



The Antarctic Treaty System and Japan's Scientific Whaling in the Southern Ocean – Is there an obligation to protect the Antarctic Marine Ecosystem?

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Abstract

This article examines the system of international and regional governance in the Antarctic region, where most of Japan's scientific whaling is conducted. It considers whether there is an obligation on States participating in the various conventions adopted under the Antarctic Treaty System to take ownership of the issue, notwithstanding the competence of the International Whaling Commission under the International Convention for the Regulation of Whaling.

Key words

Whaling, Antarctica, Southern Ocean, Marine Resource Management

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Introduction

The two words “whaling” and “Japan” are as inexorably linked as Hugo Grotius and the “freedom of the seas”, yet they raise ever so much more political manoeuvring than the publication of *Mare Liberum*.¹ Recent events in the Southern Ocean, involving the illegal boarding of the Japanese whaling vessel *Yushin Maru II* by two crew members of a Sea Shepherd vessel, highlight the extent to which the issue has become politicised.² Yet, such action also highlights the complexity of the issues raised by the standoff between anti-whaling States and Japan. The issues extend beyond the purview of the International Whaling Commission (IWC) and into matters of sovereignty; the status of Antarctic waters and the application of the regional treaties which have application in the Southern Ocean. These treaties are: the 1959 Antarctic Treaty,³ the 1980 Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR)⁴ and the 1991 Protocol on Environment Protection to the Antarctic Treaty (Environment Protocol).⁵

Japan insists that the whaling conducted in the Southern Ocean is done so in the name of legitimate scientific research and, moreover, is permitted under the International Whaling Convention.⁶ Japan has engaged in scientific whaling, under its JARPA program, since 1986.⁷ At the June 2005 meeting of the IWC, Japan announced that it intended moving to a second phase of scientific whaling (JARPA II) which involves taking greater numbers of whales from the Southern Ocean.⁸ Japan is exercising the much maligned scientific exception under the International Whaling Convention. Under Article VIII of the Convention, a Contracting Party may “grant to any of its nationals a special permit authorising that national to kill, take, and treat whales for purposes of scientific research”. Japanese whaling for

1 Published in 1609 as a stand alone chapter, it was part of a larger treatise, *De Jure Praedae*, written in 1604–5. See Hugo Grotius *The Freedom of the Seas (or the Right which belongs to the Dutch to take part in the East Indian Trade)* (1604) as translated by R.V.D Magoffin (Oxford University Press, Oxford: 1916).

2 “Sea Shepherd Accuses Whalers of Kidnapping Activists” ABC News Online 16 January 2008 <www.abc.net.au/news/stories/2008/01/16/2139250.htm> (18 January 2008).

3 402 UNTS 71.

4 19 ILM 841 (‘CCAMLR’).

5 30 ILM 1455 (the Environment Protocol).

6 International Convention for the Regulation of Whaling 1946, ATS 1948, No. 18.

7 Japanese Whaling Research Program under Special Permit in the Antarctic. Both Iceland and Norway have also conducted scientific whaling under special permits issued to nationals since the 1982 moratorium on commercial whaling came into effect in 1985–86. Attention has been focused on Japan’s activities because of the scale of harvesting undertaken.

8 Under JARPA II, approximately 850 minke whales, and 10 fin whales will be harvested. From 2007, 50 fin whales and 50 humpback whales will be taken annually. The Southern Ocean Whale Sanctuary established by the IWC is discussed below.

scientific research has been a constant source of dissent within the ranks of the IWC. Numerous resolutions critical of the Japanese position have been passed since 1985.⁹ Australia, a past whaling nation,¹⁰ is an outspoken opponent of Japan's practices. Japan's whaling has been lampooned by the past Federal Minister for the Environment who stated, in reference to Article VIII, "[T]hat's not science ... It's a loophole that Australia wants to reform."¹¹

