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JAPAN'S WHALE RESEARCH PROGRAM AND INTERNATIONAL LAW

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Since the late 1980s, commercial whaling has not been permitted under the terms of what is commonly known as a "moratorium" adopted by the International Whaling Commission (the "IWC" or the "Commission"). Nonetheless, during this period Japan has conducted a whale research program that has involved the limited, lethal taking of the stocks being studied. It has done so acting pursuant to the terms of Article VIII of the International Convention for the Regulation of Whaling.[1] Article VIII expressly authorizes member governments to issue permits to take whales for scientific research purposes, "[n]otwithstanding anything contained in this Convention," and it requires the utilization of meat and other by-products of research "so far as practicable."[2]

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1. International Convention for the Regulation of Whaling, Dec. 2, 1946, art. VIII, T.I.A.S. No. 1849, 161 U.N.T.S. 72 entered into force Nov. 10, 1948) [hereinafter ICRW or Convention].

2. Article VIII of the Convention is discussed in detail *infra* Section I.A.

Japan's program has been attacked both by other governments and by non-governmental organizations as illegitimate science, as a "cover" for commercial whaling, and as inconsistent with Japan's obligations under the Convention and international law in general. As the result of Japan's pursuit of this program, on three occasions—in 1988, 1995, and 2000—Japan has been formally "certified" by the United States under the U.S. Pelly Amendment[3] for taking actions that "diminish the effectiveness" of the IWC.[4] In connection with the most recent certification of Japan on September 13, 2000, resulting from the expansion of Japan's research program in the North Pacific, then-Secretary of Commerce Norman Mineta claimed that "Japan has no reasonable scientific justification for its whaling efforts."[5] In an Op-Ed appearing in the *Washington Post* on August 27, 2000, Secretary Mineta declared, "The Japanese argument that all of these whales must be killed in order to collect certain scientific data is preposterous."[6] Perhaps not surprisingly in light of such declarations, at least one legal commentator has urged the position that, despite the terms of Article VIII of the Convention, the Japanese research program constitutes an "abuse of right" under international law.[7]

Is the Japanese whale research program indeed beyond the pale of science and the law as some assert? This article suggests that the case against Japan, far from being firmly grounded upon a fair and impartial assessment of the program's scientific worth and international legal principles, rests upon a series of fundamentally flawed premises. As discussed in Section I, the Japanese program does not flout the Convention's rules. Rather, the program has been pursued in a manner consistent with the structure, purpose, and letter of the Convention. Further, while Japan has not always followed *recommendations* made by the parties to the ICRW, it has scrupulously adhered to all binding rules established by the IWC, including the moratorium on commercial whaling adopted in 1982 and the creation of a Southern

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3. Fisherman's Protective Act of 1967 § 8, 22 U.S.C. § 1978 *2001) [hereinafter Pelly Amendment].

4. The Pelly Amendment authorizes the President of the United States to prohibit importation of products from countries that allow a) fishing operations that diminish the effectiveness of an international fishery conservation program, or (b) trade or taking that diminishes the effectiveness of an international program for endangered or threatened species. *Id.* Although the Secretary of Commerce has certified Japan on three occasions since 1988, the President imposing trade sanctions is discretionary, and on each occasion, the President has declined to impose sanctions. For the most recent presidential determination on this subject, see Letter from William J. Clinton, President, to Dennis Hastert, Speaker of the U.S. House of Representatives (Dec. 29, 2000), *at* http://www.noaa.gov/whales/clinton-whaledecision.htm (last visited March 29, 2001).

5. White House Press Briefing on U.S. Actions on Japanese Whaling (Sept. 13, 2000) *at* http://www.noaa.gov/whales/briefing.htm (last visited March 29, 2001).

6. Norman Y. Mineta, *Stop Japan's Whale Killing*, WASH. POST, Aug. 27, 2000, at B7, *available at* LEXIS, Nexis Library Wash. Post File.

7. Gillian Triggs, *Japanese Scientific Whaling: An Abuse of Right or Optimal Utilization?*, 5 ASIA PAC. J. ENVTL. L. 33 (2000).

Ocean Sanctuary (the "SOS") for whale protection in 1994. Contrary to Secretary Mineta's claim that any scientific justification for the program is "preposterous," the program has been recognized by the IWC's Scientific Committee, the primary scientific organ of the Commission, as making important contributions to the understanding of whale biology and as being relevant to management concerns that are at the core of the IWC's mission.[8] All of Japan's research activities have been implemented with due regard to ensuring that any biological impact on the stocks would be *de minimis*, and the program thus poses scant risks to whale populations.

