words, even if the use of the plural "organizations" is intended to refer to organizations in addition to the IWC, that use does not indicate that the IWC is not an appropriate international organization with respect to conservation, management, and study of cetaceans.

C. Existing Regional Bodies Alone Are Not Adequate to Fulfill Japan's Duty to Cooperate

Even if one accepts that organizations other than the IWC could qualify as "appropriate international organizations" for purposes of Article 65, other existing organizations do not qualify. Other organizations do not cover the geographic range included in Japan's whaling operations, are not international organizations as that term is used in international law, or do not manage whaling.

1. The North Atlantic Marine Mammal Commission

The North Atlantic Marine Mammal Commission (NAMMCO) is not an "appropriate international organization" for purposes of any

---

(citing Committee II, Deliberations on Article 65 Amendment, Floor Statements (Mar. 21, 1980).

227 *Id.* at 155 (reporting on the comments of Iceland and Norway).

228 *Id.* (quoting Letter from U.S. Ambassador Elliot L. Richardson to Patricia Forkan, Exec. Vice President, Humane Society of the United States (Apr. 29, 1980)). A U.S. delegation report makes similar conclusions:

> The text [of Article 65] provides a sound framework for the protection of whales and other marine mammals . . . . It preserves and enhances the role of the International Whaling Commission (or a successor organization) especially, but not exclusively, with regard to whales. It recognizes the role of regional organizations in the protection of marine mammals, which are often taken incidental to fishing operations.

U.S. DELEGATION REPORT, NINTH SESSION THIRD U.N. CONF. L. SEA 42 (1980).

whaling that Japan might undertake.[229] First, NAMMCO does not apply to Japanese whaling where its vessels plan to hunt (in its exclusive economic zone) or have historically hunted (the North Pacific and the Southern Ocean) because the scope of NAMMCO is limited to the North Atlantic.[230]

Second, an organization comprising only two States (Iceland and Norway) and two dependent territories (Greenland and the Faroe Islands) is inadequate to be considered "appropriate," as discussed in the preceding section. The OLA noted that other organizations could become "competent" or "appropriate" in the future with respect to relevant UNCLOS provisions, but it did not establish any criteria for identifying "competent" or "appropriate" organizations.[231] Of the organizations included in its table, however, the OLA listed only large organizations with broad participation.[232] In fact, the IWC appears to be the smallest organization included in the list; it had 39 members in 1996 when OLA drafted the list, and those members were globally distributed.[233] This suggests that small, regional organizations like NAMMCO are not "appropriate international organizations."

Iceland and Norway possibly recognize that NAMMCO is not "appropriate" within the meaning of Article 65. Iceland, for example, was motivated to establish NAMMCO as an alternative to the ICRW after it withdrew from that convention in 1992.[234] Yet, even with

---

229 Agreement on Cooperation in Research, Conservation and Management of Marine Mammals in the North Atlantic, art. 1, Apr. 9, 1992, 1945 U.N.T.S. 4.

230 *Id.* art. 2.

231 *See* LAW OF THE SEA BULLETIN ISSUE, *supra* note 215, at 79.

232 For example, the OLA references large organizations with broad participation such as the International Maritime Organization, the World Health Organization, the International Labor Organization, United Nations Development Program, and others. *Id.* at 81–95.

233 FORTY-SEVENTH REPORT OF THE INTERNATIONAL WHALING COMMISSION, INTERNATIONAL WHALING COMMISSION (1997), https://archive.iwc.int/pages/download.php?ref=51&size=&ext=pdf&k=&alternative=-1&usage=-1&usagecomment= [https://perma.cc/5L8M-8V42]. The list is included in unpaginated front matter and indicates membership of small and large States, developed and developing States, as well as States from all inhabited continents.

234 *See* Alf Hakon Hoel, *Regionalization of International Whale Management: The Case of the North Atlantic Marine Mammals Commission*, 46 ARCTIC 116, 119 (1993) (describing NAMMCO's history and operation); David D. Caron, *The International Whaling Commission and the North Atlantic Marine Mammal Commission: The Institutional Risks of Coercion in Consensual Structures*, 89 AM. J. INT'L L. 154, 163–66 (1995); *see also* Steven Freeland & Julie Drysdale, *Co-Operation or Chaos? – Article 65 of United Nations Convention on the Law of the Sea and the Future of the International Whaling Commission*, 2 MACQUARIE J. INT'L & COMP. ENVTL. L. 1, 16 n.116 (2005) (citing a press release from

NAMMCO operational, Iceland re-ratified the ICRW in 2002, suggesting that it believed that its killing of fin and minke whales[235]—two species managed by the IWC[236]—is whaling that should be managed by the IWC.[237] Similarly, Norway has maintained its IWC membership, suggesting that it, too, believes the IWC remains the appropriate international organization for the management of minke whales in the North Atlantic, which Norway hunts and which the IWC conserves, manages, and studies.

2. The Antarctic Treaty System

Since 1987, Japan has hunted in the Southern Ocean by issuing special permits under Article VIII of the ICRW.[238] Although this area and its resources are managed by the Antarctic Treaty System (ATS),[239] which includes the Antarctic Treaty and the Protocol on Environmental Protection to the Antarctic Treaty (PEPAT),[240] it does not constitute an appropriate international organization under Articles 65 and 120 with respect to Japanese whaling. First and most significantly, the ATS applies only to the area south of 60° south latitude,[241] and Japan no longer plans to whale in this area.[242]

Second, even if Japan intended to whale there, the ATS would not be considered an appropriate international organization. Neither the Antarctic Treaty nor the Protocol expressly excludes cetaceans from

---

the Icelandic Ministry of Fisheries stating that "[i]t is, therefore, necessary and appropriate to work towards the establishment of a regional organization covering the North Atlantic, with particular emphasis on the northernmost areas, where marine mammals are plentiful and where management challenges are shared.").

235 *See Catches Taken: Under Objection or Under Reservation*, *supra* note 38 (tabulating the species taken by Iceland on an annual basis from 2006 to 2017); *see also* Wold, *supra* note 44 (discussing a history of Iceland's return to the ICRW and IWC).

236 Schedule, *supra* note 1, at Table 1.

237 Possibly NAMMCO could be considered "appropriate" for hunting of belugas and narwhales as they are not regulated by the IWC, but those species are not at issue under Japan's proposal to resume commercial whaling.

238 *Catches Taken: Special Permit*, *supra* note 47.

239 Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71 (entered into force June 23, 1961).

240 Protocol on Environmental Protection to the Antarctic Protocol, Annex II, art. 1(a), Oct. 4, 1991, 2941 U.N.T.S. 3 [hereinafter PEPAT]. PEPAT "supplements" the Antarctic Treaty. *Id.* art. 4(1).