This paper does not seek to discuss the merits of Japan's scientific whaling program per se.¹² Nor does it seek to discuss the future of the IWC, which seems at times uncertain.¹³ What it does do is examine the system of international and regional governance in the Antarctic region, where most of Japan's scientific whaling is conducted, with the aim of determining whether there is an obligation on States participating in the various conventions adopted under the Antarctic Treaty System¹⁴ to take ownership of the issue. Antarctic Treaty Parties have consistently absented themselves from the whaling debate on the premise that the various applicable conventions expressly exclude the regulation of whaling from their purview. This paper aims to examine that premise to determine whether in fact there is scope, if not a responsibility, to call Japan to account for its actions under the Southern Ocean whaling program. The litigation commenced by the Humane Society in the Australian Federal Court is not discussed.¹⁵ Prior to examining the Antarctic Treaty System, it is necessary to consider the management framework under the International Whaling Convention.

9 Since 1986, there have been in excess of 40 resolutions. In 2005, the IWC passed a resolution (Resolution 2005-1) expressing concern with the JARPA II program. The Resolution 'strongly urges the Government of Japan to withdraw its JARPA II proposal or to revise it so that any information needed to meet the stated objectives of the proposal is obtained using non-lethal means'.

10 Australia has been an active whaling nation in past years and was still commercially whaling as late as the 1970s. See Sam Blay and Karen Bubna-Litic "The Interplay of International Law and Domestic Law: The Case of Australia's Efforts to Protect Whales" (2006) 23(6) *Environmental and Planning Law Journal* 465, 468.

11 Former Australian Minister for Environment and Heritage, Senator the Hon Ian Campbell *Transcript of the Revised Management Scheme to maintain Moratorium on Commercial Whaling* (International Whaling Convention, Korea: 22 June 2005) <www.deh.gov.au/minister/env/2005/tr22jun2005> (8 February 2007).

12 Resolution 2007-1, which calls upon Japan to refrain from issuing a permit for JARPA II, was adopted at the IWC annual meeting in May 2007.

13 In February 2007, Japan invited IWC members to attend a special meeting which sought to establish a dialogue between pro and anti-whaling members. Just 37 of the 72 members attended. See 'Japan In Commercial Whaling Push' *BBC News Online* 13 February 2007 <news.bbc.co.uk/2/hi/science/nature/6356815.stm> (15 February 2007).

14 In particular, the Antarctic Treaty 1959 402 UNTS 71 and the 1991 *Protocol on Environmental Protection to the Antarctic Treaty* 30 ILM 1455 ('the Environmental Protocol') plus the *Convention for the Conservation of Antarctic Marine Living Resources* 19 ILM 841 ('CCAMLR').

15 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] FCA 1510; [2005] FCA 664 [2006] FCAFC 116; [2007] FAC 124; [2008] FAC 3; [2008] FCA 36. A review of the case is included in this edition: Rachel Baird and Chantal Le Feuvre "They Said They'd Never Win: Humane Society International Inc v Kyodo Senpaku Kaisha Ltd" (2008) 11 *Asia Pacific Journal of Environmental Law* 11.

International Whaling Convention

As noted, Japan is pursuing whaling under the “scientific research” exception in Article VIII of the Convention. The Convention’s Schedule requires that a Contracting Government provide the IWC copies of the proposed scientific permits before they are issued and in sufficient time to allow the Scientific Committee to review the permits and comment on them.¹⁶ In 2005, the Scientific Committee stated that it was improper to review the JARPA II program before a full review of the 18 years of JARPA activity had been concluded.¹⁷

The Scientific Committee also noted, in relation to catch levels, that the “levels are also approaching the annual commercial quotas for Antarctic minke whales that were in place prior to the moratorium.”¹⁸ In 1994, the IWC established a Southern Ocean Whale Sanctuary in which commercial whaling was prohibited. Paragraph 7(b) of the International Whaling Convention Schedule states:

In accordance with Article V(1)(c) of the Convention, commercial whaling, whether by pelagic operations or from land stations, is prohibited in a region designated as the Southern Ocean Sanctuary This prohibition applies irrespective of the conservation status of baleen and toothed whale stocks in this Sanctuary, as may from time to time be determined by the Commission. However, this prohibition shall be reviewed ten years after its initial adoption and at succeeding ten year intervals, and could be revised at such times by the Commission. Nothing in this sub-paragraph is intended to prejudice the special legal and political status of Antarctica.