Sections II-IV of this article suggest that the case against Japan pursuant to principles of international law is notable for its weakness. "Abuse of right" is a legal doctrine of uncertain contours and application.[9] It is far from clear, based on a review of traditional sources of international law such as municipal law, the writings of scholars, and the rulings of international tribunals, that the abuse of right doctrine has sufficiently evolved from a policy abstraction to a concrete rule of decision or juridical standard that limits State prerogatives. Moreover, despite some suggestions to the contrary, neither the 1998 decision of the Appellate Body of the World Trade Organization ("WTO") in the so-called "*Shrimp Case*,"[10] nor the 1999 decision on provisional remedies of the International Tribunal for the Law of the Sea ("ITLOS") in the "*Southern Bluefin Tuna Case*,"[11] supports an expansive interpretation of the abuse of right doctrine.[12] Rather, both cases turn on the specific standards set out in the agreements under review, and neither stands for the proposition that there is a general principle of abuse of right in international law on which the tribunal relied. In light of the uncertainty surrounding the principle, Japan cannot be expected to know the nature of the prohibited conduct and to be held responsible for engaging in it.

Finally, as discussed in Section V, even if the principle exists as a concrete and intelligible principle of international law, it is still difficult, given what we know about the Japanese research program, to make a credible claim that the program reflects abuse of rights guaranteed to Japan under the Convention.

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8. *Report of the Scientific Committee*, I.W.C. Scientific Committee at 63, I.W.C. Doc. IWC/49/4 (1997) [hereinafter 1997 SC Report].

9. There is a disagreement among scholars whether "abuse of right" is the same as or different from a breach of "a duty of good faith." *See infra* note 156. For convenience this article will use the term "abuse of right" broadly to include both principles.

10. United States—Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, W.T.O. Doc. WT/DS58/AB/R (Oct. 12, 1998), *at* http://www.wto.org/english/tratop_e/dispu_e/58abr.pdf [hereinafter *Shrimp Case*].

11. Southern Bluefin Tuna Case (N.Z. v. Japan; Austl. v. Japan), 1999 ITLOS Nos. 3 & 4 (Provisional Measures Order of Aug. 27), *at* http://www.itlos.org/start2_en.html [hereinafter *Southern Bluefin Tuna Case*].

12. With respect to the *Southern Bluefin Tuna Case*, subsequent to the ITLOS decision on provisional remedies, the Arbitral Panel, on August 4, 2000, reversed the ITLOS decision, finding that the Tribunal was without jurisdiction. *See infra* Section IV. The ITLOS decision is thus of little precedential significance today.

Despite the political criticism heaped on Japan for the continuation of its research activities, the program falls well within the parameters of legitimate scientific research that is permissible, in the sole discretion of the contracting party, under the terms of the ICRW. Dr. Ray Gambell, the longtime, well-respected Secretary of the IWC, stated in an interview on BBC News Online, on July 5, 2000:

> When the 1946 Convention under which we operate was signed, one of the major articles introduced by the USA was the provision for a government to be able to issue permits for research purposes. That has always been in the Convention and many governments over the years have caught quite large numbers of whales for research purposes but associated with that provision is whales are too valuable just to catch, measure and throw away. If you catch whales for research purposes, the requirement is that they are fully utilized and the products disposed of in a way that the government decides. In other words, the products have to be fully utilized and Japan is doing what every other government has done in previous years. It's using whales for research, getting the research results which are sent to the Scientific Committee of the IWC and it's putting the products into the market place.[13]

Dr. Gambell noted that the Japanese program in the Antarctic was "working out a number of the aspects of the life of the whale which can be used for management purposes" and that the Japanese North Pacific program was aimed at elucidating stock structure, "an especially important item."[14] Dr. Gambell then went on to observe, "Japan is not doing anything illegal by catching the whales that it does and it is acting legally within the terms of the Convention that we operate."[15] Dr. Gambell's observations should stand as a caution to those who would cavalierly challenge the scientific and legal *bona fides* of the Japanese research effort.

I. THE ICRW AND THE JAPANESE PROGRAM OF SCIENTIFIC RESEARCH

A. The ICRW Regime for Scientific Research

The Japanese research program takes place in the context of the rights and responsibilities established by the Convention. The Convention establishes the legal framework within which the program must be judged. Because claims of illegality may be loosely made, it is important at the outset of this article to underscore how the Japanese program conforms to the purposes and strictures of the Convention.

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13. BBC News Online Forum Interview with Dr. Ray Gambell, IWC Secretary (July 5, 2000), *at* http://newsvote.bbc.co.uk/hi/english/talking_point/forum/newsid_817000/817116.stm.

