WHERE WERE THE TUNA WATCHERS?
Lessons for Australia in litigating against Japan
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During Japan’s recent ‘scientific’ whaling expedition to Antarctica, the Australian government sent the Oceanic Viking vessel to collect evidence for possible use in any international court proceedings against Japan. It would not be the first time that Australia had instituted a case against Japan to address the conservation and utilisation of marine life, having done so in relation to southern bluefin tuna (‘SBT’) in the late 1990s. Given Australia’s experience in this regard, it is worth considering what lessons, if any, may be drawn from those proceedings in assessing whether Australia should commence international litigation against Japan in relation to its scientific whaling program. Equally, it should be asked whether the outcomes of that litigation foretell any comparable results in Australia and Japan’s relationship both with respect to whaling and more generally.

A decision to litigate

In assessing whether states are likely to turn to international litigation as a means of resolving their disputes, a range of factors — legal and non-legal — must inevitably be taken into account. Those featuring most commonly in government statements and press releases, as well as media reports and academic commentary, are historic perspectives, economic incentives, public interest, broader national interests and scientific uncertainty.

Historically

Both Australia and Japan, as island states, share long histories in the exploitation of ocean resources. Their main interaction in relation to the exploitation of marine living resources commenced after World War II when the Allied Occupation in Japan authorised both tuna and whaling expeditions, the former extending south to the equator and the latter reaching into Antarctic waters. At the time, Australia was concerned about the impact these activities would have on its own fishing industries, but largely failed in its efforts to constrain the development of Japan’s tuna fishing and whaling.

As the law of the sea developed, Australia was entitled to claim rights over greater areas of ocean off its coast. This extension of Australia’s maritime rights meant that Japan had to seek permission to send its fishing vessels into Australian waters. Australia and Japan’s first negotiations over tuna date back to the late 1960s; both states and their respective tuna industries have a history of cooperation, including undertaking a joint venture agreement, Australian ports being open to Japanese vessels for repairs and Japan providing advice on tuna fishing practices. In a variety of ways, this cooperation continued up to the time of the SBT litigation.

A long history of cooperation does not exist when comparing SBT to whaling. While both states share a history of whaling, their paths diverged in the 1970s when Australia decided that it would cease commercial whaling and advocate for a moratorium on whaling internationally. Japan’s position within the International Whaling Commission (IWC) has been to continue to support the sustainable utilisation of whales.

Economic interests

A further factor to consider as influencing a decision to pursue international litigation is the financial stakes involved. There are large sums of money at stake when it comes to tuna. The SBT caught off the Australian coast are primarily exported to Japan for sale as sashimi. The Australian tuna industry deliberately shifted its focus from capturing tuna to be sent to canneries to cultivating larger fish that could be sent to the more lucrative sashimi market. A 2004 assessment of the SBT fishery by Australia’s Department of the Environment and Heritage estimated the value of the commercial harvest as ranging up to AUD $450m after value adding (which refers to the aquaculture industry off Port Lincoln where SBT are towed to cages close to shore and fattened up prior to harvesting). Australia has professed a keen interest to ensure the ongoing survival of the fishery, precisely because of the potential for much larger Australian exports in the future if the stock does recover sufficiently. Economic motives also explain aspects of Japan’s decision-making in relation to SBT, especially as importers of the fish seek to meet market demands in Japan.

Whales are not worth as much as they once were, at least not in terms of a dollar figure. There is now very little commercial demand for whale products, and there have been reports that Japan has struggled to sell the whale meat from its scientific catch. The International Fund for Animal Welfare (IFAW) now argues the line that a whale is worth more alive than dead, given the burgeoning whale-watching industry throughout the world. IFAW has reported that: ‘Whale watching is worth almost AU$300 million to Australia’s economy and an estimated 1.6 million people go whale watching there each year.’ The Australian government has recently adopted this position, and it could be argued that Australia has considerable financial stakes in whales as well as in SBT.

REFERENCES
1. These aspects feature in different ways in the various levels of Australian foreign policy: see Shirley V Scott, Australia’s First Tuna Negotiations with Japan (2000) 24 Marine Pol’y 309.