Japan has accepted the prohibition on commercial whaling under the moratorium adopted by the IWC in 1982 and in force from 1985-86,¹⁹ however has lodged a partial objection to the Southern Ocean Whale Sanctuary in that the prohibition on whaling minke whales is not accepted.²⁰

Japanese whaling in the Southern Ocean has become highly politicised, a development that will probably impede a negotiated resolution amongst IWC members.²¹ The political complexities of the issue are also factors contributing significantly to the absence of any intervention or comment by Antarctic Treaty

16 International Whaling Convention, Schedule, paragraph 30.

17 IWC Scientific Committee *Appendix 2 to the Report of the Standing Working Group on Scientific Permits, referred to in Report of the International Panel of legal Experts on Special Permit ('Scientific') Whaling under International Law* (Prepared for International Fund for Animal Welfare: 12 May 2006) (copy on file).

18 Ibid.

19 Japan withdrew its objection to the moratorium on 1 April 1988.

20 Note that under JARPA II approximately 850 minke whales will be taken annually.

21 See Note 9 and Note 12. Though it is noted that high-level discussions took place in London in March 2008. See “Australian Drums Up Anti-Whaling Support” AAP 9 March 2008 and C. Miranda “Scientific Whaling to End” *The Courier Mail* 11 March 2008 at 12.

Parties. That the IWC Scientific Committee remains unconvinced of the merits of JARPA after 18 years of operation, and that Japan has not responded to the IWC resolutions, provides a measure of the intractability of pro-whaling and anti-whaling nations.

Background to Antarctic Management

The Antarctic continent and its surrounding seas evoke images of stark, imposing landscapes and iceberg-dotted seas where life exists in the margins. Human nature being what it is, disagreements over rights to the continent began early. In 1908, Robert Falcon Scott disputed the right of Ernest Shackleton to commence his Nimrod expedition from McMurdo Sound near Ross Island.²² Subsequent polar exploration gave way to several claims of sovereignty over the continent²³ and by the late 1950s international discord cast a dark pall over the future management of Antarctica.²⁴ The International Geophysical Year (1957-58) marked what might be described as a remarkable turnaround in international affairs in that the claimants States, together with five additional interested States, were able to reach agreement on preserving the continent for cooperative and peaceful scientific research. The Antarctic Treaty was signed on 1 December 1959 and entered into force on 23 June 1961.²⁵

Why was Antarctica viewed any differently to other continents carved up by colonial powers during the late 1800s and 1900s? Why were States able to agree to disagree on sovereignty claims, yet achieve a far sighted compromise by effectively freezing the status quo?²⁶ The remoteness and inhospitable conditions in Antarctica certainly militated against the establishment of permanent settlements such as those established in the colonial outposts in the New World. Further, the shadow of the Cold War was of particular concern to some States. That said, it is suggested that

22 Roland Huntford *Shackleton* (Atheneum, New York: 1985) 161 and 225. This claim was based on a promise extracted by Scott from Shackleton that he would leave the entire Ross Sea region to Scott to embark from on his future polar expedition.

23 The claimant States were: United Kingdom (1908), New Zealand (1923), France (1924), Australia (1933), Norway (1939), Chile (1940) and Argentina (1943).

24 There were concerns that the continent might become a casualty of the growing 'Cold War' and be used for nuclear testing.

25 In addition to the seven claimant States, Belgium, Japan, South Africa, the United States (US) and the then United Soviet Socialist Republic (USSR) were original parties to the Treaty. The US and USSR had reserved the right to make claims over Antarctica. As of January 2007, there were 28 Consultative Parties and 45 signatories.

26 This compromise has been described as a 'purgatory of ambiguity' yet it has enabled States to put conflict over competing and unrecognised territorial claims to one side. See Gillian Triggs *International Law and Australian Sovereignty in Antarctica* (Legal Book Company, Sydney:1986) 137.

there were other factors driving treaty negotiations. These include a global appreciation of the uniqueness of the unspoilt environment and perhaps a realisation by the interested States that they had been presented with a rare opportunity to protect and preserve the terrestrial and marine environment.