14. *Id.*

15. *Id.*

Our analysis begins with the purposes of the Convention. These purposes are significant in the context of this treaty. The ICRW is not a document whose sole, or even primary, goal is protection of whale stocks. As stated in its Preamble, the Convention has as its basic purpose "properly regulated"[16] whaling to achieve "the optimal level of whale stocks"[17] so as to "permit increases in the numbers of whales which may be captured without endangering these natural resources"[18] and in order to "make possible the orderly development of the whaling industry."[19] In fact, the Preamble, while calling for achievement of optimal population levels, balances this goal against the need to avoid "causing widespread economic and nutritional stress."[20] In addition, the Preamble refers to the "development"[21] as well as the "conservation"[22] of whale stocks, presumably reflecting the intent that they be developed for harvesting. In the words of one commentator, "The underlying assumption of the Whaling Convention is thus that, with proper conservation measures, the whaling industry will continue. Nowhere in the Convention is it envisaged that conservation might include a permanent ban on whaling for reasons other than a scientifically demonstrated threat to stocks or species."[23] Even ardent conservationists have acknowledged that "the ultimate aim [of the Convention] is to develop the industry."[24]

Over the past twenty years, the Commission has amended the Schedule to the Convention to adopt two management measures that have significantly limited "development" as contemplated by the treaty parties in 1946. First, in 1982, the IWC adopted a moratorium on commercial whaling, setting catch limits at zero for the indefinite future, commencing in the 1985/86 pelagic season. The moratorium is embodied in Paragraph 10(e) of the Schedule. Second, in 1994, the IWC again amended the Schedule to create the SOS. The SOS is embodied in Paragraph 7(b) of the Schedule.[25] Although

16. ICRW, *supra* note 1, pmbl., ¶ 4.

17. *Id.* pmbl., ¶ 5.

18. *Id.* pmbl., ¶ 4.

19. *Id.* pmbl., ¶ 8. The basic draft for the Convention presented by the United States would have stated that the purpose of the treaty was "to provide for the orderly conservation and development of whale fisheries." I.W.C. Doc. IWC/8 (1946).

20. ICRW, *supra* note 1, pmbl., ¶ 5.

21. *Id.* pmbl., ¶ 4.

22. *Id.*

23. Triggs, *supra* note 7, at 47. These purposes, it should be noted, are reinforced by Article V of the Convention, which authorizes the treaty parties to adopt binding management measures to be embodied in the "Schedule" to the Convention. Article V specifies that these measures "shall be such as are necessary to carry out the objectives and purposes of this Convention and to provide for the conservation, development, and optimum utilization of whale resources." ICRW, *supra* note 1, art. V, ¶ 2. Necessarily this envisages a consumption- and harvest-oriented regime.

24. 1 PATRICIA BIRNIE, INTERNATIONAL REGULATION OF WHALING: FROM CONSERVATION OF WHALING TO CONSERVATION OF WHALES AND REGULATION OF WHALE-WATCHING 172 (1985).

25. The IWC in 1979 also created an Indian Ocean Sanctuary. *See* ICRW, *supra* note 1, Schedule, ¶ 7(a) (amended 1999).

the moratorium is binding as a matter of international law on Japan, this is not true of the SOS.[26] Japan lodged a formal objection to the SOS with respect to Antarctic minke whales on August 12, 1994, and since that objection remains in effect, Japan under the ICRW is not legally bound by the relevant terms of the SOS. It is not the purpose of this article to discuss whether these measures are or are not consistent with the Convention.[27] *Assuming* their validity, it is our purpose to show despite claims to the contrary, it is consistent with the terms of either for Japan to pursue its research activities in the Antarctic or the North Pacific, even if that research is aimed at providing a predicate for the resumption of commercial whaling in areas today designated as "sanctuaries."

Japan's research initiatives have sometimes been challenged as inconsistent with the moratorium. Thus, former Secretary of Commerce Mineta, in his August 27, 2000 Op-Ed piece in the *Washington Post* stated: "We are concerned that the expansion of the Japanese hunt to larger whales is aimed at paving the way for an outright resumption of commercial whaling."[28] However, Paragraph 10(e) of the Schedule in no way precludes continued research, and, even if the purpose of the research were to "pave the way" for renewed commercial whaling, this would be perfectly consistent with the moratorium. Paragraph 10(e) of the Schedule makes it clear that the moratorium is specifically subject to "review based upon the best scientific advice."[29] It contemplates a "comprehensive assessment of the effects" of the moratorium will be undertaken and acknowledges commercial whaling might be resumed when stock reassessments "indicated sustained catches by 1990."[30] As the author of a leading treatise on the ICRW notes, "the Schedule amendment establishing [the moratorium] did not rule out the possibility of resumption of commercial whaling at some future date and provided a review within at least four years."[31] Plainly research focused upon establishing a scientific basis for the Commission again to set harvest quotas is entirely consistent with the terms of the moratorium.

By the same token, the establishment of the SOS scarcely rules out the appropriateness of research in the Antarctic. Groups like Greenpeace have

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26. Japan initially objected to the moratorium, but it subsequently withdrew that objection and so is subject to this measure. ICRW, *supra* note 1, art. V, ¶ 3. *See* Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 227-28, 227 n.1 (1986).

