

## Understanding Japan's Resumption of Commercial Whaling under International Law

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### 23.1 WHALING UNDER INTERNATIONAL LAW: AN ONGOING DEBATE

On 1 July 2019, Japan officially withdrew from the International Convention for the Regulation of Whaling (ICRW)<sup>1</sup> and resumed commercial whaling after nearly 31 years.<sup>2</sup> On this very date, the Japanese government announced that a maximum of 383 minke, Bryde's and sei whales would be caught during its first annual whaling tour within its exclusive economic zone (EEZ) of 200 nautical miles.<sup>3</sup> The Japanese whaling fleet, which had been conducting scientific whaling in the high seas, has resumed commercial whaling but limited to the Pacific coasts of Japan and not the Sea of Japan or the East China Sea. All other whaling operations are conducted on Japan's Pacific side except for areas off the coasts of Hokkaido that face the Sea of Okhotsk.<sup>4</sup> This maritime area is much narrower compared to Japan's previous whaling area in the Antarctic Ocean (see Figure 23.1).

On 8 October 2019, the whaling fleet 'Nisshin Maru' reportedly returned having captured 187 Bryde's whales (about 1,171 tons), 25 sei whales (about 232 tons) and 11 minke whales (about 23 tons), totalling approximately 1,426 tons of whale meat.<sup>5</sup>

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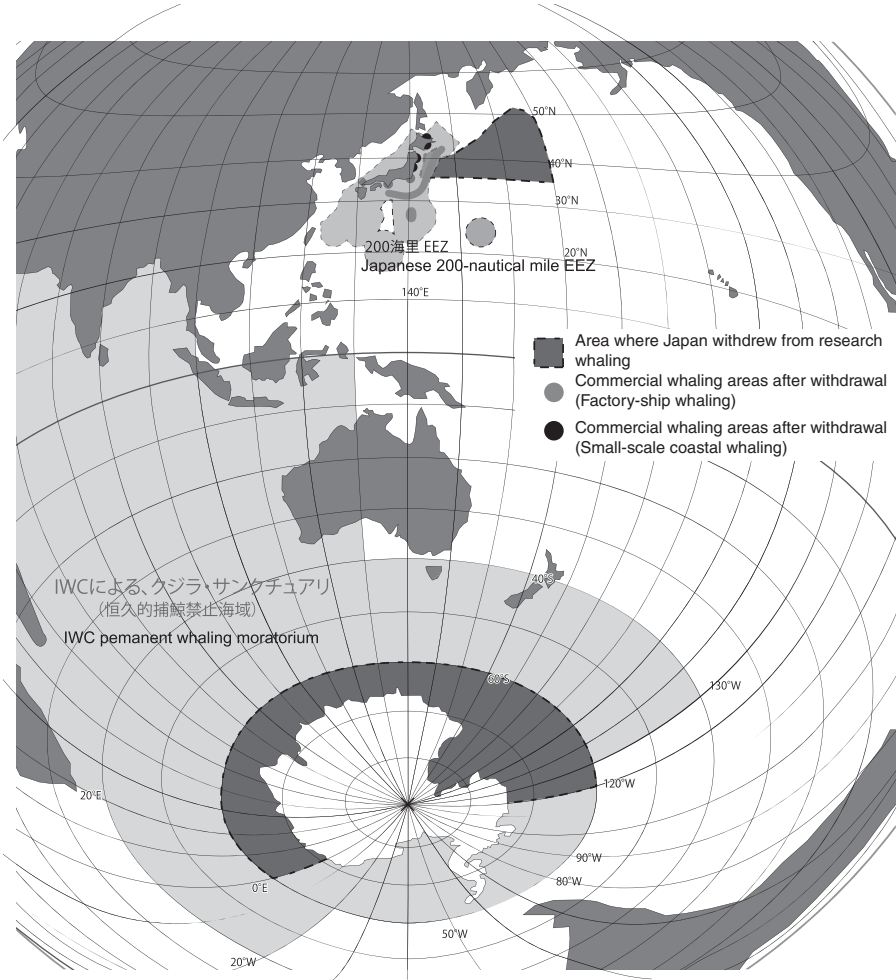
<sup>1</sup> International Convention for the Regulation of Whaling (adopted 2 December 1946, entered into force 10 November 1948) UNTS Vol 161 (72).

<sup>2</sup> Ministry of Foreign Affairs of Japan (26 December 2018); Press Secretary of the Ministry of Foreign Affairs, 'Japan Is Committed to the Conservation of Whales' (*New York Times*, 11 January 2019).

<sup>3</sup> Minke whale: 171; Bryde's whale: 187; Sei whales: 25, Fisheries Agency Statement of 1 July 2019 <[www.jfa.maff.go.jp/j/press/kokusai/190701.html](http://www.jfa.maff.go.jp/j/press/kokusai/190701.html)>.

<sup>4</sup> Junko Sakuma, 'Gains and Loses of Japan's Withdrawal from the International Whaling Commission' (*Asahi*, 9 January 2019).

<sup>5</sup> 'Commercial Whaling Vessel Nisshin Maru Returned to Port' (Keizai Daily News, 8 October 2019) [translation from Japanese] <<https://bit.ly/2vpD5YE>>.



参考資料：水産庁「捕鯨問題の情勢」（2019年6月）、海上保安庁、オーストラリア南極局、日本鯨類研究所  
 ※母船式捕鯨の海域は、2019年2020年の実績を元に修正した。

作図：佐久間淳子

Sources: Fisheries Agency, "Current State of Whaling Issues" (June 2019), Japan Coast Guard, Australian Antarctic Division, The Institute of Cetacean Research  
 \* Areas of mothership whaling have been revised based on actual whaling operations during 2019-2020.

Chart by Junko Sakuma (with permission)

FIGURE 23.1. Japan’s past and current whaling areas

On 24 February 2020, the fleet embarked on a new whaling tour in Japan’s South-Eastern EEZ. The first 2020 catch was announced on 3 March: a Bryde’s whale (about 14.85 tons).<sup>6</sup> In July 2020, the Japanese government released the 2020 catch

<sup>6</sup> ‘First Catch in 2020’ (*Blog of Kyodo Senpaku*, 3 March 2020).

quotas for Minke, Bryde's and Sei whales and stated that these are 'substantially equal to those for 2019'.<sup>7</sup>

The literature has detailed the rules and objectives of the ICRW;<sup>8</sup> the work of the International Whaling Commission (IWC), which was established in 1948 to implement the ICRW;<sup>9</sup> and litigation under the ICRW.<sup>10</sup> This chapter builds on existing scholarship and presents the reasons for, and possible implications of, Japan's decision to withdraw from the ICRW and resume commercial whaling in its EEZ from 1 July 2019.<sup>11</sup> This chapter places the issue of whaling within the overall environmental law debate and explains that promotion of the international rule of law in the field of commercial whaling calls for positive cooperation at the international level to promote the conservation and sustainable use of whale stocks. To illustrate this, the discussion provides an overview of Japan's approach towards environmental conservation and living resources management in the light of the applicable rules of international law, especially under UNCLOS and the ICRW. The chapter argues that, despite its withdrawal from the ICRW, Japan remains under a continuing obligation to cooperate meaningfully with other States through the appropriate international organizations, including the IWC, for the conservation and management of the marine natural resources presented by whales. Equally, other interested States remain under a continuing obligation to cooperate with Japan for the same purpose. Nevertheless, the degree or means of cooperation required by Japan and other interested States to fulfil their legal duty to cooperate under international law lacks clarity. It is further argued that whilst Japan is under a positive duty to adopt a precautionary approach to whaling within its EEZ, application of the precautionary approach does not generally prescribe what measures must be taken at the national level. The lessons that ought to be learnt from Japan's withdrawal by the global protagonists of whaling and the rule of law implications in light of unclarity in the applicable legal framework have been articulated as concluding remarks.