241 Antarctic Treaty, *supra* note 239, art. VI.

242 *Statement by Chief Cabinet Secretariat*, *supra* note 3, ¶ 7 ("From July 2019, after the withdrawal comes into effect on June 30, Japan will conduct commercial whaling within Japan's territorial sea and its exclusive economic zone, and will cease the take of whales in the Antarctic Ocean/the Southern Hemisphere.").

their jurisdiction; in fact, the Protocol applies to any mammal that inhabits or naturally migrates through the convention area.[243] Nonetheless, while the Protocol authorizes the taking of marine mammals, it limits that taking to scientific, educational, and other purposes.[244] None of these purposes would authorize the commercial hunt that Japan now contemplates. Moreover, PEPAT limits any taking of mammals to "small numbers" and to no more than "strictly necessary" to meet the purposes of the taking.[245] These limitations also preclude any commercial whaling by Japan.

Third, PEPAT also requires any activities in the ATS convention area to be planned and conducted so as to avoid detrimental changes in distribution and abundance of species and to avoid further jeopardy to endangered or threatened species or populations of species.[246] Without valid population estimates for minke whales and other whale species in the Southern Ocean,[247] Japan would not be able to make this affirmative finding of no detriment.[248]

Fourth, Annex II of PEPAT, relating to protection of fauna and flora, provides that "[n]othing in this Annex shall derogate from the rights and obligations of Parties under the [ICRW]."[249] Any whaling by Japan in the Southern Ocean pursuant to PEPAT would adversely affect the rights of ICRW Parties. Thus, the Antarctic Treaty and PEPAT cannot be considered an appropriate international organization for purposes of managing whaling by Japan in the area below 60° south latitude.

The Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR)[250] is also part of the ATS. Although CCAMLR has its own commission,[251] it, too, does not constitute an appropriate international organization for purposes of managing Japan's current

243 PEPAT, *supra* note 240, art. 1(a).

244 *Id.* art. 3(2).

245 *Id.* art. 3(3).

246 *See id.* art. 3(2)(c).

247 *Whale Population Estimates*, INT'L WHALING COMMISSION, https://iwc.int/estimate [https://perma.cc/RT7K-62X8] (last visited Mar. 13, 2020) (failing to provide any recent population estimates for minke or any other whale species in the Sothern Ocean, except potentially a 2009 estimate for right whales).

248 To implement the provision that activities avoid detrimental impacts, PEPAT requires proposed activities to be preceded by an EIA. *See* PEPAT, *supra* note 240, art. 8.

249 *Id.* art. 7.

250 Convention for the Conservation of Antarctic Marine Living Resources, May 20, 1980, 33 U.S.T. 3476, 1329 U.N.T.S. 47 (entered into force Apr. 7, 1982), https://www.ccamlr.org/en/organisation/camlr-convention-text [https://perma.cc/99P6-GSGE] [hereinafter CCAMLR].

251 *Id.* art. VII.

commercial hunt. First, the CCAMLR Convention Area includes the Southern Ocean, extending northward to 50° and even 45° south latitude in some places,[252] areas in which Japan will not whale.

Second, CCAMLR, while applying to all species of living organisms within the convention area,[253] provides that "[n]othing in this Convention shall derogate from the rights and obligations of Contracting Parties under the [ICRW]."[254] This provision does not operate so as to exclude whales and whaling from the application of CCAMLR, but it does ensure that the ICRW prevails to the extent of any conflict.[255] Japanese whaling in the CCAMLR Convention Area would conflict with the rights of ICRW members that are also CCAMLR members because the IWC has established a Southern Ocean Sanctuary,[256] as well as the moratorium on commercial whaling.[257] Moreover, CCAMLR requires the CCAMLR Commission to "take full account of any relevant measures or regulations established or recommended . . . by existing fisheries commissions responsible for species which may enter the [convention area]."[258] If the IWC is considered a "fisheries commission" for purposes of this provision,[259] then the provision provides an additional legal requirement for CCAMLR to defer to IWC decisions, including those relating to the moratorium and the Southern Ocean Sanctuary. Thus, CCAMLR would not be considered an appropriate international organization under Article 65 for managing Japanese catches of whales.

---

252 *Id.* art. I. For a map of the CCAMLR convention area, see *Convention Area*, COMMISSION CONSERVATION ANTARCTIC MARINE LIVING RESOURCES, https://www.ccamlr.org/en/system/files/CCAMLR-Convention-Area-Map.pdf [https://perma.cc/H8YS-CTHX] (last visited Mar. 13, 2020).

253 CCAMLR, *supra* note 250, art. I(2).

254 *Id.* art. VI.

255 For more on savings clauses, see Deborah Russo, *Addressing the Relation Between Treaties by Means of 'Saving Clauses*,*'* 85 BRITISH Y.B. INT'L. L., 133 (2015).

256 Schedule, *supra* note 1, ¶ 7(b).

257 *Id.* ¶ 10(e).

258 CCAMLR, *supra* note 250, art. IX(5).

259 Maria Clara Maffei, *The Protection of Whales in Antarctica*, *in* INTERNATIONAL LAW FOR ANTARCTICA 171, 190 (Francesco Francioni & Tullio Scovazzi eds., 1996).

3. *The Convention on the Conservation of Migratory Species of Wild Animals*

The Convention on the Conservation of Migratory Species of Wild Animals (CMS)[260] prohibits the taking[261] of endangered migratory species included in Appendix I of the convention.[262] For Appendix II species, those species with an unfavorable conservation status or which might benefit from international cooperation,[263] CMS parties may establish binding or nonbinding agreements for their conservation and management.[264] Many cetaceans, including those species regulated by the IWC, are included in Appendix I or II.[265] However, CMS appears to defer to the IWC with respect to management measures for cetaceans. CMS specifically provides that, with respect to Appendix II species, any agreement should "at a minimum, prohibit . . . any taking that is not permitted . . . under any other multilateral agreement."[266] Although it does not mention the IWC by name, the IWC had already adopted take prohibitions for right whales and other whales by the time CMS was negotiated.[267] Presumably, negotiators did not want to take action to undermine the work of the IWC.

---

260 Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, 1651 U.N.T.S. 333 (entered into force Nov. 1, 1983) https://www.cms.int/sites/default/files/instrument/CMS-text.en_.PDF [http://perma.cc/XP9Q-GBWZ] [hereinafter CMS].

261 *Id.* art. III(5).

262 *Id.* art. III(1) ("Appendix I shall list migratory species which are endangered.").

263 CMS defines Appendix II species as follows:

> Appendix II shall list migratory species which have an unfavourable conservation status and which require international agreements for their conservation and management, as well as those which have a conservation status which would significantly benefit from the international co-operation that could be achieved by an international agreement.