27. It has been argued, in particular, that the SOS is not justified under the Convention. *See* William T. Burke, *Memorandum of Opinion on the Legality of the Designation of the Southern Ocean Sanctuary by the IWC*, 27 OCEAN DEV. & INT'L L. 315 (1996); William T. Burke, *Legal Aspects of the IWC Decision on the Southern Ocean Sanctuary*, 28 OCEAN DEV. & INT'L L. 313 (1997). *But see* Patricia Birnie, *Opinion on the Legality of the Designation of the Southern Ocean Whale Sanctuary by the International Whaling Commission*, Agenda Item 13, I.W.C. Doc. IWC/47/41 (1995).

28. Mineta, *supra* note 6.

29. ICRW, *supra* note 1, Schedule, ¶ 10(e) (amended 1999).

30. *Id.*

31. 2 BIRNIE, *supra* note 24, at 655.

argued that "[i]n 1994 the entire Southern Ocean was designated a whale sanctuary so [sic] prohibiting the killing of whales for commercial purposes in the area (regardless of their population status)—there is no possible need for the Japanese data."[32] Likewise, in announcing his decision following the certification of Japan under the Pelly Amendment in September 2000, President Clinton stated:

> I also remain concerned about Japan's practice of taking whales in the Southern Ocean Sanctuary north of Antarctica. This is an internationally recognized sanctuary that was approved by the IWC. I see no justification for Japan's practice and will continue to urge Japan to reconsider its policy, which I believe undermines the effectiveness of whale sanctuaries everywhere.[33]

Such statements ignore the terms of the sanctuary designation. Under Paragraph 7(b) of the Schedule, the SOS is not permanent. It is to be reviewed by the IWC "ten years after its initial adoption," in 2004, and thereafter at ten-year intervals.[34] Moreover, by its terms, it in no way prohibits research, including lethal taking, in the Southern Ocean.[35] Even skeptics of the Japanese program must acknowledge that, "Japan is . . . not prohibited from taking minke whales within the SOS, if whaling is under a special permit for scientific purposes."[36] Arguably such research is *necessary* to allow the Commission to make a decision in 2004 based on the best available science and consistent with the Convention's objectives of achieving the twin goals of conservation *and* utilization of whale resources.

It is equally clear that Japan's decision not to follow various resolutions of the IWC requesting it to "refrain" from research activities does not put it in violation of its treaty obligations.[37] Groups like Greenpeace have repeatedly emphasized that "Japan has continuously ignored the numerous resolutions adopted by the IWC calling for Japan to cease its 'scientific' whal-

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32. Greenpeace, *Japan's "Scientific" Whaling* (July 2000), *at* http://www.greenpeace.org/~oceans/whaling/japanesewhaling_scientific.html.

33. Letter from William J. Clinton, President, to Dennis Hastert, Speaker of the U.S. House of Representatives (Dec. 29, 2000), *at* http://www.noaa.gov/whales/clinton-whaledecision.htm (last visited March 29, 2001).

34. ICRW, *supra* note 1, Schedule, ¶ 7(b) (amended 1999).

35. "The Commission has a major research initiative in the Antarctic (SOWER—Southern Ocean Whale and Ecosystem Research Programme) with two main components, one concerning the abundance estimation of minke whales and other baleen whales south of 60°S, and the second concerning the status of Southern Hemisphere blue whales." Gregory P. Donovan, *First Editorial*, 1 J. CETACEAN RES. & MGMT. at ii (1999), *available at* http://www.ourworld.compuserve.com/homepages/iwcoffice/Editorial.html. In 1998, the Commission affirmed that it was consistent with the sanctuary designation to undertake research on the status of the stocks and "the effects of environmental change on whale stocks." *Id.*

36. Triggs, *supra* note 7, at 52.

37. *See infra* Section I.C.

ing."[38] The United States has also stressed the IWC resolutions in making Pelly Amendment certifications.[39] It is suggested that "non-compliance" with IWC resolutions indicates that Japan is flouting the will of the IWC. Article VI of the Convention, however, which authorizes the Commission to adopt resolutions, makes it clear that such resolutions make "recommendations" only.[40] They are not binding on member states.[41] In connection with its Scientific Research program, Japan has been scrupulous in complying with all its legal obligations under Paragraph 30 of the Schedule.[42] That it may choose not to comply with each and every Commission recommendation is plainly its legal prerogative.

Japan's freedom under the Convention to issue research permits and pursue scientific studies of whales as it deems fit, whatever the resolutions of the IWC may recommend, is underscored by Article VIII of the Convention, which deals directly with the issue of scientific research. While Professor Birnie has referred to Article VIII as "exempting from the regulations of the IWC whales taken and treated under scientific permits,"[43] and while Article VIII does contain the term "exempt," the Article is far broader than a mere exemption or exception from the IWC's rules. Article VIII, confirming the presumably pre-existing powers of treaty parties to conduct research, recognizes their absolute, sovereign right to issue permits for scientific research in their sole discretion. Article VIII, paragraph 1, provides:

> Notwithstanding anything contained in this Convention, any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take, and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention.[44]

It is hard to imagine a broader statement of the treaty parties' ability to carry out certain activities by national decision. Article VIII provides no cri-

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38. Greenpeace, *supra* note 32, *at* http://www.greenpeace.org/~oceans/whaling/ japanesewhaling_scientific.html.