<sup>7</sup> Government of Japan, Fisheries Agency, 'Fisheries White Paper, 5 June 2020' Government of Japan, Fisheries Agency, 'Whaling Catch Quotas 2020' <[www.jfa.maff.go.jp/e/whale/attach/pdf/index-7.pdf](http://www.jfa.maff.go.jp/e/whale/attach/pdf/index-7.pdf)>

<sup>8</sup> Malgosia Fitzmaurice, 'International Convention for the Regulation of Whaling and International Whaling Commission: Conservation or Preservation – Can the Gordian Knot Be Cut (or Untangled)' (2013) 5 *Yearbook of Polar Law* 451.

<sup>9</sup> William C. G. Burns and Geoffrey Wandesforde-Smith, 'The International Whaling Commission and the Future of Cetaceans in a Changing World' (2002) 11(2) *Review of European Community & International Environmental Law* 199.

<sup>10</sup> Malgosia Fitzmaurice, *Whaling and International Law* (Cambridge: Cambridge University Press 2015) 88–122.

<sup>11</sup> Atsuko Kanehara, 'Japan's Withdrawal from the International Convention for the Regulation of Whaling' (2019) 62 *Japanese Yearbook of International Law* 376–387.

### 23.2 WHALING IN RELATION TO MARINE ENVIRONMENTAL PROTECTION

Pro-whaling nations, such as Japan, and anti-whaling nations and environmental non-governmental organizations (NGOs), such as Australia and Greenpeace respectively, have fundamentally different approaches to the matter. Anti-whaling parties' rhetoric is largely focused on emotion and ethics: the whale is presented as a beautiful and highly intelligent living creature that should not be exploited.<sup>12</sup> An image has been created of a 'super whale' drawing on all whale species: the whale is the largest animal on earth (the blue whale); it has the largest brain on earth (the sperm whale); it sings nicely (the humpback whale); it is friendly (the grey whale); it is endangered (the blue whale); and the like. Some States that favour whaling, such as Norway and Japan, criticize this emotional approach. They assert that the core issue for natural resource sustainability is neither the animal per se nor its appearance or intelligence, but protection and conservation of the marine environment, its flora and its fauna.<sup>13</sup> Such States posit the key question: should the management, conservation and sustainable use of the marine natural resources be (re)presented by whales? These States argue this is a legal and scientific question on protection of the marine environment and, in particular, the sustainable management of whale stocks.

These two approaches embody, according to Fitzmaurice, 'the tension between, or the binary of, on the one hand, the expressly commercial objective of conserving and managing whale stocks in order to provide for the "orderly development of the whaling industry", and on the other the recognition that whales are a "general trust" to be safeguarded for future generations'.<sup>14</sup> Ethical issues, including surrounding animal rights and cultural diversity, permeate the whaling debate.<sup>15</sup> Some animal rights theories suggest whaling should be banned altogether as animals enjoy a full right to life.<sup>16</sup> Conversely, theories based on cultural diversity or cultural identity assert the need to protect the cultural rights

<sup>12</sup> Michael Heazle, *Scientific Uncertainty and the Politics of Whaling* (Washington, DC: University of Washington Press 2006) 170.

<sup>13</sup> As Morishita explains, "There are more than 80 different species of cetaceans and the statement ["whales are endangered"] is as wrong as stating that "birds are endangered", Joji Morishita, 'Multiple Analysis of the Whaling Issue: Understanding the Dispute by a Matrix' (2006) 30 *Marine Policy* 802, 803.

<sup>14</sup> Fitzmaurice, *Whaling and International Law* (n 10) 34.

<sup>15</sup> Morishita (n 13) 802–808; Fitzmaurice, *Whaling and International Law* (n 10) 123–181.

<sup>16</sup> Anthony D'Amato and Sudhir Chopra, 'Whales: Their Emerging Right to Life' (1991) 85 *American Journal of International Law* 21; Catherine Redgwell, 'Life, the Universe and Everything: A Critique of Anthropocentric Rights' in Alan Boyle and Michael Anderson (eds.) *Human Rights Approaches to Environmental Protection* (Oxford: Oxford University Press 1996) 71–75.

of nations that have historically engaged in whaling.<sup>17</sup> Many other theories relevant to environmental policy, which draw for instance on moral philosophy and bioethics, cannot be explored fully in this chapter.<sup>18</sup> These theories are largely relative and depend on one's standpoint, personal views and emotions. Their application within UNCLOS, the ICRW and other relevant environmental treaties is not without problems.<sup>19</sup> Ethical values and attitudes differ among people and States, including depending on whether they practise whaling. There are strong emotions on all sides of the ethical and cultural whaling debate.<sup>20</sup>

What Japan and other pro-whaling States see as essential is not blanket preservation of individual animals based on emotions and ethics, but protection of the holistic whole, the marine environment, based on law and science.<sup>21</sup> International law takes an expansive view of 'marine environmental protection'. The totality of Articles 192–196 of the UNCLOS indicates that protection and preservation of the marine environment encompasses protection of ecosystems and conservation of living resources and depleted or endangered species of marine life.<sup>22</sup> Thus, the task at hand is to weigh those pro-whaling States' legal and scientific evidence of conservation and sustainable use against the competing evidence of anti-whaling States in light of applicable rules and principles of international law.

As the present chapter argues, promoting the international rule of law in the field of whaling lies in compromise and meaningful cooperation between the global protagonists of whaling. Maintaining inflexible assertions without being prepared to make concessions in pursuit of common ground neither conserves nor protects fragile whale stocks for generations to come. Instead, it alienates key whaling players, thus undermining whatever chances for meaningful international cooperation may have existed while rendering existing legal instruments incapable of implementation and enforcement.<sup>23</sup>

<sup>17</sup> Fitzmaurice, *Whaling and International Law* (n 10) 148–149.

<sup>18</sup> *Ibid.*, 123.

<sup>19</sup> *Ibid.*, 168.

<sup>20</sup> *Ibid.*, 147.

<sup>21</sup> D'Amato and Chopra (n 16) 451, 455; Fitzmaurice *Whaling and International Law* (n 10) 147.

<sup>22</sup> In the South China Sea arbitration, the Annex VII tribunal noted that '... the obligations in Part XII apply to all States with respect to the marine environment in all maritime areas, both inside the national jurisdiction of States and beyond it', *The South China Sea Arbitration (Philippines v. China)* (Merits) (Award of 12 July 2016) para. 940.