The treaties that now comprise the Antarctic Treaty System support this view. The rejection by the international community of the Mineral Resources Treaty, which paved the way for mining activity in the Antarctic region, in favour of the Environment Protocol²⁷ indicates the level of commitment within the Treaty membership to protecting the Antarctic environment. The Protocol is prescriptive in its list of prohibited activities and makes a number of references to the need to protect Antarctic ecosystems. This poses the obvious question - Why have the Antarctic Treaty members not acted to condemn Japanese whaling under the Antarctic Treaty System? It may be a lack of collective political will, a perceived lack of authority under the applicable conventions, or a combination of both.

Whales command a central position in the marine ecosystem. The toothless smaller whales eat krill, whilst larger tooth whales are top order predators and seek the larger fish, which in turn feed on smaller fish and so the food chain descends. Despite playing a central role in the wellbeing of the Antarctic marine ecosystems, the interrelated issues of the impact of Japan's scientific whaling and a return to commercial whaling have been given scant consideration by Antarctic Treaty System States. Hence, it is useful to examine the relevant sections of the Antarctic Treaty, Environment Protocol and CCAMLR.

The Antarctic Treaty

There are currently 45 signatories to the Antarctic Treaty. These signatories represent more than 80 per cent of the world's population. The Treaty applies to 10 per cent of the world's land mass and 10 per cent of its oceans.²⁸ The Treaty applies to the area south of 60 degrees South latitude.²⁹ Article IV is well known and its full reproduction here is unnecessary for the purposes of this paper. Essentially, the Article allows all States to remain involved in Antarctic activities without seeming to have conceded any rights, be they claimant, non-claimant or potential claimant States.

²⁷ See Note 12.

²⁸ Neil Gilbert, "History of the Antarctic Treaty" (Antarctic New Zealand Information Sheet, New Zealand: July 2003) <www.antarcticanz.govt.nz/downloads/information/infosheets/AntarcticTreaty.pdf?PHPSESSID=2e5e6dce18c9bf6b37f071db6251ef61#search=%22history%20of%20the%20antarctic%20treaty%22> (23 August 2006).

²⁹ Antarctic Treaty, Article VI.

Although the Antarctic Treaty has been often cited as a watershed moment in international relations, in that its adoption averted potential international conflict,³⁰ the source of tension the Treaty sought to resolve remains. The Antarctic Treaty Parties have, in the past, been regarded as members of an exclusive club by developing States and States gaining independence post World War II. The United Kingdom and Argentina, two claimant States, are engaged in ongoing conflict over continental claims and the Falkland Islands/Malvinas. Cynics might view the numerous national bases and expeditions in Antarctica to be more about territorial posturing than scientific research. Realists would acknowledge that they are about both.

The point is that the stakes are already too high for any one State to risk destabilising the framework upon which the Antarctic Treaty System is premised. The Treaty works, by and large, because it creates enough ambiguity for all Parties to put issues of territoriality to one side. It works well because there is no ongoing conflict between the Parties. The intractable issue of whaling has mired the meetings of the IWC, with Japan threatening to withdraw from the Commission.³¹ Whilst some States have dismissed Japan's threats as mere theatrics, the alternatives to the IWC are less than clear and fraught with uncertainty. It is very much a case of better the devil you know.

The Antarctic Treaty does not specifically refer to whaling, as CCAMLR and the Environment Protocol do. However, it does acknowledge high seas freedoms in Article VI with the statement that:

[n]othing in the present Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area.³²

The seas adjacent to the Antarctic continent remain high seas and any assertion of authority over these waters has been consistently met with objections. For example, the 1994 Australian declaration of an EEZ offshore the mainland and external territories, has not been recognised. Japan, in particular, continues to regard the waters within the Australian Antarctic EEZ to be high seas. The international

30 The Preamble of the Antarctic Treaty states that the continent should be continue 'forever to be used for peaceful purposes and [is] not to become the scene of object of international discord.'