Id. art. IV(1).

264 *Id.* art. IV(3).

265 *Id.* apps. I–II, at 2, 7–8 (effective Jan. 26, 2018).

266 *Id.* art. V(4)(f).

267 The taking of right whales was prohibited even before the ICRW came into force pursuant to the 1931 Geneva Convention on the Regulation of Whaling. When the ICRW was negotiated and adopted, it carried forward that prohibition. *See* Barbara Galletti Vernazzani et al., *Conservation Management Plan for Eastern South Pacific Southern Right Whale Population (Eubalaena australis)*, § 2.1, SC/66b/BRG/23 (Apr. 2016), https://archive.iwc.int/pages/download.php?ref=6097&size=&ext=pdf&k=&alternative=-1&usage=-1&usagecomment= [https://perma.cc/JT75-7V83].

Thus, for Appendix I cetacean species, CMS Parties do not manage them, instead focusing on conservation.[268] For Appendix II cetacean species, the parties defer to the IWC. In either circumstance, CMS would not appear to be the "appropriate international organization," or at least not the only "appropriate international organization," for purposes of Article 65.

In addition, CMS does not establish a commission or organization.[269] Even though UNEP provides the Executive Secretary of CMS,[270] CMS has an identity separate from UNEP.[271] These facts also indicate that it is not an "appropriate international organization" because it is not an organization at all.[272]

IV
HOW JAPAN CAN FULFILL ITS DUTY TO COOPERATE

In light of ICJ, ITLOS, and other jurisprudence, including interpretations specific to UNCLOS, as well as the shared nature and conservation status of the minke, Bryde's, and sei whales that Japan is hunting, Japan must implement a range of actions to fulfill its duty to cooperate. Japan must "work through" the IWC as the appropriate international organization for the conservation, management, and study of cetaceans in order to give due regard to the rights and duties of IWC members. By working through the IWC, Japan is not necessarily required to implement all of the IWC's rules, but it must comply with those rules that are central to the IWC's mandate to conserve, manage, and study cetaceans. Japan cannot give due regard to the rights and duties of ICRW parties without, for example, providing the IWC with data concerning populations, stock structure, and numbers of animals struck and killed because these data are central to implementing the ICRW's dual purposes of conservation and management. Moreover, Japan must implement the RMP and, at least until adequate data exists to actually use the RMP to ensure the sustainability of catches, prohibit

---

268 In addition to the take prohibition, CMS Parties must, among other things, endeavor to remove obstacles to migration. CMS, *supra* note 260, art. III(4).

269 Instead, it creates a "Conference of the Parties," a decision-making body that exists only during meetings of the Parties. *Id.* art. VII.

270 *Id.* art. IX(3).

271 For more on the legal personality of conventions and their secretariats, see BHARAT H. DESAI, MULTILATERAL ENVIRONMENTAL AGREEMENTS: LEGAL STATUS OF THE SECRETARIATS (Cambridge Univ. Press 2010).

272 RALPH ZACKLIN, THE AMENDMENT OF THE CONSTITUTIVE INSTRUMENTS OF UNITED NATIONS AND SPECIALIZED AGENCIES 8 (A.W. Shijthoff ed., 1968) (stating that international organizations have a legal identity separate from their member States).

commercial whaling. By cooperating with the IWC in these ways, Japan also ensures that it is not causing harm to the resources or environment of another state or to areas beyond national jurisdiction, as described in Section II.B.[273] Japan must respect the rights and marine environment of other states, as well as areas beyond national jurisdiction,[274] by engaging meaningfully in IWC processes.

A. Participation in IWC Meetings

In the context of UNCLOS, Japan has a mandatory duty to "work through the appropriate international organizations" by participating in relevant meetings of the IWC and the Scientific Committee.[275] As one scholar notes, "participation in good faith in the work of an organization would require a positive contribution or sharing of experience, expertise, or information designed to positively assist the work of the international organization."[276] A positive contribution starts by actually attending relevant meetings that concern the conservation and management of the species. That certainly includes participation as a non-party state at meetings of the IWC and Scientific Committee.[277]

Not only does Japan have a duty to cooperate through the IWC but ITLOS has also characterized the provisions of UNCLOS as providing the appropriate international organization a "right . . . to require cooperation from non-Member States."[278] Consistent with this right,

---

273 *See generally* Legality of the Threat or Use of Nuclear Weapons, *supra* note 148; Gabčíkovo-Nagymaros Project, Judgment, 1997 I.C.J. Rep. 7, at 20 (Sept. 25), ¶ 53; Pulp Mills on the River Uruguay (Arg. v. Uru.), 2010 I.C.J. 14, ¶¶ 101, 139 (Apr. 20).

274 *See* Rio Declaration, *supra* note 95, Principle 2; Stockholm Declaration *supra* note 95, Principle 21.

275 UNCLOS, *supra* note 7, art. 65; *see also supra* Part III.

276 McDorman, *supra* note 88, at 186–87. This is similar to the position of Canada, made in 1980, the "work through" obligation "can be fulfilled through consultation with the scientific bodies of such organizations." *Statement by the Delegation of Canada*, *supra* note 204, at 104.

277 The Rules of Procedure for meetings of both the Commission and the Scientific Committee allow for participation by non-Member States. IWC, Rules of Procedure, *supra* note 170, C.1(a) ("Any Government not a party to the Convention . . . may be represented at meetings of the Commission by an observer or observers); IWC, Rules of Procedure, *supra* note 170, A.4 (non-member governments may be represented at meetings of the Scientific Committee).

278 SRFC Advisory Opinion, *supra* note 127, ¶ 218.

the IWC has noted the importance of obtaining contributions from non-member whaling countries in the past.[279]

Moreover, as described in Section II.B.2, the ICJ and ITLOS have made clear that the duty to cooperate exists regardless of where the activity occurs, including territorial waters, although the duty to cooperate through the IWC only applies expressly to whaling in exclusive economic zones and the high seas. The relevant question is whether the rights of other states are affected, not the location of the activity. Consequently, Japan must cooperate by participating in IWC meetings even if it limits its whaling to its territorial sea and exclusive economic zone. Japan has indicated that it will do so,[280] but no IWC meetings have taken place since Japan's withdrawal to determine whether Japan will participate in good faith.

B. Submission of Data on the Whales It Hunts

Good faith participation through the IWC requires more than occupying a seat. As noted by the various international tribunals, the duty to cooperate requires the sharing of information.[281] In the context of commercial whaling, Japan must submit data concerning the populations of whales that it hunts. In addition, it must include data concerning the number of whales landed and whales struck and lost, as well as the location of any catches, because these data are central to determining the total number of whales within a population and whether the hunt is sustainable.[282] Moreover, Japan must submit data on all whales taken as bycatch and from other anthropogenic sources.