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Public interest
In turning to public interest in tuna and whaling, there is a contrasting position, whereby public interest in Australia in whaling far surpasses public interest in the welfare of SBT. Despite the mass over-fishing of SBT over decades, these fish just fail to capture the public's imagination in the same way as whales. Their physiological difference is one immediate explanation for this difference. Whales are marine mammals; it has been shown that they are able to communicate with one another, have considerable cognitive abilities and complex social patterns. Some commentators have gone so far as to suggest that whales might be entitled to a right to life. SBT are fish, and research about their life cycles or habits has been for the purpose of assessing their exploitation as an ocean resource. Certainly it seems difficult to conclude that pressure from the general public was a catalyst or provided additional impetus for Australia to pursue litigation against Japan over SBT. Whaling has received considerable media attention in Australia, particularly of late in relation to the dramatic clashes between Japan's whalers and the Sea Shepherd Conservation Fund during last season's expedition. When the Prime Minister emphasised diplomatic options for dispute settlement during his recent trip to Japan, he was compelled to respond to public pressure in reiterating that litigation remained an option.

National interests
The question of national interests raises some of the broader concerns that are at stake in Australia and Japan's relationship concerning SBT and whales. For Australia, it would be mindful of the reputation of its scientific measurements that were once used to determine the allowable catch and because of a history of under-reporting (or misreporting) of whaling activities. Any attempt to enforce these injunctions would be dealing with the whaling issue quite differently if it was truly interested in over-turning the moratorium on commercial whaling.13 Hirata has also highlighted the domestic power plays driving Japan's decisions on whaling, but considers that they support the pro-whaling position.14 The relevance of issue linkage also has bearing on Japan, especially in terms of how positions on SBT and on whales may influence each other, as well as decisions on the conservation and management of other marine species. The potential for a decision in one forum to serve as precedent in another forum is of critical importance to Japan. To this end, Japan may not wish to compromise its scientific programs on whaling or SBT, or abandon its perspective on the viability of sustainable utilisation of marine species in the event that any perceived concession in one forum may lead to the expectation of another such concession elsewhere.

Scientific uncertainty
For both SBT and whales, decisions regarding management, conservation and exploitation have been complicated by differing scientific views on the status of the stocks. Scientific differences with respect to SBT have arisen in relation to the basic question as to the rate of recovery of the stock overall.15 This question is then linked to conflicting views as to the age at which SBT reach maturity, with Japanese scientists taking the position that SBT mature in eight years, whereas Australian scientists tend to believe that the age of maturity is not reached until at least the twelfth year.16 The age of maturity is relevant to determining the reproductive age of the SBT and affects projections about how quickly population numbers may increase. Scientists from each state have challenged the other's methodological aspects, as well as the assumptions underpinning research design, and its execution, and disagreed over ecological modeling.17 These differences motivated Japan to pursue unilaterally its Experimental Fishing Program, which was the ultimate catalyst for Australia and New Zealand to commence legal proceedings.

For whales, the scientific uncertainty has arisen because of the scientific measurements that were once used for determining the allowable catch and because of a history of under-reporting (or misreporting) of whaling activities.18 Japan's current research program in Antarctica is known as JARPA II, and comprises monitoring of the Antarctic ecosystem and development of new management objectives for whale resources. Japan has argued that the low level of abundance of blue whales is due to their niche in the ecosystem having been filled by the Antarctic minke whale. Japan therefore proposes that by selective harvesting of minke whales, the recovery of blue and
fin whales would be accelerated. Scientists within the IWC have argued that this research methodology contains 'several unsubstantiated or incorrect assumptions'. Another point of controversy regarding the research has been whether lethal research is essential. Similar to SBT, the scientists just don't agree.

What is the legal case?
It is difficult to predict what weight might be given to any of these national imperatives in decisions regarding how a dispute will be resolved. For litigation, all these factors are played out to varying extents, and with varying degrees of acknowledgement, in the context of specific legal disputes.

Both fishing for SBT and whaling are regulated under multilateral treaties. With New Zealand, Australia and Japan decided to formalise their cooperation over SBT in the 1993 Convention for the Conservation of Southern Bluefin Tuna (CCSBT). This treaty creates a SBT Commission with responsibility for, inter alia, collecting and accumulating scientific information on SBT; deciding upon the total allowable catch and national allocations for each party, and considering regulatory and other matters arising from the work of the Commission's Scientific Committee. The legal dispute that arose concerning SBT related to Japan's unilateral commencement of an Experimental Fishing Program (EFP). While the program clearly implicated obligations under the CCSBT, Australia and NZ chose to pursue their claims under the UN Convention on the Law of the Sea (UNCLOS), arguing that the EFP was in violation of obligations of cooperation in the conservation and management of fish species on the high seas.