31 See Alex Kirby "Japan Plans Pro Whaling Alliance" *BBC News Online* 14 July 2004 <news.bbc.co.uk/1/hi/sci/tech/3892909.stm> (15 January 2007); Sarah Clarke "Japan Threatens to Leave IWC" *ABC News Online* 16 July 2006 <www.abc.net.au/news/newsitems/200606/s1665442.htm> (15 January 2007). More recently the threat has been repeated: see Hiroshi Hiyama "Japan Says Could Leave Whale Group" *AFP* 15 February 2007 <news.yahoo.com/s/afp/20070215/sc_afp/japanenvironmentwhalingiwc_070215073904> (16 February 2007).

32 Antarctic Treaty, Article VI.

position is well understood by the Australian Government. In submissions to the Federal Court, the Attorney-General at the time stated that:

[e]nforcement ... against foreigners in the Antarctic EEZ ... can be reasonably expected to prompt a significant adverse reaction from other Antarctic Treaty parties.³³

This position is supported by other factors. For example, the Australian Antarctic EEZ is not included as part of the Australian Fishing Zone in the *Fisheries Management Act* 1991. Under Fisheries Management Regulations, the *Fisheries Management Act* applies only to Australian citizens or bodies corporate, or Australians on boats in the Antarctic EEZ. Foreign persons are therefore not regulated.

The better view, therefore, is to regard the seas surrounding Antarctica as high seas upon which the freedoms of the high seas may be exercised.³⁴ CCAMLR, discussed below, does regulate the use of the marine environment, yet specifically excludes whales.

The recognition that whales are managed under the IWC has been consistently acknowledged and demonstrated by Antarctic Treaty Parties. In 1964, at the third meeting of Antarctic Treaty Consultative Parties in Brussels, Belgium, the Parties agreed to *Measures for the Conservation of Antarctic Fauna and Flora*. Whales were excluded from the Agreed Measures through the definition of “native mammals”.³⁵

CCAMLR

This position was followed by Treaty Parties negotiating CCAMLR. It was agreed that the CCAMLR regime would apply to the Antarctic ecosystem in preference to individual species. Whilst whales are an integral part of the marine ecosystem, given that they were already regulated under the IWC, there was no attempt to bring them under the mantle of CCAMLR. The agenda had been set in 1959 and whaling was to be left to the IWC.

Whereas the vast majority of living marine resources conventions are species or fishery specific, the CCAMLR regime applies to the Antarctic marine living

33 *Humane Society International Inc v. Kyodo Senpaku Kaisha Ltd* [2005] FCA 664, Allsop J at 13.

34 Rachel Baird *Aspects of Illegal, Unreported and Unregulated Fishing in the Southern Ocean* (Springer, The Netherlands:2006) 138-139.

35 Article VI prohibits the killing of any native mammal which is defined as ‘any member at any stage of its life cycle, of any species belonging to the Class Mammalia indigenous to the Antarctic continent or occurring there through natural agencies of dispersal, excepting whales.’

resources of the area south of 60 degrees South latitude and to the Antarctic marine living resources in the area between that latitude and the Antarctic Convergence which forms part of the Antarctic marine ecosystem.³⁶ The Antarctic marine ecosystem is defined to mean the complex of relationships of Antarctic marine living resources with each other and with their physical environment.³⁷ However, as stated above, the management of whales found within the CCAMLR Convention Area is specifically excluded. Article VI of CCAMLR states:

Nothing in this Convention shall derogate from the rights and obligations of Contracting Parties under the International Convention for the Regulation of Whaling and the Convention for the Conservation of Antarctic Seals.

It is arguable that this was the only political option available to the Antarctic Treaty Consultative Parties. With the benefit of hindsight, it is easy to criticise and suggest that it would have been preferable to attempt to include whaling back in 1982. The political sensitivities and scientific uncertainties associated with a resumption of commercial whaling in 2007 are such that that door is permanently closed.

Whilst there has always been criticism, the CCAMLR model of management has many positives. It is premised upon solid scientific research.³⁸ The Scientific Committee, established to advise the CCAMLR Commission³⁹ also acts as a vehicle for cooperation between member States. Article XV states that the Scientific Committee shall:

provide a forum for consultation and co-operation concerning the collection, study and exchange of information with respect to the marine living resources to which this Convention applies.