The submission of this information is central to Japan's duty to cooperate for at least four reasons. First, as noted in Part III, the populations of whales that Japan hunts are shared populations. Sei

---

279 *See, e.g.*, INT'L WHALING COMMISSION, Resolution on Directed Takes of White Whales, Res. 1998-9 (1998), (encouraging non-members, particularly Canada, "to send experts to the Scientific Committee . . . meeting . . . to assist its discussions of stock structure and abundance estimates of white whale populations"); INT'L WHALING COMMISSION, Resolution on Small Populations of Highly Endangered Whales, Res. 1999-7 (1999), (encouraging "non-member governments to send appropriate representatives and documents to the next meeting of the Scientific Committee to facilitate this work").

280 *See* Letter from Hideki Moronuki, Director, Fisheries Negotiation, to Dr. Robert Suydam, Chair, Int'l Whaling Commission Sci. Comm. (July 1, 2019), https://archive.iwc.int/pages/download.php?ref=9582&size=&ext=pdf&k=34d7539e86&alternative=-1&usage=-1&usagecomment=) [https://perma.cc/4J4U-PA5P].

281 *See supra* Section II.B.

282 IWC Members must submit this information pursuant to paragraph 27 of the Schedule. Schedule, *supra* note 1, ¶ 27, (as amended Sept. 2018).

whales and Bryde's whales are also found in the high seas.[283] Second, the stock structures of sei whales and minke whales in the region are not fully understood.[284] Third, sei whales and Bryde's whales are very difficult to distinguish and their ranges overlap.[285] Thus, "[i]ndividuals from different biological populations of the same species cannot be distinguished at sea (either by scientists when estimating abundance or by hunters before catching)."[286] Consequently, the Scientific Committee needs all the data gathered by Japan to more fully understand how to conserve and manage these species. Without these data, it is not clear how the rights of IWC members in the proper conservation, management, and study of these stocks can be maintained; the failure to provide these data would result in significant gaps concerning stock size and structure for each of these species.

Fourth, these data are required to set sustainable catch quotas. The IWC uses its Catch Limit Algorithm (CLA) to generate those catch quotas, or "catch limits" in IWC jargon. As the IWC states, "Regular abundance estimates are essential to the 'feedback' way in which the *CLA* works. If no recent abundance estimate is available, catches are set to zero."[287] As such, Japan must submit these data so that the Scientific Committee can properly evaluate the data, and the IWC has all relevant information for making management decisions. Japan must also use the guidelines and rules established by the Scientific Committee "to ensure abundance estimates are of sufficient quality to be used."[288]

Moreover, the Scientific Committee and the IWC need data concerning mortalities from bycatch and other anthropogenic sources so they can ensure that the RMP generates a sustainable quota. As the IWC agreed in IWC Resolution 1998-2, catch limits are calculated based on the total allowable removal, and "catch limits for commercial purposes for any species of whale in any region shall be calculated by deducting all human-induced mortalities that are known or can be reasonably estimated, other than commercial catches, from the total

283 *See supra* Section III.A.

284 *See supra* Section III.A.

285 *See supra* Section III.A.

286 *The Revised Management Procedure—A Detailed Account*, *supra* note 177.

287 *Id.*

288 *Id.* The guidelines and rules can be found in *Requirements and Guidelines for Conducting Surveys and Analysing Data Within the Revised Management Scheme*, 13 J. CETACEAN RES. MGMT. (SUPPL.) 509 (2012), https://archive.iwc.int/pages/download.php?ref=297&size=&ext=pdf&k=&alternative=1049&usage=-1&usagecomment= [https://perma.cc/N6CL-M6J3].

allowable removal."[289] As the IWC has been concerned about "[p]articularly high levels" of bycatch of J-stock minke whales in the Sea of Japan,[290] it is critical that Japan report whatever bycatch mortality is associated with its fisheries.

Sharing these data is consistent with the decisions of the ICJ and ITLOS to exchange information.[291] It is also consistent with the statement by ITLOS that "fisheries conservation and management measures, to be effective, should concern the whole stock unit over its entire area of distribution or migration routes."[292] Without data from an active whaling nation, the IWC cannot conserve and manage effectively the relevant whale stocks across their entire area of distribution.

Sharing these data is also consistent with past practice at the IWC. For example, in order to calculate the aboriginal whaling catch limit for the West Greenland stock of bowhead whales, the Scientific Committee asked Canada, an IWC non-member, for data regarding its bowhead whale catch, which Canada provided.[293] Sharing data on whale catches is also consistent with Japan's many statements about the need to make science-based catch limits and its commitment to the collection of scientific information that contributes to setting sustainable catch limits.[294]

Japan has indicated that it will submit information to the Scientific Committee.[295] To date, however, the information submitted to the

---

289 INT'L WHALING COMMISSION, RESOLUTION ON TOTAL CATCHES OVER TIME, RES. 1998-2 (1998), https://archive.iwc.int/pages/download.php?ref=2073&size=&ext=pdf&k=&alternative=3041&usage=-1&usagecomment= [https://perma.cc/7BC5-GQGM].

290 Denise Risch et al., *Common and Antarctic Minke Whales: Conservation Status and Future Research Directions*, 6 FRONTIERS MARINE SCI. 1, 5 (2019), https://www.frontiersin.org/articles/10.3389/fmars.2019.00247/full [https://perma.cc/56FN-36X6] ("Particularly high levels of by-catch and entanglement of the J stock population of minke whales, inhabiting the Sea of Japan, Yellow Sea, and East China Sea, have raised serious concerns in the IWC Scientific Committee in recent years.").

291 MOX Plant (Ir. v. U.K.), Provisional Measures, Order, 2001 ITLOS Rep. 95 (Dec. 3), ¶ 110; Land Reclamation by Singapore in and around the Straits of Johor (Malay. v. Sing.), Provisional Measures, 2003 ITLOS Rep. 10 (Oct. 8), ¶ 106.

292 SRFC Advisory Opinion, *supra* note 127, ¶ 214.

293 CHAIR'S REPORT OF THE 63RD MEETING, INT'L WHALING COMMISSION, § 7.3.5.1 (2011), https://archive.iwc.int/pages/download.php?ref=1577&size=&ext=pdf&k=9f53f4c140&alternative=-1&usage=-1&usagecomment= [https://perma.cc/X9JA-XV5W].