<sup>23</sup> Malgosia Fitzmaurice, 'International Convention for the Regulation of Whaling' (United Nations Audiovisual Library of International Law 2017) <[https://legal.un.org/avl/pdf/ha/icrw/icrw\\_e.pdf](https://legal.un.org/avl/pdf/ha/icrw/icrw_e.pdf)>.

23.2.1 *Legality of Whaling and the Precautionary Approach*

Under present international law, whales are an exploitable marine living resource and States possess, in principle, 'a legal right to whale'.<sup>24</sup> The UNCLOS preamble endorses the 'equitable and efficient utilization' of marine living resources in conformity with 'protection and preservation of the marine environment'.<sup>25</sup> A coastal State has a legal right to authorize and regulate exploitation of marine living resources, including whales, within its territorial sea<sup>26</sup> and EEZ.<sup>27</sup> This right is subject to due regard obligations and a legal duty to cooperate 'with a view to ensuring conservation and promoting the objective of *optimum utilization*' (emphasis added) of highly migratory species listed in Annex I of UNCLOS.<sup>28</sup> Category 17 of Annex I encompasses seven families of whales: sperm, blue, humpback, minke, bowhead, grey and narwhal whales. UNCLOS also allows the sustainable exploitation of marine living resources on the high seas.<sup>29</sup>

States decide whether or not they wish to harvest whales. The IWC determines which and how many whale species member States can harvest. The ICRW preamble includes 'the proper conservation of whale stocks and ... the orderly development of the whaling industry' as an aim.<sup>30</sup> Similarly to UNCLOS, the ICRW discusses sustainable exploitation by employing expressions such as achieving the 'optimum level of whale stocks', 'confined to those species best able to sustain exploitation' and safeguarding for future generations 'the great natural resources represented by the whale stocks'.<sup>31</sup> The ICRW preamble further recognizes that 'whale stocks are susceptible of natural increases if whaling is properly regulated, and that increases in the size of whale stocks will permit increases in the number of whales which may be captured without endangering these natural resources'.<sup>32</sup> It adds that 'it is in the common interest to achieve the optimum level of whale stocks as rapidly as possible without causing widespread economic and nutritional distress'.<sup>33</sup> The ICRW seeks to balance the objective of protecting and conserving whale stocks against the objective of managing and utilizing whale stocks, thus

<sup>24</sup> Steinar Andresen, 'The International Whaling Regime: Order at the Turn of the Century?' in Davor Vidas and Willy Østreng (eds.) *Order for the Oceans at the Turn of the Century* (Dordrecht: Kluwer Law 1999) 215, 218.

<sup>25</sup> Preamble, UNCLOS.

<sup>26</sup> Art. 2 UNCLOS provides that the sovereignty of a coastal State extends to the territorial sea.

<sup>27</sup> Art. 56 UNCLOS gives coastal States 'exclusive sovereign rights' for the purpose of exploring and exploiting, conserving and managing the living resources occurring within their EEZ subject to 'due regard' for obligations with respect to the rights and duties of other States.

<sup>28</sup> Art. 7(1)(b) UNCLOS.

<sup>29</sup> Art. 120 UNCLOS.

<sup>30</sup> Preamble, ICRW.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

preserving the whaling industry.<sup>34</sup> The International Court of Justice (ICJ) found that these objectives had remained essentially unchanged in the *Whaling in the Antarctic* case.<sup>35</sup>

Can commercial whaling take place without severely depleting whale stocks and, hence, without harming the marine environment of which whales form an inalienable part? This is the chief question when ascertaining the legality of exploiting whale resources under UNCLOS and the ICRW. The answer is not straightforward. Science has not so far provided definite answers about the population dynamics of certain whale species and the impact of human-related and climatic factors on those species.<sup>36</sup> Scientists remain unsure of how many whales exist, how marine pollution disturbs their habitat, how declining fisheries affect their food supply and how whaling impairs their ability to survive.<sup>37</sup> Other scientists argue that 'difficulties in dealing with uncertain data were exacerbated by strong personal philosophies, which in some cases were influenced by national positions'.<sup>38</sup> Morishita, Japan's leading marine scientist, writes that 'with greatly advanced scientific knowledge about whales and wildlife management and new technologies available today, sustainable whaling is possible'.<sup>39</sup>

Even in the absence of conclusive scientific evidence linking commercial whaling to permanent environmental damage, it may be argued that the precautionary approach is applicable to exploitation of whales as a means of ensuring effective conservation and preventing serious harm to whale stocks.<sup>40</sup> This is particularly true in light of the *Southern Bluefin Tuna* case.<sup>41</sup> There, ITLOS's references to 'scientific uncertainty' focused on the relevance of the precautionary approach to the interpretation and application of UNCLOS.<sup>42</sup> Judges Laing and Treves stressed this point

<sup>34</sup> Fitzmaurice, *Whaling and International Law* (n 10) 43–45.

<sup>35</sup> *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (Judgment) [2014] ICJ Rep 226 paras. 56–58; Fitzmaurice, *Whaling and International Law* (n 10) 178.

<sup>36</sup> Fitzmaurice, 'Can the Gordian Knot Be Cut (or Untangled)' (n 8) 51–54.

<sup>37</sup> Cinnamon Pinion Carlane, 'Saving the Whales in the New Millennium: International Institutions, Recent Developments and the Future of International Whaling Policies' (2005) 24 *Virginia Environmental Law Journal* 1, 32–45.

<sup>38</sup> Joji Morishita and Dan Goodman, 'Role and Problems of the Scientific Committee of the International Whaling Commission in terms of Conservation and Sustainable Utilization of Whale Stocks' (2005) 9(2) *Global Environmental Research* 157–166.

<sup>39</sup> Joji Morishita, 'Resumption of Whaling and the Principle of Sustainable Use' (2002) *Ship and Ocean Newsletter* No 4, 10.

<sup>40</sup> *Whaling in the Antarctic* (Sep Op Charlesworth) ICJ Rep 226, 455; *Responsibilities and Obligations of States with Respect to Activities in the Area* (Advisory Opinion, 1 February 2011) ITLOS Reports 2011; *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)* (Judgment) (Sep Op Judge Weeramantry) reprinted in (1998) 37 *International Legal Materials* 162, 215.

<sup>41</sup> *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)* (Provisional Measures) (1999) ITLOS Rep 280 para. 70.