Further it:

shall encourage and promote cooperation in the field of scientific research in order to extend knowledge of the marine living resources of the Antarctic marine ecosystem.

³⁶ CCAMLR, Article 1(1).

³⁷ CCAMLR, Article 1(3).

³⁸ CCAMLR scientific research has been relied upon for CCAMLR Conservation Measures and has been described as being internationally recognised to be of a high standard. For example see Antarctic and Southern Ocean Coalition, *Antarctic Marine Ecosystem Research in the CCAMLR Area* (SC-CAMLR -XXIV/BG/20) (2005) <www.ascoc.org> (1 June 2008).

³⁹ The Scientific Committee is established under Article XIV. The Commission is established under Article VII.

Under the Convention, each Commission member may appoint a representative to the Scientific Committee.⁴⁰ The Committee may also seek the advice of other experts as required on an ad hoc basis.

The relationship between the Scientific Committee and CCAMLR Commission on the one hand, and the Japanese Government on the other, seems to be one based upon unspoken conflicts. The Japanese do not apprise CCAMLR of their whaling activities conducted in the area under CCAMLR's geographical competence, and CCAMLR does not directly address Japanese whaling. However, the work of the Scientific Committee and that of the Commission is being undermined by JARPA and JARPA II, which are arguably not based upon sound scientific research or findings.⁴¹ The Antarctic and Southern Ocean Coalition (ASOC) identified a number of areas of conflict in a paper tabled at the 2005 meeting of the CCAMLR Scientific Committee.⁴² These included the focus of JARPA II on areas of direct responsibility and interest to CCAMLR, and the uncertainties over whether the experimental design and methodology in JARPA II meets the sort of standards of scientific rigour ordinarily considered essential within CCAMLR scientific circles.⁴³

CCAMLR has in the past commented on Japan's whaling activities, albeit indirectly and in response to a matter introduced by Japan. In 2001, Japan advised the CCAMLR Commission members of its intention to run an International Workshop on the Conservation and Sustainable Use of Living Resources in the Antarctic.⁴⁴ Granted, the scope of the Workshop was ambiguous and not directly aimed at reactivating commercial whaling. Australia made the point that CCAMLR is the recognised expert in matters concerning the Southern Ocean.⁴⁵ Other States made the point that the Workshop raised issues within CCAMLR's area of competence.⁴⁶ Australia and the European Community expressed concerns that "doubt was being cast on the competence of CCAMLR with respect to the sustainable use of Antarctic marine resources."⁴⁷

Whilst the Commission might express disquiet at Japanese overtures into areas within CCAMLR's competence, there has been no official comment on the validity of Japan's science-based whaling program. The 2005 ASOC paper suggested that the Scientific Committee take possession of JARPA II in that it considers whether the Program meets the highest international standards of scientific credibility, meets

40 Rules of Procedure of the Scientific Committee.

41 See IWC Resolutions, note 9.

42 See note 38.

43 Ibid, at 2-3.

44 CCAMLR Commission Report, CCAMLR XX, 2001, [18.2- 18.17].

45 Ibid, at [18.7].

46 Ibid, at [18.2-18.17].

47 Ibid, at [18.14].

CCAMLR scientific standards which are generally taken as the appropriate standard for marine scientific research, and whether there are advantages in the proposal being reviewed scientifically by CCAMLR's Scientific Committee prior to its commencement.⁴⁸

It is considered unlikely that the CCAMLR Commission will contemplate a formal assessment of the scientific validity of JARPA II as an agenda item at a future annual meeting. CCAMLR has been very careful to protect its mandate, as evidenced by the strong reaction to the nomination by the Australian delegate at the 2002 meeting, of the Patagonian Toothfish for listing under Annex II of CITES.⁴⁹ The majority of the Commission's members expressed strong opposition for the proposal.⁵⁰ The consensus was that CCAMLR was the body with "the primary competence for managing the conservation and rational use of Toothfish in the Convention Area."⁵¹