39. *See* Letter from Norman Y. Mineta, Secretary of Commerce, to William J. Clinton, President (Sept. 13, 2000), *at* http://www.noaa.gov/whales/minetaletter.htm [hereinafter Letter from Mineta].

40. ICRW, *supra* note 1, art. VI.

41. *See* 1 BIRNIE, *supra* note 24, at 189. Recommendations stand in contrast to Schedule Amendments, which are adopted pursuant to Article V of the Convention. ICRW, *supra* note 1, art. V. Schedule Amendments require a three-quarters majority for adoption. ICRW, *supra* note 1, art. III, ¶ 2. In addition, Schedule Amendments must be "based on scientific findings," and an elaborate procedure allows member states to "object" to such Amendments and so avoid their effect. ICRW, *supra* note 1, art. V, ¶ 3.

42. *See infra* Section I.B.

43. 1 BIRNIE, *supra* note 24, at 190.

44. ICRW, *supra* note 1, art. VIII.

teria, standards, or other guidance for the conduct of "scientific research."[45] It is up to the particular nation to decide what projects it should pursue. While Article VIII, paragraph 1, requires the parties to "report" to the Commission all authorizations which they may grant,[46] it is clear that there is no requirement for prior approval from the Commission.[47] In short "[t]he discretionary power is undeniably broad,"[48] and the issuance of scientific permits represents the exercise of "sovereign authority."[49]

Japan's exercise of its authority under Article VIII has not been exceptional or unique. "[P]rior to 1982, over 100 permits had been issued by a number of governments including Canada, USA, USSR, South Africa and Japan."[50] Since institution of the moratorium, Norway and Iceland, in addition to Japan, have issued scientific permits.[51]

In exercising its rights under Article VIII, Japan has been particularly attacked for selling whale meat from animals taken for research purposes. In his letter of certification under the Pelly Amendment, Secretary Mineta stressed that "[p]roducts of the research harvest are sold in Japanese markets,"[52] and, in his August 27, 2000 *Washington Post* Op-Ed, he termed this an "alarming factor."[53] Greenpeace, not surprisingly, has chosen to make the same point, stating, "The fact that all the whale meat from Japan's so-called 'scientific' whaling is destined for the domestic market makes obvious that it is primarily a commercial activity."[54] It is understandable that those opposed to whaling, especially for ethical reasons, are troubled by the consumption of whale products, whether derived from animals taken for research or otherwise. However, Japan, in authorizing the sale of whale meat, is doing no more than what the Convention requires. Article VIII, paragraph 2, of the Convention provides, "Any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accor-

45. Triggs, *supra* note 7, at 51.

46. ICRW, *supra* note 1, art. VIII, ¶ 3. That paragraph also requires that research results be submitted to "such body as may be designated by the Commission," viz., the Scientific Committee. *Id.*

47. *See* 1 BIRNIE, *supra* note 24, at 190. As Professor Birnie points out, "[s]uggestions that the Commission should be consulted, not merely informed, about such permits were rejected." *Id.* at 190 n.110. Although Paragraph 30 to the Schedule was adopted to require proposed scientific permits be submitted to the Scientific Committee in advance of issuance, "[t]he permits are still not, however, subject to prior approval by the SC, only to review and comment." *Id.* at 190 n.111 (emphasis in original).

48. Triggs, *supra* note 7, at 50-51.

49. *Id.* at 52.

50. Int'l Whaling Commission, *The IWC, Scientific Permits and Japan*, *at* http://www.iwcoffice.org/sciperms.htm (last visited Feb. 24, 2001) [hereinafter IWC Scientific Permits Page].

51. *See id.*

52. Letter from Mineta, *supra* note 39.

53. Mineta, *supra* note 6.

54. Greenpeace, *supra* note 32.

dance with directions issued by the Government by which the permit was granted."[55]

To comply with the Convention, Japan has no option but to utilize ("process") the whales taken. Secretary Mineta's professed shock that whale meat is being sold in the Japanese market thus, has little credibility. The attack on Japan's research program is ill-founded, especially because proceeds from the sale funded further research.[56]

Finally, despite the orientation of the Convention toward consumptive uses of whales and its ratification of national sovereignty over research programs, some commentators, citing "State practice" and developments in the Law of the Sea and elsewhere, have suggested that the Convention can and should be interpreted as evolving into a more "protectionist" agreement, premised upon the "precautionary principle," where even lethal *research* might not be tolerated.[57] These commentators have espoused a "dynamic" approach to treaty interpretation.[58] Yet, even these advocates must concede that the precautionary principle cannot transform the Convention into something its language does not permit. As Professor Triggs notes, a "dynamic" approach must be "employed with restraint . . . so as [not] to subvert . . . [a treaty's] clear words and objectives."[59] Or, as Professor Birnie notes:

> [The Commission] can interpret the treaty broadly to achieve its general purposes, e.g., of conservation and development of stocks. Although such interpretation can be broad, it cannot be perverse, and must conform to the objects and purposes of the convention and to the general rules of international law concerning treaties.[60]

The parties cannot by "interpretation" change the positive terms of the ICRW.[61] That can only be accomplished by formal amendment to the treaty. Professor Burke stated, "Reinterpretation of an agreement which defeats the major purpose of the parties, and substitutes a purpose not shared by all parties and actively rejected by some, is not a permissible means of interpretation under contemporary international law."[62] National prerogatives with re-

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55. ICRW, *supra* note 1, art. VIII, ¶ 2.