<sup>42</sup> *Ibid.*, para. 74.

in their separate opinions: environmental legal instruments should be interpreted and applied in light of the precautionary approach.<sup>43</sup>

The IWC halted commercial whaling by adopting ‘zero quotas’ on whale hunting in 1982. Some commentators viewed this blanket moratorium as application of the precautionary approach to commercial whaling: preventive action should be taken even in the absence of clear evidence as to the necessity for such measures before damage has been determined.<sup>44</sup> Voigt describes several factors that are not directly associated with the exploitation of whales and make a prediction of impacts on marine life, and hence whale populations, virtually impossible.<sup>45</sup> Such factors include climate change (global warming affects oceanographic conditions and harms zooplankton species krill, whales’ primary source of food in the Southern Hemisphere) and chemical and noise pollution (marine contaminants and underwater noise pollution may pose long term threats to marine mammals’ living conditions, but the precise impact of these threats must be further investigated).<sup>46</sup>

### 23.2.2 Whaling in Japan’s Environmental and Ocean Policy

Understanding Japan’s approach towards commercial whaling requires starting from Japan’s legal system for protection of the marine environment and conservation of marine natural resources. The Japanese legal system takes an expansive view of the definition of the environment, be it terrestrial or maritime. The Japanese Basic Environment Law of 1993 states that its principal purpose is to promote ‘environmental conservation’ to prevent among others ‘decrease in wildlife species and others which are caused by human activities and affect the environment of the entire globe or a large part of it . . .’<sup>47</sup> The same law stipulates that ‘environmental harm or damage’ (*kogai* in Japanese) includes any interference with environmental conservation ‘as a result of business and other human activities, which cause damage to human health or the living environment (including property closely related to human life, as well as fauna and flora closely related to human life and their living environment)’.<sup>48</sup>

<sup>43</sup> Ibid. (Sep Op Judge Laing) paras. 16–19 and (Sep Op Judge Treves) para. 9.

<sup>44</sup> Fitzmaurice, ‘Can the Gordian Knot Be Cut (or Untangled)’ (n 8) 453–454.

<sup>45</sup> Christina Voigt, ‘A Precautionary Approach to the Whaling Convention: Will the ICJ Challenge the Legality of Scientific Whaling?’ in Inge Lorange Backer, Ole Kristian Fauchald, and Christina Voigt (eds.) *Pro Natura: Festschrift til Hans Christian Bugge* (Oslo: Universitetsforlaget 2012) 557, 575–781 <[https://papers.ssm.com/sol3/papers.cfm?abstract\\_id=2430723](https://papers.ssm.com/sol3/papers.cfm?abstract_id=2430723)>

<sup>46</sup> Ibid.

<sup>47</sup> Art. 1, Basic Environment Law (Law No 91 of 1993) (JPN) <<https://www.env.go.jp/en/laws/policy/basic/index.html>>.

<sup>48</sup> Ibid., Art. 2(3); Yumiko Nakanishi (ed.), *Contemporary Issues in Environmental Law: The EU and Japan* (Berlin, Heidelberg, New York: Springer 2016) 1–13.



Japan's Basic Act on Ocean Policy of 2007 (Ocean Act) introduces a utilitarian approach to marine environmental conservation.<sup>49</sup> The Ocean Act connects, on the one hand, marine biological diversity and marine environmental protection to, on the other, the prosperity of the Japanese people and development of the Japanese economy. It states: 'securing marine biological diversity and conserving the marine environment are the basis of the existence of mankind and also *indispensable for prosperous and affluent lives of the citizenry*' (emphasis added).<sup>50</sup> This connection is likely truer for Japan than other G-20 countries, given Japan's heavy reliance on seafood to support its national economy and society. Commentators defend Japan's position on whaling on the basis of whaling's contribution to Japan's 'food self-sufficiency'.<sup>51</sup> Others note that appetite for whale meat is 'embedded in the Japanese psyche' and should therefore continue to be a source of food.<sup>52</sup> However, whaling is no longer a major industry in Japan, and whale meat consumption in the country had declined even before the 1982 moratorium.<sup>53</sup> Whale constituted around 3 per cent of overall meat consumption in 1981.<sup>54</sup> Japanese government subsidies keep the country's whaling industry on life-support and current trends suggest commercial whaling may become unprofitable in the long term.<sup>55</sup>

The Ocean Act sets out the general principles and objectives guiding the development and use of Japan's waters and marine natural resources 'in harmonization of the peaceful and positive development and use of the oceans with . . . conservation of the marine environment'.<sup>56</sup> This aspires to 'contributing to the sound development of the economy and society', 'supporting industries bearing the development, use and conservation of the oceans' (referred to as 'Oceanic Industries') and improving 'the stability of the lives of citizens'.<sup>57</sup> The Ocean Act states that the Japanese government undertakes three policy objectives. First, to promote the 'sound development of Japan's Ocean Industries'.<sup>58</sup> The central Government, through the Ministry of Agriculture, Forestry and Fisheries (MAFF) and its Fisheries Agency,

<sup>49</sup> Basic Act on Ocean Policy <[www8.cao.go.jp/ocean/english/act/pdf/law\\_e.pdf](http://www8.cao.go.jp/ocean/english/act/pdf/law_e.pdf)>.

<sup>50</sup> Art. 2, *ibid.*

<sup>51</sup> Kate Barclay and Charlotte Epstein, 'Securing Fish for the Nation: Food Security and Governmentality in Japan' (2008) 37(2) *Asian Studies Review* 215.

<sup>52</sup> Arne Kalland, 'Aboriginal Subsistence Whaling: A Concept in the Service of Imperialism' in Georg Blichfeldt (ed.) 11 *Essays on Whale and Man* (2nd ed., High North Alliance 1994) 5; Yasuo Lino and Dan Goodman, 'Japan's Position in the International Whaling Commission' in William C. G. Burns and Alexander Gillespie (eds.) *The Future of Cetaceans in a Changing World* (Transnational Publishers 2003) 3, 7–8.

<sup>53</sup> Junko Sakuma, 'The Repercussions of the Documentary Film *The Cove*: Unravelling the Real Nature of the Whaling Problem the Film and the Two Counter-Movies Failed to Uncover' (2018) 60 *Journal of Applied Sociology* 251 (in Japanese).

<sup>54</sup> Credit: Junko Sakuma (2018).

<sup>55</sup> Annual Budget Report, Cetacean Research Institute (Estimated Budget for 1 April 2019; to 31 March 2020); Kanehara (n 11) 384.

<sup>56</sup> Art. 1, Basic Act on Ocean Policy (n 49).

<sup>57</sup> *Ibid.*

<sup>58</sup> Art. 5, Basic Act on Ocean Policy (n 49).

have a legal duty to ensure the proper conservation and management of fisheries resources; secure a stable supply of fishery products; and support the development of the fishing industry. As whaling is part of fisheries in Japanese law, the Government has a legal duty to promote its sound development.<sup>59</sup> Of note here, the ICRW also uses the expression ‘whale fisheries’, which raises the ‘assumption of similarity in nature’ between whaling and commercial fishing.<sup>60</sup>

Second, to improve ‘scientific knowledge of the oceans’ through ‘ocean science and technology’ programmes as an ‘indispensable [condition] for the proper development and use of the oceans and conservation of the marine environment’.<sup>61</sup> Scientific programmes on the study, conversation and development of whale stocks fall under this policy objective.