294 *See, e.g.*, *Opening Statement to the Twenty-Sixth Meeting of the North Atlantic Marine Mammal Council, Japan*, NORTH ATL. MARINE MAMMAL COUNCIL [NAMMCO], NAMMCO/26/ Opening Statements 1, 8 (2018), https://nammco.no/wp-content/uploads/2018/03/nammco-26-opening-statements.pdf [https://perma.cc/KX2K-XA2K].

295 Letter from Hideki Moronuki to Robert Suydam, *supra* note 280.

Scientific Committee has been incomplete. For example, Japan did not explain how it incorporated bycatch and other mortality into its procedure for setting catch limits.[296]

C. Submission of Data on Its Whaling Vessels

Japan must submit data, consistent with the ICRW Schedule, concerning the size (in gross tonnage) of each whaling vessel, as well as the number of days each vessel is at sea on the whaling grounds.[297] This information is needed to judge fishing effort, which can provide scientists with additional information by which to gauge the status of the stocks.[298] As with other data, sharing these data is consistent with the decisions of the ICJ and ITLOS to exchange information[299] and to ensure effective conservation and management over the species' entire area of distribution or migration routes.[300]

D. Use of the RMP as Approved by the IWC

As part of its duty to cooperate, Japan must use the RMP to generate catch quotas. The RMP, which the IWC has adopted but not incorporated into the Schedule as a binding regulation, is the IWC's scientifically vetted process to estimate sustainable catch limits for commercial whaling of baleen whales,[301] such as minke, sei, and Bryde's whales.

A requirement to use the RMP as part of the duty to cooperate is especially critical for at least two reasons. First, the RMP is designed to produce sustainable catch limits. UNCLOS, too, requires parties to base catch limits on the maximum sustainable yield and optimal utilization, concepts that assume a non-declining target population capable of supporting sustainable exploitation.[302] The RMP is the

---

296 *Id.*

297 Schedule, *supra* note 1, ¶ 28.

298 Eyolf Jul-Larsen et al., *Management, Co-Management or No Management?: Major Dilemmas in Southern African Freshwater Fisheries*, 426/2 FAO Fisheries Technical Paper § 2.2.1 (2003), http://www.fao.org/3/y5056e/y5056e.pdf [https://perma.cc/MNB7-D6DV] ("An understanding of fishing effort is fundamental for assessing and managing fish stocks.").

299 MOX Plant (Ir. v. U.K.), Provisional Measures, Order, 2001 ITLOS Rep. 95 (Dec. 3), ¶ 110.

300 SRFC Advisory Opinion, *supra* note 127, ¶ 214.

301 *The Revised Management Procedure—A Detailed Account*, *supra* note 177.

302 *See, e.g.*, U.S. NAT'L OCEANIC & ATMOSPHERIC ADMIN., FISHERIES GLOSSARY 28 (2006), https://www.st.nmfs.noaa.gov/st4/documents/FishGlossary.pdf [https://perma.cc/SN7P-TYLJ] (defining MSY as "[t]he largest average catch or yield that can continuously

international community's scientifically vetted method for calculating sustainable catches of baleen whales—the type of whales that Japan has proposed to hunt.[303] The RMP was developed after years of review by many of the world's leading whale biologists. Thus, using a different model would be antithetical to sustainable use, optimal utilization, and the very goals of both the ICRW and UNCLOS. Consequently, Japan must use the RMP as part of its duty to cooperate.

Second, if Japan does not follow the rules for setting sustainable catch quotas, Japan risks diminishing the whale stocks shared with other states as well as the Bryde's and sei whale stocks that are also found on the high seas. This would violate Japan's duty not to cause harm to the resources of other states or of areas beyond national jurisdiction.[304] This interpretation is consistent with Article 56 of UNCLOS, which provides that coastal states "shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention."[305] It is also consistent with rulings of the ICJ and international tribunals, which have concluded that the duty to cooperate imposes a duty to give "due regard to the rights of other States and the needs of conservation for the benefit of all."[306]

For these reasons, Japan must use the RMP as approved by the IWC, including the 0.72 tuning level chosen for the CLA. The CLA is the IWC's procedure for determining "safe" catch limits.[307] The 0.72 tuning level is designed to stabilize populations for any baleen whale at 72% of carrying capacity, or pre-catch level.[308] The IWC adopted this tuning level in 1991 after reviewing a range of tuning levels provided by the Scientific Committee because it allows the IWC to "balance between the conservation objectives and the catch objectives established by the Commission."[309] Only by implementing the RMP

---

be taken from a stock under existing environmental conditions. For species with fluctuating recruitment, the maximum might be obtained by taking fewer fish in some years than in others. Also called: maximum equilibrium catch; maximum sustained yield; sustainable catch.").

303 Sei, Bryde's, and minke whales are all baleen whales. *See Whales – An Introduction*, INT'L WHALING COMMISSION, https://iwc.int/lives [https://perma.cc/EKC7-5R87] (last visited Mar. 13, 2020).

304 *See supra* Part III.

305 UNCLOS, *supra* note 7, art. 56(2).

306 Fisheries Jurisdiction (U.K. v. Ice.), Judgment, 1974 I.C.J. Rep. 3, ¶ 72; Fisheries Jurisdiction (Ger. v. Ice.), Judgment, 1974 I.C.J. Reports 175, ¶ 64.

307 *The Revised Management Procedure—A Detailed Account*, *supra* note 177.

308 *Id.*

309 *Id.*

with its agreed tuning level can Japan ensure that its measures are, in the words of ITLOS, "consistent and compatible" with those of the appropriate international organization.[310]

Japan has communicated to IWC members that it calculated its catch limits with a tuning level of 0.6,[311] far lower than the IWC's tuning level. In addition, while Japan claims that its "application of the CLA was based on the best and latest scientific information, including stock structures and abundance estimates,"[312] it has not involved the IWC Scientific Committee[313] to set its catch limits, and scientists have reported that "it is not possible to reproduce their catch limit calculations without more information."[314] Consequently, Japan has violated this obligation.

E. Preparation of a Transboundary EIA

Because of the potential transboundary impacts associated with catching shared whale stocks, Japan must prepare an EIA either as part of its duty to cooperate, as noted in the *Land Reclamation Case*,[315] or as a freestanding duty, as in *Pulp Mills*.[316] Even if Japan is allowed to determine the overall content of the EIA, it must "hav[e] regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment."[317] Consequently, it must be conducted *prior to* whaling[318] and with *prior* consultation with potentially affected states and IWC members.[319] As Japan does not

310 SRFC Advisory Opinion, *supra* note 127, ¶ 207(iii).

311 Letter from Hideki Moronuki to Robert Suydam, *supra* note 280.

312 *Id.*

313 At the most recent meeting of the IWC Scientific Committee, Japan stated that it "will duly provide SC with scientific information of the catch limits by July 2019." *Statement from Japan Regarding Japan's Withdrawal from IWC*, *in* REPORT OF THE SCIENTIFIC COMMITTEE, Annex U (2019), https://archive.iwc.int/pages/download.php?ref=9570&size=&ext=pdf&k=&alternative=4692&usage=-1&usagecomment=[https://perma.cc/8RHD-REPD]. Japan has not yet provided that information.