Whilst one can appreciate the reasons why the CCAMLR Commission has sought to avoid commenting on JARPA or JARPA II, there are compelling political factors which suggest the very existence of the whaling program may undermine CCAMLR's authority in the Southern Ocean. JARPA II directly intrudes upon CCAMLR's area of competence. The stated objectives of JARPA II include monitoring the Antarctic ecosystem. Further, the Program may impact upon "non-cetacean predators of Antarctic krill such as crabeater seals, penguins, seabirds and cephalopods."⁵²

Environment Protocol

As stated, the Protocol was negotiated to replace the Minerals Convention adopted by the Antarctic Treaty Consultative Parties in June 1988. It was a strategic move by the member Parties to legitimise their authority in Antarctica and avoided destabilising conflict over oil, gas or minerals exploration. The objective of the Protocol is stated in Article 2:

The Parties commit themselves to the comprehensive protection of the Antarctic environment and dependent and associated ecosystems and hereby designate Antarctica as a natural reserve, devoted to peace and science.

48 SC-CAMLR-XXIV/BG/20, note 26 at 4.

49 *Convention for International Trade in Endangered Species of Wildlife Flora and Fauna* (CITES) 993 UNTS 243.

50 See generally CCAMLR Commission Report, CCAMLR-XXI 2002, paras 10.1-10.75.

51 *Ibid*, at [10.72-10.73].

52 Antarctic and Southern Oceans Coalition *International Whaling Commission and Southern Ocean Whaling Issues* (on file).

Annex II to the Environment Protocol addresses the conservation of Antarctic fauna and flora. A reading of the various Articles of the Annex reveals that native mammals (which include those which occur in the Antarctic Treaty area through seasonally natural migrations) are protected in that the taking (killing, injuring and capture) or harmful interference is prohibited except in accordance with a permit.⁵³ This definition would, on its face, include whales. The term “permit” is defined as a “formal permission in writing issued by an appropriate authority.”⁵⁴ “Appropriate authority” is defined as “any person or agency authorised by a party to issue permits under this Annex.”⁵⁵ Notably, permits to take (specifying by whom, when and where) shall only be issued in limited circumstances, including to allow the taking of specimens for scientific study or information, or to provide specimens for museums and similar institutions.

If one were to read no further, this Annex of the Environment Protocol would seem to be directly applicable to the Japanese program of whaling. However, Article 7 of Annex II specifically refers to the IWC and its competence over whaling. Article 7 states:

Nothing in this Annex shall derogate from the rights and obligations of Parties under the International Convention for the Regulation of Whaling.

Even if the Annex did apply, Japan would almost certainly rely on the “scientific study” exception through the issuance of a permit, in much the same way as is done under the International Whaling Convention, thereby claiming that a permit has been validly granted by an “appropriate authority”.

Given the specific wording of Article 7, it is often assumed that there is no scope at all to scrutinise Japanese whaling activities under the authority of the Environment Protocol. If this were to be the case, then it is the author’s view that the stated objective of the Protocol; that is the comprehensive protection of the Antarctic environment and dependent and associated ecosystems; would be continually undermined.

Rather than assuming the Environment Protocol is excluded in its entirety, an alternative view of the effect of Article 7, Annex II, warrants examination. First, as a matter of interpretation, the acknowledgement of the IWC’s authority in the Southern Ocean appears in an Annex of the Protocol not within the main body of the Protocol. Furthermore, that Annex specifically deals with the conservation of fauna and flora. Whilst it may have been politically prudent to avoid declaring

⁵³ Environment Protocol, Annex II, Article 3(1).

⁵⁴ *Ibid*, at Annex II, Article 1.

⁵⁵ *Ibid*.

competence over the actual conduct of whaling, there is no indication that the Parties wished to exclude the application of the Environment Protocol in its entirety.