Third, to ‘formulate a basic plan with regard to the oceans’.<sup>62</sup> This plan would prescribe necessary measures for the ‘conservation and management of living aquatic resources, conservation and improvement of the growing environment for aquatic plants and animals, increase of fishing ground productivity’.<sup>63</sup> The Basic Plan on Ocean Policy was published for the first time in 2008 and was revised in 2013 and 2018. The first edition (2008) recognized that ‘realization of sustainable use of finite major fishery resources has become an urgent issue for international society’.<sup>64</sup> It further added that ‘it is important for Japan to make efforts to gain the understanding and support of the international society widely for its basic stance to seek sustainable use of marine living resources’.<sup>65</sup>

The second edition (2013) first repeated the long-established maxim that ‘the development and use of the oceans are the basis of existence for the economy and society of [the Japanese] State’.<sup>66</sup> It then directs the Japanese government to ‘*elicit the potential of the sea to the maximum extent* in order to bring wealth and prosperity to [the] country ... while seeking to harmonize the development and use of the oceans with conservation of the marine environment’ (emphasis added).<sup>67</sup> The Ocean Plan, conscious of issues raised by Japan’s whaling activities, also called on the Government to: ‘[s]afely conduct whale research programmes, and continually implement initiatives to gain a wider international understanding of Japan’s stance to realize sustainable use of whale stocks based on scientific evidence’.<sup>68</sup>

<sup>59</sup> See also Art. 24, Basic Act on Ocean Policy (n 49); under Japanese law, marine mammals, including whales, are excluded from the regulations of the Wildlife Protection and Hunting Law and come under the jurisdiction of the Fisheries Agency and the Fishery Resource Conservation Law.

<sup>60</sup> Preamble and Art. II (6), ICRW.

<sup>61</sup> Arts. 4 and 23, Basic Act on Ocean Policy (n 49).

<sup>62</sup> *Ibid.*, Art. 16.

<sup>63</sup> *Ibid.*, Art. 17.

<sup>64</sup> Basic Plan on Ocean Policy (March 2008) 20.

<sup>65</sup> *Ibid.*, 20–22.

<sup>66</sup> Basic Plan on Ocean Policy (April 2013) 2.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*, 20.

The third and most recent edition of the Ocean Plan (2018) directs the Government, through global initiatives 'to lead the world on measures to protect the environment and to promote the integrity of environmental protection and the sustainable use and development of the ocean by cultivating sound marine industries'.<sup>69</sup> The Plan stresses that: 'It is necessary to increase the effectiveness of environmental protection and to develop a *win-win relationship with sustainable development and environmental protection*' (emphasis added).<sup>70</sup> The Ocean Plan envisages the expansion of 'ocean-based businesses', including the fishing industry, as contributors to national economic growth.<sup>71</sup> On commercial whaling, the Ocean Plan states that, in anticipation of resumption of commercial whaling, Japan will continue discussing the issue of whaling with stakeholder countries and conducting scientific whaling based on Japanese law.<sup>72</sup>

### 23.2.3 *Public Opinion on Whaling and Implications on Policy-Making in Japan*

Japanese public opinion on whaling is an important factor, which is not directly relevant to Part XII of UNCLOS but which impacts Japan's ocean policy-making and has played a crucial role in its decision to resume commercial whaling. Several nationwide opinion polls have included questions concerning whaling.<sup>73</sup> A 2011 survey by the Associated Press asked whether commercial whaling and the subsequent sale of whale meat were supported: 52 per cent said yes, 35 per cent were indifferent and only 13 per cent said no.<sup>74</sup> Thus, while only a small fraction of the Japanese public consumes whale meat, a majority supports commercial whaling to produce whale meat.<sup>75</sup>

Reasons underpinning this discrepancy are unclear. Holm writes that despite a sharp decline in whale meat consumption, the Japanese public has in recent years become more involved in traditional whaling culture.<sup>76</sup> Whaling is seen as the 'symbolic continuation of a genuine whaling culture from the Edo period and has become more significant for the Japanese population and politicians in recent years'.<sup>77</sup> Indeed, many Japanese coastal communities, so-called whaling towns, 'have

<sup>69</sup> Basic Plan on Ocean Policy (March 2018) 15.

<sup>70</sup> *Ibid.*, 15–16 and 22.

<sup>71</sup> *Ibid.*, 29.

<sup>72</sup> *Ibid.*, 77; Act No. 76 of 2017 (JPN).

<sup>73</sup> Data provided to the author by Junko Sakuma (March 2018).

<sup>74</sup> The 2011 public survey results can be accessed here: <<https://search.e-gov.go.jp/servlet/Public?CLASSNAME=PCMMSTDETAIL&id=550002675&Mode=2>> (in Japanese).

<sup>75</sup> Amy L. Catalinae and Gerald Chan, 'Japan, the West, and the Whaling Issue: Understanding the Japanese Side' (2005) 17(1) *Japan Forum* 133, 148–149.

<sup>76</sup> Fynn Holm, 'Japan's Walfangpolitik: Die Gründe für den Austritt aus der Internationalen Walfangkommission' in Chiavacci and Wieczorek (eds.) *Japan 2019: Politik, Wirtschaft, Gesellschaft* (München: Iudicium 2019) 126.

<sup>77</sup> *Ibid.*

inextricably linked the continued existence and rebuilding of their towns with coastal whaling operations'.<sup>78</sup> The Japanese delegation has made repeated efforts before the IWC to allow these communities to carry out limited small-scale coastal whaling to protect their traditional lifestyle and ensure their economic survival.<sup>79</sup> These efforts have been unsuccessful, despite the conclusions of a scientific report suggesting that the IWC create a 'separable and definable category' of small-scale whaling with overlapping elements of both aboriginal and commercial whaling.<sup>80</sup>

Other authors suggest that constant anti-whaling campaigns by Western environmental NGOs since the 1960s have contributed to growing 'whale nationalism (*kujira nashonarizumu*)'.<sup>81</sup> As Maekawa and Fukuda explain, although the Japanese public should be indifferent to whaling in general, 'it is a recent characteristic that when foreigners criticize the whale issue, strong nationalistic calls such as "this is the arrogance of the West" or "Japanese food culture must be protected" suddenly appear'.<sup>82</sup>

At any rate, if the Japanese public – for whatever reasons – broadly supports whaling and if Japanese basic ocean policy is to support Japan's oceanic industries, the Japanese government has a vested interest in acting on this mandate.

### 23.3 JAPAN'S RESUMPTION OF COMMERCIAL WHALING UNDER INTERNATIONAL LAW

Japan has resumed commercial whaling within its EEZ and emphasized in its domestic laws, regulations and public rhetoric that whaling will only be conducted in a sustainable and transparent manner based on science.<sup>83</sup> This is in essence what the international rule of law in the maritime domain calls for, according to Japan. Indeed, Japan's whaling policy is based on a straightforward principle: 'being a food resource, if whale populations can sustain a controlled harvest then there is no reason to prohibit their utilization for human consumption'.<sup>84</sup> The government of Japan was legally entitled to leave the ICRW: Article XI of the ICRW expressly

<sup>78</sup> Fynn Holm, 'After Withdrawal from the IWC: The Future of Japanese Whaling' (2019) 17(4) *The Asia-Pacific Journal* 1–16.

<sup>79</sup> Fitzmaurice, *Whaling and International Law* (n 10) 78–87, 121.