314 E-mail from Justin Cooke, Cetacean Specialist Group, Int'l Union Conservation Nature, Species Survival Commission, to Chris Wold, Professor of Law, Lewis & Clark Law School (Sept. 11, 2019) (on file with author).

315 *See supra* Section II.B.

316 *See supra* Section II.C.

317 Pulp Mills on the River Uruguay (Arg. v. Uru.), 2010 I.C.J. 14 (Apr. 20), ¶ 205.

318 *Id.*

319 *Id.* ¶ 206; MOX Plant (Ir. v. U.K.), Provisional Measures, Order, 2001 ITLOS Rep. 95 (Dec. 3), ¶ 89(1); Chagos Arbitration, Mauritius v. U.K., 2011-03 (Perm. Ct. Arb. 2015).

appear to have prepared a transboundary EIA, it has already violated this obligation.

F. Monitoring the Impacts of Its Whaling Operations

Japan has an ongoing duty to monitor the impacts of its whaling activities as part of its duty to cooperate. As the ICJ declared in *Pulp Mills*, the preparation of an EIA did not end Uruguay's obligations to assess the environmental impacts of its pulp mills. Instead, "once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken."[320] Similarly, ITLOS declared in the *MOX Plant Case* that Ireland and the United Kingdom were required to cooperate in order to "monitor risks or the effects of the operation of the MOX plant for the Irish Sea."[321] Consistent with these decisions and its duty to cooperate, Japan must continue to monitor the impacts of its whaling on the relevant whale stocks and provide information deriving from these monitoring activities to the IWC and Scientific Committee.

G. Prohibition on Whaling Until Unresolved Issues Are Addressed

Japan has a duty to prohibit whaling until it can demonstrate that such whaling is consistent with maximum sustainable yield and optimum utilization. At present, it cannot do so due to the large number of unresolved questions relating to the structure of the stocks, abundance levels for the stocks, and bycatch levels, among other things. Without this information, it cannot ensure with any degree of probability that its whaling will be consistent with the requirements for sustainability and optimum utilization under Articles 61, 62, and 64 of UNCLOS. As stated in the CLA, without recent abundance estimates, catch limits are set at zero.[322]

Without this information, Japan risks harming stocks shared with other states. In doing so, Japan would not be giving due regard to the rights of these states and violate its duty to cooperate and its duty not to cause harm to the resources of other states and areas beyond national jurisdiction. As noted in Section IV.D above, the RMP, and the information required to use it, provides the internationally recognized and scientifically vetted method for calculating sustainable catch limits

320 *Pulp Mills*, 2010 I.C.J. 14, ¶ 205.

321 *MOX Plant*, 2001 ITLOS Rep. 95, ¶ 89(1).

322 *The Revised Management Procedure—A Detailed Account*, *supra* note 177.

for baleen whales. However, once these issues are resolved, then the duty not to take whales likely no longer applies.

V
THE DISPUTE SETTLEMENT PROVISIONS OF UNCLOS

Although Japan has withdrawn its consent to the jurisdiction of the ICJ for disputes involving marine living resources,[323] it has reaffirmed its commitment to dispute settlement under UNCLOS.[324] Consequently, other UNCLOS parties may use the binding and compulsory dispute settlement provisions of UNCLOS[325] to compel Japan to implement its duty to cooperate and those UNCLOS parties that are also IWC members may use those procedures to compel Japan to implement its duty to cooperate through the IWC.

UNCLOS's dispute settlement provisions first demand that parties settle their dispute concerning the interpretation or application of UNCLOS by peaceful means.[326] UNCLOS makes clear that parties to a dispute have freedom to choose the means of settlement of their preference,[327] including binding dispute settlement.[328] However, if the

---

323 *Declarations of Japan*, *supra* note 63 (amending its declaration to preclude the ICJ's jurisdiction in "any dispute arising out of, concerning, or relating to research on, or conservation, management or exploitation of, living resources of the sea").

324 In a press release, the Japanese Ministry of Foreign Affairs wrote the following:

> On 6 October 2015, Japan made a new declaration, considering that, as Japan is a State Party to the United Nations Convention on the Law of the Sea (UNCLOS) and continues to observe its obligations, it is more appropriate, as long as there is no special agreement, to apply dispute settlement procedure under the UNCLOS that establishes provisions regarding living resources of the sea as well as the involvement of experts from the scientific or technical perspective when an international dispute arises with respect to research on, or conservation, management or exploitation of, living resources of the sea.

Press Release, Japan, Ministry of Foreign Affairs (undated), https://www.mofa.go.jp/files/000104046.pdf [https://perma.cc/H8SL-35GN].

325 Parties are allowed to choose among four options. UNCLOS, *supra* note 7, arts. 279–99. This legal opinion does not describe the relative strengths and weaknesses of the four approaches. It notes, however, that Japan, which has been a party to UNCLOS since 1996, has not made a choice of forum declaration under UNCLOS. Therefore, Japan is deemed to have accepted arbitration under the provisions found in UNCLOS Annex VII. Presumably, Japan has chosen arbitration under Annex VII because it prefers to have maximum control over the procedure; under Annex VII, it will be able to choose one of the arbitrators and jointly choose with the other disputing parties three other arbitrators. *Id.* annex VII, art. 3.

326 *Id.* art. 279.

327 *Id.* art. 280.

328 *Id.* art. 282 (providing that parties may agree to submit a dispute to any other applicable arrangement such as general, regional or bilateral international agreement).

procedures chosen by the parties have been unsuccessful in bringing a final negotiated settlement, the parties may return to UNCLOS's basic procedures.[329] Under those procedures, the disputing parties must first exchange views.[330] They may then opt to settle the dispute by conciliation, although they are under no obligation to do so.[331] If these procedures do not result in a satisfactory resolution to the dispute, then one of the disputing parties may initiate a dispute under UNCLOS's compulsory procedures for binding decisions.