The 1946 International Convention on the Regulation of Whaling (ICRW) indicates in its preamble paragraphs that the treaty is concerned with 'the proper conservation of whale stocks' in order to 'make possible the orderly development of the whaling industry'. There is clear recognition of the need for conservation, and that this conservation will allow for continued whaling. The ICRW establishes a commission, the International Whaling Commission (IWC), which meets annually and allows for discussion and decisions on whaling matters. Through the IWC, states parties to the ICRW agreed to set a catch limit of zero, but to keep this catch limit under review in accordance with the best scientific advice available. This moratorium applies to commercial whaling only, as Article VIII of the ICRW, commonly referred to as a 'loophole' in the treaty, allows parties to the ICRW to issue special permits for the conduct of scientific whaling. The state party determines any conditions to attach to the permit and the IWC has extraordinarily few powers of oversight when it comes to the issuance of permits. Article VIII also allows for whales killed as part of research to be 'processed', that is, it is lawful for these whales to be sold once the research is complete. Japan relies on Article VIII as the legal basis for its scientific whaling program.

The main legal arguments against Japan's scientific whaling allege that JARPA II is not scientific research but is tantamount to commercial harvesting and hence in violation of the ICRW; that Japan has not followed ICRW procedures in issuing permits for JARPA II; and that Japan's actions amount to an abuse of right under the treaty. In addition, it can be argued that the program is in violation of certain provisions of the UNCLOS (and arguably other multilateral treaties).

Litigation
It is evident that the factors leading to litigation over SBT are not perfectly aligned with those relevant to the current dispute with Japan over whales. It may be the case that each dispute is sufficiently unique in its factual setting that there can never be any presumption as to what mode of dispute settlement is appropriate. If litigation is to be considered as a dispute resolution option, the factual setting needs to be assessed in addition to what may happen during the course of the litigation and then subsequent to the litigation. Whatever factors ultimately contribute to the decision to litigate, it is at least clear that no government takes this decision lightly. Andrew Serdy, who previously worked for the Australian government, has noted:

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

Yet this decision was made in relation to SBT. The SBT Case has been the subject of considerable academic commentary, and it does not need to be revisited in its entirety here. Rather, some aspects will be highlighted...
as a means of showing how comparable decisions and outcomes might arise in relation to litigation over whales.

Litigation in SBT
The CCSBT has a dispute settlement clause, which includes the possibility of parties resorting to arbitration but only if the parties so consent. There are also provisions for mediation and negotiations. Japan was willing to follow these routes, but refused to cease its EFP pending these different procedures. Dissatisfied with this response, Australia and New Zealand decided to turn to the dispute settlement procedure available under the UNCLOS, which does not require the consent of states parties to the treaty to proceed to arbitration. In making this decision, Australia and New Zealand were able to secure provisional measures, which are similar to an injunction in Australian law, so that Japan was ordered to stop its EFP until the case was heard. The arbitral tribunal ultimately decided that it lacked jurisdiction to determine the case on the basis that the dispute settlement procedures in the CCSBT took precedence over those available under the UNCLOS. As a result, no decision was reached on the merits of Japan's EFP.

Litigation over whales
For litigation about Japan's scientific whaling program, Australia again has a choice of forum. The ICRW does not have its own dispute settlement system, so Australia could turn to the UNCLOS again without fear of a comparable decision on jurisdiction as occurred in relation to SBT. There is no dispute settlement procedure in the ICRW that would take precedence over the one in the UNCLOS for a dispute about whales. Also open to Australia is the possibility of turning to the International Court of Justice (ICJ), as both Australia and Japan have accepted the compulsory jurisdiction of this Court. There would inevitably be some arguments over whether the Court could hear the case, but there are no prima facie obstacles to establishing jurisdiction.