<sup>80</sup> Tomoya Akimichi and others, *Small-Type Coastal Whaling in Japan: Report of an International Workshop* (Alberta: University of Alberta Press 1988) 84.

<sup>81</sup> Ben Dooley and Hisako Ueno, 'Do People in Japan Actually Want Commercial Whaling to Resume After Three Decades?' (*The Independent*, 2 July 2019).

<sup>82</sup> Yūsuke Maekawa and Masahiko Fukada, 'The Fate of Whaling: Future of Japanese Whaling Driven into Difficult Situation' (*Newsweek*, 15 April 2014) (in Japanese).

<sup>83</sup> Kanehara (n 11) 380.

<sup>84</sup> Catalinac and Chan (n 75) 133, 153.

provides for the ability of a State party to withdraw from the ICRW.<sup>85</sup> Japan gave formal notice of its withdrawal on 26 December 2018 and, hence, stopped being bound by the ICRW on 30 June 2019.<sup>86</sup> So, what are the possible rule-of-law ramifications of Japan's decision to resume commercial whaling?

Despite its withdrawal, Japan remains under a general obligation to cooperate with other States 'either directly or through appropriate subregional or regional organizations' for the conservation and management of species occurring across jurisdictions (Article 63 of UNCLOS) and of highly migratory species, including several whale species (Article 64 of UNCLOS and Annex I).<sup>87</sup> The obligation to cooperate in relation to marine environmental protection is reinforced by Article 65 of UNCLOS, which notably provides that:

States shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular *work through the appropriate international organizations* for their conservation, management and study (emphasis added).<sup>88</sup>

Article 65 is UNCLOS's 'principal marine mammal provision'.<sup>89</sup> However, this provision is subject to important ambiguities and limitations. Two points merit highlighting. The first concerns the meaning of the 'appropriate international organizations'. UNCLOS does not specify which body, or bodies, is 'the appropriate international organization' through which States must cooperate with respect to the management and conservation of whales.<sup>90</sup> The literature shows some consensus on whaling regulation: the IWC, that is, the body entrusted with implementation of the ICRW, is the principal international organization.<sup>91</sup> Section 17 of Agenda 21 of the Rio Conference expressly refers to the IWC as the competent international organization for the conservation and management of whale stocks and regulation of whaling.<sup>92</sup> In addition to the IWC, other international organizations may also have a mandate to conserve and manage whales and, thus, fall within Article 65. The United Nations Division for Ocean Affairs and the Law of the Sea (DOALOS) note

<sup>85</sup> Art. XI, ICRW.

<sup>86</sup> Art. 70 (1–2), Vienna Convention on the Law of Treaties (23 May 1969) 1155 United Nations Treaty Series 331.

<sup>87</sup> Philippe Sands and others, *Principles of International Environmental Law* (4th ed., Cambridge: Cambridge University Press 2018) 215–216.

<sup>88</sup> Ted L. McDorman (1998) 'Canada and Whaling: An Analysis of Article 65 of the Law of the Sea Convention' (1998) 29(2) *Ocean Development & International Law* 179–194; Patricia W. Birnie, 'Marine Mammals: Exploiting the Ambiguities of Article 65 of the Convention on the Law of the Sea and Related Provisions: Practice under the International Convention for the Regulation of Whaling' in David Freestone, Richard Barnes and David Ong (eds.) *The Law of the Sea: Progress and Prospects* (2006) 261–280; Fitzmaurice, Whaling and International Law (n 10) 214–216.

<sup>89</sup> McDorman (n 88) 179, 181.

<sup>90</sup> Birnie (n 88) 309, 323.

<sup>91</sup> Fitzmaurice, 'Can the Gordian Knot Be Cut (or Untangled)' (n 8) 451, 471.

<sup>92</sup> United Nations Conference on Environment and Development (1992). [www.un.org/Depts/los/consultative\\_process/documents/A21-Ch17.htm](http://www.un.org/Depts/los/consultative_process/documents/A21-Ch17.htm).

these organizations could include the Food and Agricultural Organization (FAO) and the United Nations Environment Programme (UNEP).<sup>93</sup>

Additionally, DOALOS has suggested that ‘some organisations may become “competent” in the future’ with respect to whaling regulation.<sup>94</sup> Insofar as Article 65 does not specify a single international organization with exclusive authority on whales, other international organizations could reasonably be established for the conservation, management and study of whales.<sup>95</sup> This is particularly important if one considers ‘the prevalent atmosphere of confrontation and mistrust among member governments’ within the IWC, which has led, according to the Chair and Vice-Chair of the IWC, ‘to little progress being made on key practical matters of conservation and management since the early 1990s despite advances at scientific level’<sup>96</sup>. The ongoing lack of consensus within the IWC ‘contributes to its declining credibility among member States and the wider international community, and encourages the development of other “appropriate international organizations”’.<sup>97</sup> Indeed, Iceland, the Faroe Islands, Greenland and Norway established the first whaling regional organization in 1992 by expressly invoking Article 65: the North Atlantic Marine Mammal Commission (NAMMCO).<sup>98</sup> Japan has repeatedly emphasized the importance of regional environmental organizations, its intention to maintain and strengthen its observer role within NAMCCO and its aim to lead regional efforts to establish another international organization relating to the conservation and management of whale stocks.<sup>99</sup>

Another fundamental limitation in Article 65 relates to the meaning of ‘work[ing] through’ the appropriate international organizations. To ‘work through’ entails some form of inter-State cooperation with a view to managing and conserving marine living resources, including whales and other marine mammals.<sup>100</sup> How a State would fulfil its obligation to ‘work through’ the appropriate organization(s) is,

<sup>93</sup> Office for Ocean Affairs and Law of the Sea (1996) 31 *Law of the Sea Bulletin* 79, see Table at 82. [www.un.org/Depts/los/doalos\\_publications/LOSBulletins/bulletinpdf/bulletinE31.pdf](http://www.un.org/Depts/los/doalos_publications/LOSBulletins/bulletinpdf/bulletinE31.pdf).

<sup>94</sup> *Ibid.*, 79.

<sup>95</sup> McDorman, (n 88) 182–183.

<sup>96</sup> IWC, Proposed Consensus Decision to Improve the Conservation of Whales from the Chair and Vice-Chair of the Commission (28 April 2010) 57, cited Goodman (2011) 63–74.

<sup>97</sup> Steven Freeland and Julie Drysdale, ‘Co-Operation or Chaos? Article 65 of United Nations Convention on the Law of the Sea and the Future of the International Whaling Commission’ (2005) 2(1) *Macquarie Journal of International and Comparative Environmental Law* 1, 10–11.

<sup>98</sup> Agreement on Cooperation in Research, Conservation and Management of Marine Mammals in the North Atlantic thereby establishing the North Atlantic Marine Mammals Commission (‘NAMMCO’) (Signed 9 April 1992, entered into force 8 July 1992) <[www.fao.org/faolex/results/details/en/c/LEX-FAOC024298/](http://www.fao.org/faolex/results/details/en/c/LEX-FAOC024298/)>.

<sup>99</sup> Alex Kirby, Japan Plans Pro-Whaling Alliance (BBC News, 14 July 2004) <http://news.bbc.co.uk/1/hi/sci/tech/3892909.stm>.