56. Institute of Cetacean Research, *Questions and Answers: Japans Whale Research Programs*, *at* http://www.whalesci.org/Q&Ajapanswhaleresearchpro2.html.

57. *See* Triggs, *supra* note 7, at 50.

58. *Id.*

59. *Id.*

60. 2 BIRNIE, *supra* note 24, at 654.

61. Article 31(1) of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27, 1990) [hereinafter Vienna Convention], specifies that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

62. William Burke, *Memorandum of Opinion on the Legality of the Designation of the Southern Ocean Sanctuary by the IWC*, 27 OCEAN DEV. & INT'L L. 315, 323 (1996) (citing Michael Akehurst, A MODERN INTRODUCTION TO INTERNATIONAL LAW 204, 205 (6th ed. 1987)). *See also* William Burke, *Legal Aspects of the IWC Decision on the Southern Ocean*

gard to research, and the obligation to utilize whales taken, are so integral to the language and structure of the Convention that in no way can an interpretation be countenanced that would outlaw or limit research, even though the fundamental purpose of the research may be to "pave the way" for the resumption of commercial whaling.

B. The Nature of the Japanese Research Program

Given the legal framework described above, any claim that a research program is inconsistent with the Convention or constitutes an "abuse of right" ratified and conferred by that treaty would be difficult to make. Based upon the *assumption* "that Japanese whaling has not been undertaken for the primary purpose of scientific research," at least one commentator has argued that the "abuse of right" doctrine then becomes "relevant."[63] However convenient that assumption may be for such an argument, it is not borne out by the facts.

In 1982, the IWC adopted a moratorium that set commercial whaling catch limits for the indefinite future at zero, commencing after 1986.[64] However, the provision made it clear that the zero quota would be "kept under review, based upon the best scientific advice," and that the Commission would undertake a "comprehensive assessment of the effects of this decision on whale stocks."[65] It was contemplated that whaling might be resumed when the "comprehensive assessment" of the stocks indicated that sustained harvests would be permissible.[66]

The Japanese research program was created in direct response to the moratorium. In effect, it was intended to provide the scientific basis for the IWC to make precisely the decisions contemplated by the treaty parties when they adopted the moratorium. That it may have been intended to generate data and information that might support the resumption of commercial whaling should scarcely be remarkable or a matter for criticism or concern. Japan was simply going about obtaining what the Commission said it wanted: research results that would permit future management decisions to be made.

Since its inception, the Japanese research program has been conducted under the auspices of the Institute for Cetacean Research (the "ICR" or the "Institute"). The Institute was formed in 1987 as a non-profit research foundation.[67] It is not a fishing or processing company. It is a scientific institu-

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Sanctuary, 28 OCEAN DEV. & INT'L L. 313, 317, 322-23 (1997) ("the evolutionary approach is not an acceptable way to subject one party to an agreement to a new agreement against its wishes").

63. *See, e.g.*, Triggs, *supra* note 7, at 37.

64. ICRW, *supra* note 1, Schedule, ¶ 10(e) (amended 1999).

65. *Id.*

66. *See id.*

67. *See* Institute of Cetacean Research, *About ICR*, *at* http://www.whalesci.org/

tion, whose staff includes biologists and other professionals trained in fisheries science and wildlife management. It is dedicated to a wide range of cetacean research. Today, it is funded by an annual grant of approximately nine million dollars from the Government of Japan, together with funds derived from the sales of whale meat.[68] In addition to providing papers for review by the IWC, the ICR holds monthly workshops for whale population assessment, fisheries population assessment and management meetings and other meetings for the exchange of information on cetaceans.[69] The Japanese program involves not just sampling (through lethal takes) but "sighting surveys, photo identification, acoustic surveys and biopsy sampling."[70]

Throughout its history, the ICR has conducted all its activities in close coordination with the IWC Scientific Committee, a body composed of scientist members designated by each State's representative to the Commission. Under the terms of Paragraph 30 of the Schedule to the Convention, the Scientific Committee reviews and comments upon all scientific permits proposed to be issued by member states, in advance of their actual issuance.[71] The Scientific Committee also reviews the research results from activities conducted under the permits. Article F of its Rules of Procedure specifies that the Scientific Committee shall "review the scientific aspects of the proposed research at its annual meeting," taking into account any "guidelines" issued by the Commission.[72] The Rules require that the:

> proposed permits and supporting documents should include specifics as to the objectives of the research, number, sex, size, and stock of animals to be taken, opportunities for participation in the research by scientists of other nations, and the possible effect on conservation of the stock resulting from granting the permits.[73]

Preliminary results "should be made available for the next meeting of the Scientific Committee as part of the national progress report or as a special report, paper or series of papers."[74] While the Scientific Committee conducts a detailed review, the Committee recognizes that "the ultimate responsibility for [permit] issuance lies with the member nation."[75]

All proposed Japanese scientific permits have in fact been submitted in advance to the Scientific Committee. Consistent with its Rules of Procedure, the Scientific Committee "concentrates" on the following:

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abouticr.html (last visited May 16, 2001)

68. *See supra* Section I.A. Japan is *required* under the terms of Article VIII of the Convention to process and utilize meat from whales taken for scientific research purposes.

69. *See About ICR*, *supra* note 67.

70. *Id.*

71. ICRW, *supra* note 1, Schedule, ¶ 30 (amended 1999).

72. INT'L WHALING COMMISSION, CHAIRMAN'S REPORT OF THE 51ST ANNUAL MEETING 72, app. 13, arts. F.1, F.2 (1999) (Revised Rules of Procedure of the Scientific Committee).

73. *Id.* art. F.3.

74. *Id.* art. F.4.

75. IWC Scientific Permits Page, *supra* note 50.

(1) whether the permit adequately specifies its aims, methodology and the samples to be taken;

(2) whether the research is essential for rational management, the work of the Scientific Committee or other critically important research needs;

(3) whether the methodology and sample size are likely to provide reliable answers to the questions being asked;

(4) whether the questions can be answered using non-lethal means;

(5) whether the catches will have an adverse effect on the stock; and

(6) whether there is the potential for scientists from other nations to join the research programme.[76]

More recently, the IWC has refined its guidance to two basic elements: first, whether the research program is "required for the purposes of management of the species or stock being researched," and, second, "whether the information sought could be obtained by non-lethal means."[77] With 120 scientist members from many different nations, as can be expected, "the review of any permits rarely result [sic] in unanimity. The published reports of the Scientific Committee reflect the agreements and disagreements of the review process."[78]

There can be little question that review of the Japanese program by the Scientific Committee has been thorough and intensive. The Government of Japan has been assiduous in submitting its proposals and research results to the Committee. Over the past fourteen years, massive amounts of data and information have been provided for scientific review, and the Scientific Committee has commended Japan on both the quantity and quality of the research undertaken.[79] While there have often been vigorous debate and strongly asserted views, both pro and con, about various aspects of the Japanese program, few have ever suggested that there was no scientific value to the work, and most have recognized the validity of the studies in question. An examination of the IWC record, especially the deliberations of the Scientific Committee over the past five years, demonstrates that the science is grappling with important questions and the research is making real contributions to the IWC's understanding of cetacean biology and the role of whales in the ecosystem.

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76. *Id.*

77. INT'L WHALING COMMISSION, CHAIRMAN'S REPORT OF THE 51ST ANNUAL MEETING 72 (1999), app. 3, I.W.C. Resolution 1999-2.

78. IWC Scientific Permits Page, *supra* note 50. *See also* Alexander Gillespie, *Whaling Under a Scientific Auspice: The Ethics of Scientific Research Whaling Operations*, 3 J. INT'L WILDLIFE L. & POL'Y 1, 39 (2000) (noting "persistent lack of agreement between the scientists").

79. Institute of Cetacean Research, *Questions and Answers: Japans Whale Research Programs, at* http://www.whalesci.org/Q&Ajapanswhaleresearchpro2.html.

1. Antarctic Research—the JARPA Program

The initial, and still the major, component of the Japanese research initiative is its program for studies in the Antarctic, usually referred to as "JARPA." JARPA began with two feasibility studies in 1987/88 and 1988/89. Following these feasibility studies, a full-scale, fourteen-year program was launched. The stated objectives of the program are:

> (1) estimation of biological parameters (especially the natural mortality rate) to improve management;
>
> (2) elucidation of stock structure to improve management;
>
> (3) examine role of whales in the Antarctic ecosystem; and
>
> (4) examine effect of environmental changes on cetaceans.[80]

The program has two components: "a sighting survey whose primary purpose is the estimation of trends in abundance, and a sampling component to allow biological parameter values to be estimated given also the abundance information provided by the sighting survey."[81] Japan originally planned to issue permits authorizing the take of 825 minke whales per year in connection with the sampling survey, but this number was subsequently reduced to 300 following completion of the feasibility studies.[82] In 1995/96, another 100 minke whales were added to the sampling effort, so that the current level of sampling is 400 animals (plus or minus 10%)—all minke whales—annually.[83] To conduct its research, Japan employs four vessels, plus a mother ship. In keeping with the best tradition of open scientific research, Japan has repeatedly emphasized that "[p]articipation by international scientists is welcomed" in research activities.[84] As of the half-way point in the program in 1997, the program had produced 133 published and unpublished papers, a number of which appeared in peer-reviewed scientific journals, and some 56 scientific works based on JARPA data and material, presented in symposia and other scientific meetings.[85]

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80. IWC Scientific Permits Page, *supra* note 50.