The Protocol addresses a wide range of matters including environmental impact and assessment, waste disposal, liability and the prevention of marine pollution. The listed environmental principles in Article 3 cover a broad range of issues and include a statement that activities in the Antarctic Treaty area shall be planned and conducted so as to avoid 'detrimental changes in the distribution, abundance or productivity of species or populations of fauna and flora'.⁵⁶

The argument is that notwithstanding the Parties to the Environment Protocol agreed to respect the competence of the IWC, there is scope to apply some of its provisions. As a Party to the Antarctic Treaty and Environment Protocol, Japan has an obligation to comply with the Protocol. For example, there is a requirement in Annex II Article 3(6) to take native mammals and birds in a manner that involves the least degree of pain and suffering practicable. Further, there are other Articles and Annexes which could apply, such as the Environmental Impact Statement (EIS) process in Annex I.

Article 8(1) of the Environment Protocol requires that "proposed activities referred to in paragraph 2 below" be subject to the EIS process in Annex 1 to assess the impact on the Antarctic environment or on dependent or associated ecosystems. Paragraph 2 activities include "any activities undertaken in the Antarctic Treaty area pursuant to scientific research programs, tourism and all other governmental and non-governmental activities in the Antarctic Treaty area for which advance notice is required under Article VII(5)" of the Treaty. Particularly, paragraph 5 of Article VII states that advance notice shall be provided of all expeditions to and within Antarctica. Whaling expeditions should fall under these parameters, for there is nothing to suggest the wording of Article 8 of the Protocol should be read down to exclude whaling expeditions.

In practice, the situation is quite different. There have been no EIS processes applied to whaling expeditions within the Antarctic Treaty area. But there is nothing to say there couldn't be. There is nothing to say the Committee for Environment Protection⁵⁷ cannot take account of Japanese whaling activities within the Antarctic Treaty area.⁵⁸ The functions of the Committee include providing advice on the application and implementation of the EIS procedures and means of minimising or mitigating environmental impacts of activities in the Antarctic Treaty area.⁵⁹

⁵⁶ Ibid, at Article 3(b)(iv).

⁵⁷ Established under Article 11 of the Environment Protocol.

⁵⁸ Environment Protocol, Article 1 defines Antarctic treaty area.

⁵⁹ Environment Protocol, 12(1)(d) and (e).

Further support for the application of the Protocol to whaling activities can be found in Article 3, which requires Parties⁶⁰ to plan activities to limit the adverse impact on the Antarctic environment and dependant ecosystems. Activities shall be planned and conducted so as to avoid “detrimental changes in the distribution abundance or productivity of species of populations of species of fauna and flora.”⁶¹

Conclusion

It is acknowledged that there has been no EIS process applied to whaling or fishing within the Antarctic Treaty area. Fish species are adequately covered by CCAMLR. Many would argue that whaling is adequately covered by the International Whaling Convention. The almost two decades of disagreement within the ranks of the IWC, and recent polarisation of members into two distinct camps, would suggest that the IWC is less than functional. As an alternative, it is suggested that the management framework established by the Antarctic Treaty Parties, through the layering of the 1959 Treaty, CCAMLR and Environment Protocol, places a duty upon member States to act when the Antarctic environment is under threat. They are obliged to act, not because of the activity of whaling per se, but because of the threats posed to the environment and marine ecosystem caused by the whaling.

At the meeting of the Antarctic Treaty Consultative Parties in June 2006, the decision was reached whereby 2007 was designated the International Polar Year. To give any credence to this commitment, the Scientific Committee of CCAMLR and/or the Committee for Environment Protection established under the Protocol should investigate the scientific basis for JARPA II. To do so would not undermine the authority of the IWC, which already applies conservation principles under the International Whaling Convention. However, to do so might just provide an alternate source of scientific scrutiny of the Japanese scientific whaling program and in doing so, encourage independent thought and assessment amongst the IWC members.⁶² The risk of Japan leaving the IWC, should members reject Japanese efforts to lift the moratorium on whaling, is thought to be slim. If Japan did so, the existence of the IWC might be uncertain and the management of the world's whale stocks would then become uncertain. If there were no IWC, the full force of CCAMLR and the Environment Protocol would by definition apply to the Southern Ocean and it is difficult to see how Japan could mount a case for whaling in either of those forums.

⁶⁰ Japan ratified the Protocol on 15 December 1997.

⁶¹ Environment Protocol, Article 3(2)(iv).

⁶² There are already allegations of vote buying within the IWC.