The provisions for compulsory dispute settlement by binding decision are among the many unique features of UNCLOS. Although a party may choose one court or tribunal over another, it is not free to opt out of compulsory dispute settlement entirely.[332] A party may escape the binding dispute settlement provisions of UNCLOS only if the dispute falls under one of the exceptions or limitations provided by UNCLOS. UNCLOS provides two possibilities. First, UNCLOS allows a state to make a declaration limiting the jurisdiction of the courts and tribunals, but it allows such declarations only for a narrow set of disputes, none of which relate to the duty to cooperate.[333] In any event, Japan did not make any declaration regarding dispute settlement.[334]

Second, UNCLOS provides exceptions that a party may invoke in specific disputes.[335] Prior to the tribunal's decision in the *Chagos* arbitration, the traditional view held that Article 297(1) limited jurisdiction to the three enumerated circumstances included in that paragraph.[336] In the *Chagos* arbitration, however, the tribunal read

---

329 *Id.* art. 281.

330 *Id.* art. 283.

331 *Id.* art. 284.

332 *Id.* art. 287.

333 *Id.* art. 298. UNCLOS does allow States to make declarations to opt out of disputes concerning (1) maritime boundaries with neighboring States or those involving historic bays or titles, (2) military activities and certain kinds of law enforcement activities in the exclusive economic zone, and (3) the U.N. Security Council's exercise of the functions assigned to it by the Charter of the United Nations. *Id.*

334 *See* Law of the Sea, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en [https://perma.cc/WD3C-NUWV] (last visited Mar. 13, 2020).

335 UNCLOS, *supra* note 7, arts. 297–98.

336 For an excellent discussion of the tribunal's decision, as well as the negotiating history of Article 297, see Stephen Allen, *Article 297 of the United Nations Convention on the Law of the Sea and the Scope of Mandatory Jurisdiction*, 48 OCEAN DEV. & INT'L L. 313 (2017); *see also* Bernard H. Oxman, *Courts and Tribunals: The ICJ, ITLOS, and Arbitral Tribunals*, *in* THE OXFORD HANDBOOK OF THE LAW OF THE SEA 394, 404 (Donald

Article 297(1) of UNCLOS as allowing resort to dispute settlement concerning the "interpretation or application of [UNCLOS] with regard to the exercise by a coastal State of its sovereign rights or jurisdiction."[337] In other words, the tribunal instead concluded that Article 297(1) reaffirmed that those three cases were subject to compulsory dispute settlement.[338] According to the tribunal, the inclusion of specific exceptions in Article 297(3) relating to certain fisheries disputes would be entirely redundant if Article 297(1) already precluded jurisdiction over those disputes.[339]

Article 297(3) expressly provides for compulsory dispute settlement "with regard to fisheries," although it also allows coastal states to avoid dispute settlement in certain circumstances.[340] Specifically, a coastal state "shall not be obliged to accept" dispute settlement for

> any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining

---

R. Rothwell et al. eds., 2015) (stating that Article 297(1) "establishes the basic rule generally limiting such challenges to the three situations enumerated in that paragraph"). Article 297(1) provides as follows:

> 1. Disputes concerning the interpretation or application of this Convention with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in this Convention shall be subject to the procedures provided for in section 2 in the following cases:
>
> (a) when it is alleged that a coastal State has acted in contravention of the provisions of this Convention in regard to the freedoms and rights of navigation, overflight or the laying of submarine cables and pipelines, or in regard to other internationally lawful uses of the sea specified in article 58;
>
> (b) when it is alleged that a State in exercising the aforementioned freedoms, rights or uses has acted in contravention of this Convention or of laws or regulations adopted by the coastal State in conformity with this Convention and other rules of international law not incompatible with this Convention; or
>
> (c) when it is alleged that a coastal State has acted in contravention of specified international rules and standards for the protection and preservation of the marine environment which are applicable to the coastal State and which have been established by this Convention or through a competent international organization or diplomatic conference in accordance with this Convention.

UNCLOS, *supra* note 7, art. 297(1).

337 Chagos Arbitration, Mauritius v. U.K., 2011-03 (Perm. Ct. Arb. 2015), ¶¶ 307–17.

338 *Id.* ¶ 308.

339 *Id.*

340 The provisions read in relevant part, "Disputes concerning the interpretation or application of the provisions of this Convention with regard to fisheries shall be settled in accordance with section 2 [concerning compulsory dispute settlement], except that any dispute relating to its sovereign rights with respect to the living resources . . ." UNCLOS, *supra* note 7, art. 297(3)(a).

> the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.[341]

While Japan may argue that a dispute over its duty to cooperate is really a dispute over its exercise of sovereign rights in the exclusive economic zone, that argument should fail. First, a commercial whaling operation does not relate to "fisheries," and consequently, the exception of Article 297(3) does not apply. While the definition of "fish" and "fishing" often relates to non-fish taxonomic groups, such as crustaceans and mollusks,[342] the laws of most countries conserve and manage marine mammals, such as whales and dolphins, very differently.[343] UNCLOS, too, distinguishes fish from marine mammals, specifically allowing a different management regime for marine mammals than for other living marine resources.[344]

Second, although the exception in Article 297(3) refers to "living resources," that exception must be read consistently with the general rule that precedes it.[345] In this case, the general rule provides that "fisheries" disputes are subject to compulsory dispute settlement. The exception cannot be read more broadly than the rule.

Third, properly presented, a case against Japan would not necessarily be about its right to whale or even the number of whales it is taking. Instead, it would be about its duty to cooperate by sharing data, following the RMP, and fulfilling the other obligations discussed in Part IV. Even if Japan has certain rights and implementation of those rights is exempt from compulsory jurisdiction, it also has duties, and those duties are not exempt from compulsory jurisdiction.[346] The tribunal in the *Chagos* arbitration concluded that Article 297(3) also

---

341 *Id.*

342 *See, e.g.*, Magnuson Stevens Fishery Conservation and Management Act, 16 U.S.C.A. § 1802(12) (Westlaw through Pub. L. No. 116-91) (defining "fish" as "finfish, mollusks, crustaceans, and all other forms of marine animal and plant life *other than marine mammals*, and birds") (emphasis added).

343 *See, e.g.*, U.S. Marine Mammal Protection Act, 16 U.S.C.A. §§ 1361–1421h (Westlaw through Pub. L. No. 116-91) (prohibiting the taking, import, and export of marine mammals, subject to narrow exceptions).

344 *See supra* Section II.A (describing Article 65 of UNCLOS).

345 UNCLOS, *supra* note 7, art. 297(3)(a).

346 The plain language of Article 297(3)(a) speaks only to exempting disputes involving the exercise of sovereign rights. Nowhere does it exempt a coastal State from implementing its duties or exempting disputes concerning duties from compulsory dispute settlement. *See id.*

exempted procedural obligations, such as the duties to consult,[347] but the duty to cooperate is substantive and includes, in the context of Japanese whaling, the requirement to use the RMP and the duty to prohibit whaling until relevant data are collected.