If Australia proceeded under the UNCLOS or before the ICJ, either option would permit Australia to seek provisional measures to halt JARPA II. Obviously, this possibility may prove attractive at the end of the year when Japan is about to recommence its research season. From the SBT Case, we have seen that the tribunal available under the UNCLOS is willing to make orders halting these sorts of programs. The ICJ does not have such a good track record when it comes to halting the type of research we are discussing. And the method of determining this, which ICJ has not been involved in any dispute settlement procedures, which is as ambiguous in any win/loss assessment — again, each side could well be able to read into such a decision a vindication of their position.

Outcomes of litigation
The litigation between Japan and Australia and New Zealand over SBT had a range of effects — in relation to resolving the immediate dispute concerning the EFP (and accompanying port ban measures Australia and New Zealand had put in place) and as a more general matter in the relationship between the states parties to the CCSBT. While not an immediate effect, the dissipation of the friction surrounding the EFP permitted the states to reach a new agreement on the total allowable catch and national catch quotas. The membership of the SBT Commission has also been expanded, and monitoring and inspection techniques have been enhanced. There are still contrasting views on how well this organisation is functioning, but the fact that the disputant states remained engaged in the organisation is still notable. Even when it was revealed in 2006 that Japan had been over-fishing from Australian waters for twenty years, Australia was prepared to pursue the matter through the SBT Commission rather than consider litigation once again. Although the litigation itself left a variety of legal questions unanswered, several commentators have taken the view...
These changes would render it more difficult, if not impossible, for states like Japan to undertake commercial harvesting under the banner of scientific research.

that the process itself contributed to the restoration of cooperative relationships in various ways.79

The longer-term outcomes of litigation over whaling should also be considered. Irrespective of whether there is a win for Australia or a win for Japan (or something in between), the matter will inevitably go back to the IWC. There is not going to be a ruling that scientific whaling as a general matter is unlawful (so a court or tribunal is unlikely to change Article VIII), nor would a court decide that the moratorium should be lifted. There may be indications one way or another, but it would otherwise remain a decision for the IWC. It could be argued that if Japan lost, it would withdraw from the ICRW, especially as Japan has threatened to do so in the past. However, given a complete loss may be unlikely, Japan will probably continue to recognise that its interests are better served within the organisation than outside of it.

The benefits of litigation would be seen if the judgment provides enough guidance on certain questions of interpretation and application so as to break the present impasse in the IWC and indicate how various differences should be resolved. In particular, some of the most problematic aspects of JARPA II (including the number and species of whales proposed to be taken, as well as its lethal nature) might be resolved. There may be enough of a ‘win’ for both sides that stalled negotiations could be resumed. While litigation always entails risks, the potential losses for Australia will be able to respond to strong public sentiment on the issue and support a growing economic industry, as well as maintain a leadership role on the issue in the IWC. The experience from pursuing litigation against Japan over SBT has demonstrated that litigation may be an important avenue for overcoming a deadlock in an international organisation and that Australia and Japan’s overall bilateral relationship is strong enough to weather these differences over the conservation and utilisation of marine life.

For the moment, though, it appears that Australia will not be pursuing this option. Despite Labor’s position on the need to institute legal proceedings against Japan prior to the 2007 elections and subsequent comments to this effect during the most recent whaling season, Prime Minister Kevin Rudd emphasised prior to his June 2008 trip to Japan that diplomacy must be given a chance.80 This view reflects the fact that discussions are currently underway in the IWC on ways to reform the organisation.81 Moreover, Australia has also put forward proposals to overhaul some of the most offensive aspects of scientific whaling (including the unilateral aspect of decision-making when it comes to issuing special permits and the use of lethal research).82 These changes would render it more difficult, if not impossible, for states like Japan to undertake commercial harvesting under the banner of scientific research. It is obvious that Australia will want to see whether these efforts make any difference before pursuing a more adversarial course of conduct.

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38. Gillian Bradford, “Japan Caught Overfishing Bluefin Tuna,” ABC News, 16 October 2006 (referring to comments of the Australian Fisheries Minister that Australia expected Japan to comply with new SBT fishing limits since Japan had admitted its wrong doing and accepted a penalty).


41. Dispute settlement experts have been brought into the IWC as a means of finding ways around the current impasse. See Chair’s Report of the Intersessional Meeting on the Future of IWC (6-8 March, 2008), IWC/60/7 Agenda item 18 <iwcoffice.org/,_documents/commission/ IWC60docs/60-7.pdf> at 24 June 2008.