<sup>100</sup> Seokwoo Lee and Jeong Woo Kim, ‘UNCLOS and the Obligation to Cooperate: International Legal Framework for Semi-Enclosed Seas Cooperation’ in Keyuan Zou (ed.) *Maritime Cooperation in Semi-Enclosed Seas* (Leiden: Brill 2019) 11–29.

however, unclear. UNCLOS does not clarify the substantive elements of the positive duty to 'work through'. Taken plainly, to 'work through', means 'to manage a problem that has many different parts step by step'.<sup>101</sup> It may be suggested that Article 65 does not give rise to a legal obligation on States to become members of the relevant international organizations or to adhere to the regulations adopted by these organizations.<sup>102</sup> Article 65 may be satisfied 'through consultation with scientific bodies'<sup>103</sup> or 'active engagement in the organization as observers'.<sup>104</sup> On the other hand, the requirement to 'work through' cannot be narrowed to mere scientific consultation. Article 65 would oblige States 'to defer to the appropriate international organizations to set minimum conservation and management measures for cetaceans'.<sup>105</sup> In the specific context of Japanese whaling, the obligation to 'work through the appropriate international organizations' is insufficient to determine the degree or means of cooperation required by the Japanese government to fulfil its legal duties under Article 65 of UNCLOS.<sup>106</sup>

Japan expressly recognizes its duty to cooperate over whaling matters and has publicly committed to engage meaningfully with other States directly and through the appropriate international organizations in good faith. First, Japan has indicated that it would maintain observer status within the IWC.<sup>107</sup> Second, Japan has stated it would strictly monitor all whaling operations within its EEZ by having government officials at each landing base and onboard factory ships and by observing vessels' locations through satellite communication devices. All relevant information about operations and the number of whales caught would then be shared publicly. Third, all catch quotas within Japanese waters will be calculated in accordance with the calculation formula unanimously adopted by the IWC Scientific Committee for setting sustainable catch limits and preventing any adverse effects on whale stocks.<sup>108</sup> This formula, known as the Revised Management Procedure (RMP),<sup>109</sup> was the culmination of several years of research and extensive simulation testing by the IWC

<sup>101</sup> Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/work-through-sth>

<sup>102</sup> Ray Gambell, 'International Management of Whales and Whaling: An Historical Review of the Regulation of Commercial and Aboriginal Subsistence Whaling' (1993) 46(2) *Arctic* 97, 105.

<sup>103</sup> McDorman (n 88) 183.

<sup>104</sup> James Harrison and Elisa Morgera, 'Commentary to Articles 61–65' in Alexander Proelß (ed.) *United Nations Convention on the Law of the Sea: A Commentary* (Oxford: Hart 2017) 480–526.

<sup>105</sup> Kimberly Davis, 'International Management of Cetaceans under the New Law of the Sea Convention' (1985) 3 *Boston University International Law Journal* 477, 505–506.

<sup>106</sup> *Ibid.*

<sup>107</sup> Ministry of Foreign Affairs of Japan, Statement by Chief Cabinet Secretary (26 December 2018) <[www.mofa.go.jp/ecm/fsh/page4e\\_000969.html](http://www.mofa.go.jp/ecm/fsh/page4e_000969.html)>.

<sup>108</sup> *Minutes of the Committee on Agriculture, Forestry and Fisheries, House of Councilors, 198th Session No 4* (April 9, 2019) 10, cited in Kanehara (n 11) 376, 382.

<sup>109</sup> This presents 'a scientifically robust method of setting safe catch limits for certain stocks (groups of whales of the same species living in a particular area) where the numbers are plentiful' IWC, 'The Revised Management Procedure' <[https://iwc.int/index.php?cID=581&cType=html&zenario\\_sk\\_return=zenario\\_\\_content/panels/content\\_types/item/html/item/en/html\\_1](https://iwc.int/index.php?cID=581&cType=html&zenario_sk_return=zenario__content/panels/content_types/item/html/item/en/html_1)>.

Scientific Committee based on quantifiable ‘politically agreed management objectives’ set by the IWC in the event of the moratorium being lifted or relaxed.<sup>110</sup> According to Japan’s Fisheries Agency, this calculation formula is ‘extremely conservative’ and confirms ‘that continuous harvest of calculated number of animals for 100 years would have no harmful effect on the targeted stock’.<sup>111</sup> However, despite the RMP’s scientific soundness and unanimous endorsement by the IWC Scientific Committee, the proposal to lift the moratorium did not attract the required three-quarters majority for adoption; hence the moratorium remained in place.<sup>112</sup>

In all, Japan’s obligation to engage meaningfully with other States and the IWC does not constitute an obligation to agree to or adopt unconditionally every IWC regulation.<sup>113</sup> How other States delineate the substantive content of Japan’s duty to ‘work through’ with the IWC and other international organizations under Article 65 of UNCLOS remains to be seen.<sup>114</sup>

### 23.3.1 Whaling within Japan’s EEZ Lawful if Conducted Sustainably

Japan’s decision to resume commercial whaling may be unpopular for anti-whaling States and environmental NGOs. Yet, it is existing legal instruments governing whaling that provide the legal pathways to whaling.<sup>115</sup> For instance, Norway, which opted out of the moratorium, has been conducting commercial whaling in its EEZ ‘perfectly legally’, according to New Zealand’s Commissioner to the IWC, Sir Geoffrey Palmer.<sup>116</sup> The ICRW provides an option for States members to avoid being bound by a particular proposed new regulation simply by objecting to them under Article V(3) of the Schedule of the ICRW.<sup>117</sup> Japan also objected to the moratorium but was later persuaded by the United States to drop its objection. Iceland left the ICRW in 2002 and later re-joined with a reservation against the moratorium.

<sup>110</sup> Justin Cooke, Russell Leaper and Vassili Papastavrou, ‘Science Should not be Abandoned in a Bid to Resolve Whaling Disputes’ (2009) 5(5) *Biology Letters* 614–616.

<sup>111</sup> ‘The catch limit calculated by this method is always less than 1% of the estimated abundance of the targeted stock’, Fisheries Agency of Japan, ‘Resumption of Commercial Whaling’ (1 July 2019).

<sup>112</sup> *Ibid.*

<sup>113</sup> Mika Hayashi, ‘The Whaling Judgment and the Challenges of Dynamic Treaty Regimes’ in Malgosia Fitzmaurice and Dai Tamada (eds.) *Whaling in the Antarctic: Significance and Implications of the ICJ Judgment* (Leiden: Brill 2016) 221, 232.

<sup>114</sup> Freeland and Drysdale (n 97) 1–33.

<sup>115</sup> Fitzmaurice, ‘Can the Gordian Knot Be Cut (or Untangled)’ (n 8) 456–458, 464–465; Geoffrey Palmer, ‘Whales and Humans: How Whaling Went from Being a Major Industry to a Leading Environmental Issue then Landed Japan in the International Court of Justice for the First Time’ (2015) 13 *New Zealand Yearbook of International Law* 107, 111.