For these reasons, a dispute involving Japan's duty to cooperate for the conservation and management of whales is subject to the compulsory dispute settlement provisions of UNCLOS.

CONCLUSION

Japan may withdraw from the ICRW and IWC, but customary international law and UNCLOS impose significant obligations, including the duty to cooperate and the duty to prepare a transboundary EIA, that Japan must fulfill prior to whaling. Moreover, the specific elements of the duty to cooperate—consultation, notification, information sharing, and monitoring, for example—are ongoing duties that Japan owes to IWC members.

The decisions of the ICJ, ITLOS, and other international tribunals make clear that states must give "due regard" to the rights of other states. In the context of Japan's commercial whaling, Japan must give "due regard" to the rights of other states by cooperating through the IWC. These decisions also make clear that the duty to cooperate depends on the nature of the rights held by other states.

This Article has detailed the relevant law and the nature of the rights held by IWC members and reaches the following conclusions:

1. Although Japan has withdrawn from the ICRW and IWC, it has a duty to cooperate through the IWC in the conservation, management, and study of cetaceans. The duty to cooperate is customary international law that finds a specific expression in UNCLOS Articles 65 (for marine mammals in exclusive economic zones) and 120 (for marine mammals in the high seas).
2. NAMMCO and the ATS do not constitute "appropriate international organizations" for purposes of Japan's commercial whaling. NAMMCO only applies to activities in the North Atlantic and would not apply to any of Japan's past whaling activities or to its current whaling activities. Moreover, a regional organization like NAMMCO with just two participating states and two overseas territories is not an "appropriate *international* organization." The ATS, including CCAMLR, does not constitute an "appropriate international organization" because the ATS and CCAMLR (1) apply only to areas of the Southern Ocean where Japan no longer hunts whales and

347 Chagos Arbitration, Mauritius v. U.K., 2011-03 (Perm. Ct. Arb. 2015), ¶¶ 299–300.

(2) allow hunting of marine mammals only for scientific and other non-commercial purposes. CMS is not an organization and, in any event, appears to defer to the IWC as the appropriate international organization for the conservation and management of cetaceans.

3. Even if Japan creates its own regional body, similar to NAMMCO, participation in that organization would not eliminate Japan's duty to cooperate through the IWC. The plain language of Article 65 provides that coastal states must cooperate through all appropriate international organizations. The drafters of UNCLOS also appear to have contemplated that an organization other than the IWC would be appropriate under Article 65 only with respect to bycatch of marine mammals in fisheries. Regardless, the IWC is the only organization that conserves and manages whale stocks on a global basis and for all types of whaling. Thus, Japan is required to cooperate with the IWC regardless of its creation of a regional management body.

4. Decisions of the ICJ, ITLOS, and other tribunals make clear that the duty to cooperate under both customary international law and UNCLOS applies anywhere Japan might whale: the Southern Ocean, North Pacific, or its territorial seas and exclusive economic zone. Articles 65 and 120 of UNCLOS clarify that, with respect to whaling in its exclusive economic zone and on the high seas, Japan has a duty to cooperate through the IWC.

5. Decisions of the ICJ, ITLOS, and other tribunals interpret the duty to cooperate, whether as customary international law or under UNCLOS, to require that the relevant state have "due regard" to and "take full account" of the rights of other states and the needs of conservation for the benefit of all. This requires, at a minimum, that the relevant state negotiate, consult, and share information in good faith.

6. To fulfill its duty to cooperate with the IWC, Japan must undertake the following actions:

    a. *Participate in IWC meetings*. Japan must participate in good faith in meetings of the IWC and its Scientific Committee as a non-party observer.

    b. *Exchange information*. Japan must provide data concerning the number of whales killed, the number of whales struck and lost, the number of each species that are killed and struck and lost, and mortality from bycatch and other anthropogenic causes. This duty to exchange information also requires Japan to submit information concerning the number and type of whaling vessels involved in the whaling operation, including the number of days at sea on the whaling grounds. This will help IWC scientists confirm the population status of the relevant stocks. Only by providing all of this data can

the IWC ensure that its conservation and management measures are effective over the entire area of distribution of the relevant species.

c. *Use the Revised Management Procedure (RMP).* Japan must generate catch limits using the IWC's Revised Management Procedure in order to ensure that any whaling is sustainable and takes into account the full range of the stock.

d. *Monitor the impacts of its whaling program*. Japan has an ongoing duty to monitor the impacts of its whaling activities and submit any new information to the IWC.

e. *Comply with the moratorium*. Japan must comply with the moratorium on commercial whaling until all unresolved issues concerning the stocks are addressed. As noted in Part III, significant questions remain about the stock structure of both sei and minke whales, and sei and Bryde's whales are easily misidentified. Moreover, data gaps must be filled such that the RMP can generate catch limits that take into account all mortality from all sources, including bycatch in fisheries. Once these issues are resolved and data submitted, however, Japan likely no longer has a duty to comply with the moratorium.

7. As part of its duty to cooperate or as a freestanding duty to avoid transboundary environmental harm, Japan must prepare a transboundary EIA prior to engaging in commercial whaling because its commercial whaling has the potential to harm resources shared with other states or existing in areas beyond national jurisdiction. In preparing the EIA, Japan must provide relevant information to potentially affected states and allow them to comment on the EIA.

8. The nature of Japan's duty to cooperate with the IWC does not change if its whaling is viewed through the lens of UNCLOS Article 65 for cetaceans or Article 64 for highly migratory species, which expressly refers to the promotion of optimum utilization, because the duty to cooperate must be viewed in light of the rights of other states. Rights relating to whales derive from the conservation and management of whales through the IWC and by virtue of the shared nature of whale stocks with other states and the efforts of the IWC to conserve and manage whale stocks. In any event, the IWC, through the RMP and other measures, has been ensuring the sustainable use and optimum utilization of whales.

9. If Japan does not implement its duty to cooperate, IWC members that are also UNCLOS parties may use the compulsory and binding dispute settlement provisions of UNCLOS to compel Japan to fulfill its duty to cooperate and duty to prepare a transboundary EIA. Japan has resumed commercial whaling

without fulfilling certain aspects of its duty to cooperate. For example, it has resumed whaling without seeking the advice of the IWC's Scientific Committee and without using the IWC's scientifically vetted algorithm for setting sustainable catch limits.[348] It has resumed whaling without a scientifically accepted understanding of the stock structure for sei whales and minke whales. It appears to have resumed whaling without preparing a transboundary EIA.[349] As such, Japan has violated its duty to cooperate, and UNCLOS parties that are also IWC members can challenge Japan's whaling through the compulsory dispute settlement provisions of UNCLOS.

348 *See supra* Section IV.D.

349 *See supra* Section IV.E.