<sup>116</sup> Palmer (n 115).

<sup>117</sup> Art. V(3), ICRW.



Thus, it would appear that under the current rules, Japan could lawfully pursue whaling outside the ICRW, thereby pursuing the benefits sought for its economy and citizens, and not be bound to abstain from whaling as long as it conducts commercial whaling sustainably and does not lead species to overexploitation. Nevertheless, this is not an uncomplicated endeavour. Overexploitation is not the only concern for whale sustainability. Today, whales are subjected to simultaneous threats, not associated with whaling per se, including climate change, marine contamination, and biological and habitat degradation.<sup>118</sup> Scientific research, in part led by Japan, gives clues on how human activities may impact certain marine mammals, but, as Voigt writes, 'knowledge is far from complete, and it appears that there is no understanding of how such activities will affect cetaceans when they are synergistically exposed to them'.<sup>119</sup> Scientists are not always able to precisely quantify the short- or long-term scale of such impacts.

At any rate, application of the precautionary approach does not generally prescribe what measures must be taken at the national level. Instead, the precautionary approach can be applied 'in different ways and different contexts'.<sup>120</sup> Thus, in practice, States – whilst under a positive duty to adopt a precautionary approach – what sort of action the precautionary approach prescribes may differ significantly from State to State and, thus, whether a State interprets the precautionary approach in light of scientific uncertainty as requiring either a complete ban or regulated hunting is part of the State's lawful discretion: it may mean an open-ended blanket ban on all whale species or controlled hunting of certain species known to be abundant in the target areas, subject to stricter conditions and constant monitoring.<sup>121</sup>

#### 23.4 TOWARDS SOLUTIONS

This chapter has shown that whaling is intimately connected to the broader environmental law debate. The legal and regulatory approach to whaling is, first and foremost, about environmental protection and sustainable use of marine living resources. Therefore, clearer guidance is required as to what will promote sustainable whaling in any given situation. One possibility, which may be unpopular in certain countries, is to allow limited, but internationally monitored, whaling in specific places. In other places, whaling could be stopped altogether. As Freeland

<sup>118</sup> Voigt (n 45) 557, 579.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

<sup>121</sup> Yoshifumi Tanaka, 'The Changing Approaches to Conservation of Marine Living Resources in International Law' (2011) 71 *ZaöRV* 291, 315.

writes, if complete cessation of whaling cannot be achieved, at least in the short term, ‘the only rational and pragmatic response is to ensure that as few whales as possible are taken’.<sup>122</sup> The only way for that to happen is for IWC members to agree a compromise based on widely accepted environmental principles such as sustainability.

Further research should be conducted to allow an adjustment of those approaches based on science. This necessarily makes discussions more complex than a straightforward binary decision to allow or ban whaling. Yet it also allows for urgently needed constructive international engagement. In some places, whaling will be off the table because of its not being supported by the public (hence being politically unviable) – but that applies on the side of the proponents of a global whaling ban as much as on the side of its opponents, such as Japan and Norway, where whaling is still popular and supported politically.<sup>123</sup> As we have seen, the Japanese government has a vested national interest in safeguarding whaling, even if it is not a major industry in Japan.

Independent scientific research, uncompromised by the economic, social and political interests of those concerned with whaling, is urgently needed to ensure decisions are based on the scientific evidence produced.<sup>124</sup> As scientific knowledge advances and whale stock management theories become even more complex, scientific advice may not necessarily produce clear-cut answers. In situations of scientific uncertainty, the precautionary principle can allow for rational decisions – provided that the principle is not misinterpreted and transformed into ‘a principle of inaction’ by insisting on the status quo and refusing to consider alternative courses of action.<sup>125</sup> The precautionary approach serves precisely to enable meaningful decisions in the face of uncertainty. This ensures that decision-making is not stifled in every instance of uncertainty and reflects the reality that uncertainty may remain unavoidable in the foreseeable future. The search for a desirable compromise will inevitably involve some risk.

Decisions must be multi-dimensional, grounded on good science and international environmental cooperation. Such cooperation should be conducted in good faith and presupposes, according to the ICJ, ‘a genuine attempt ... to engage in discussions with the other disputing party, with a view to resolving the

<sup>122</sup> Steven Freeland, ‘With a Less Confrontational Approach to Whaling, More Whales Could be Saved’ (The Conversation, 7 November 2016) <[www.abc.net.au/news/2016-11-07/a-less-confrontational-approach-to-whaling/8001302](http://www.abc.net.au/news/2016-11-07/a-less-confrontational-approach-to-whaling/8001302)>.

<sup>123</sup> Ian Hurd, ‘Almost Saving Whales: The Ambiguity of Success at the International Whaling Commission’ (2012) 26(1) *Ethics & International Affairs* 1, 6–7.

<sup>124</sup> Shigeki Sakamoto, ‘ICJ Judgment in the Antarctic: Its Significance and Implications: The Whaling in the Antarctic from a Japanese Perspective’ (2015) 58 *Japanese Yearbook of International Law* 247.

<sup>125</sup> Gail Chamley, ‘Risk Analysis under Fire’ (2000) 20(1) *RISK Newsletter* 3.

dispute'.<sup>126</sup> This duty of cooperation, which stands at the heart of international environmental law, is an obligation of means and not of result. It does not mandate that all negotiations succeed: it is effectively a duty of 'meaningful cooperation'.<sup>127</sup> The International Law Commission has confirmed in its work that meaningful cooperation requires that discussions be conducted in good faith 'and must take into account each other's legitimate interests'.<sup>128</sup> This arguably includes a willingness to alter one's approach in light of the other party's legitimate interests and views as opposed to insisting on maintaining the status quo despite the existence of reasonable and satisfactory alternatives. After the IWC imposed its blanket moratorium on whaling in 1982, Japan argues that it spent 30 years trying to negotiate a compromise based on scientific evidence of sustainability; it repeatedly proposed amending the moratorium to allow limited and internationally controlled whaling under the ICRW; and it only decided to withdraw on realizing that such a compromise would not be reached.<sup>129</sup> One may suggest that Japan genuinely sought compromise and that the onus is on other IWC member States to show that they have duly fulfilled their duty of meaningful cooperation. Meaningful cooperation in good faith goes both ways. So does respect for ethical and cultural values. In essence, this is the perennial challenge of whaling regulation, which insists on and facilitates open disputes between parties with seemingly irreconcilable interests and assessing the relative positions.

<sup>126</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)* (Preliminary Objections) (Judgment) [2011] ICJ Rep 70 para. 157; On the requirement that negotiations ought to be meaningful, see *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark and Netherlands)* (Judgment) [1969] ICJ Rep 3 para. 85; *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7 para. 141; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgment) [2010] ICJ Rep 14 para. 146.

<sup>127</sup> *North Sea Continental Shelf* (n 126) para. 85.

<sup>128</sup> International Law Commission, 'Draft Articles on Prevention of Transboundary Harm' Commentary on Article 9 (Yearbook of the International Law Commission, 2001, Volume II, Part Two), 148–170, 160, <[https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_7\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf)>.

<sup>129</sup> Holm, (n 76) 126.