81. 1997 SC Report, *supra* note 8, at 59.

82. *See id.*

83. *See id.* In connection both with JARPA and with Japanese research efforts in the North Pacific (*see infra* Sections I.B.2, I.B.3), it has sometimes been suggested that the number of animals being taken is so large, and the program so long in duration, that the program must perforce be "commercial whaling in disguise," rather than a scientific endeavor. However, the number of samples is small relative to the size of the populations being sampled, and, in order to obtain statistically valid results, the sample size must be significant. Further, a program of many years is necessary to examine trends in population parameters in long-lived species such as whales. Notably, t he IWC Scientific Committee has not suggested that the sample size is too large or the duration of the program too long.

84. *See, e.g.*, INT'L WHALING COMMISSION, CHAIRMAN'S REPORT OF THE 50TH ANNUAL MEETING 55 (1998).

85. *See Report of the Intersessional Working Group to Review Data and Results from*

On May 12-16, 1997, the IWC held an intensive working group meeting to assess the program's progress and value. This resulted in the JARPA Workshop Report, which is also discussed extensively in the 1997 Report of the IWC Scientific Committee.[86] One legal commentator has suggested the JARPA Workshop Report confirmed that "JARPA failed to meet its stated objectives," and characterizes the Report as finding that the program was "'not required for management.'"[87] Similarly, environmental organizations like Greenpeace have stated that "the group (which included Japanese scientists) agreed unanimously that the data from JARPA 'were not required for management,'" and have claimed that "to call [the program] . . . 'scientific' brings both science and the scientific community into disrepute."[88] Such statements grossly distort the Workshop record. While it is true the Workshop did not find the JARPA research "required," the IWC itself has stressed that phrases like "required for management," "essential for management," "critical research need," and so forth are value-laden, and have rarely, if ever, produced consensus in its scientific deliberations.[89] That should not detract, however, from the Workshop's clear recognition of the scientific *value* of JARPA.

In fact, the JARPA Workshop Report, which was adopted by the Scientific Committee at its 1997 meeting, presents a positive picture of JARPA and certainly contains nothing to indicate that it is not a valid scientific endeavor. The Workshop examined five components of JARPA: "sighting surveys and abundance estimation, stock structure, biological parameter studies, marine ecosystem studies, and those addressing environmental change."[90] Its comments were typically positive. It noted that "[t]here was general agreement that the data presented on stock structure . . . were *important contributions* to the objectives of JARPA and stock management."[91] Similarly, "the meeting agreed that the papers presented have given *valuable information* on recruitment, natural mortality, decline in age at sexual maturity and reproductive parameters of minke whales."[92] It went on to note that "the information produced by JARPA has set the stage for answering many questions about long term population changes regarding minke whales . . . [and] has

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Special Permit Research on Minke Whales in the Antarctic, IWC Doc. SC/49/Rep.1, annex E1 (1997) [hereinafter JARPA *Workshop Report*]. As of May 1999, the Japanese IWC Commissioner reported that the research program had generated "[o]ver 150 papers," and research that was important to the Commission in both "quantity and quality." IWC, CHAIRMAN'S REPORT OF THE 51ST ANNUAL MEETING 29 (1999). The ICR website lists 158 papers. ICR, *Scientific Contribution of the Japanese Whale Research Program Under Special Permit in the Antarctic (JARPA), at* http://www.whalesci.org/contribution.html (last visited May 17, 2001).

86. *See* 1997 SC Report, *supra* note 8, at 63.
87. Triggs, *supra* note 7, at 36.
88. Greenpeace, *supra* note 32.
89. IWC Scientific Permits Page, *supra* note 50.
90. 1997 SC Report, *supra* note 8, at 58.
91. *Id.* at 61 (emphasis added).
92. *Id.* at 63 (emphasis added).

already made a *major contribution* to understanding of certain biological parameters."[93] Moreover, it was optimistic about the future of the program:

> [T]he Committee agreed that none of the sampling and stock identity problems that had been identified in the JARPA review or subsequently would in principle prevent JARPA from achieving its objectives in terms of estimation of biological parameters. All of the identified problems appear to be addressable. Most members were optimistic that the JARPA data in conjunction with additional work planned would allow estimation of the biological parameters with reasonable levels of precision.[94]

Finally, while the Committee did state that JARPA was not "required for management," it is important to understand that this statement does not constitute a value judgment about the program. Rather, it is simply a statement of fact. The Revised Management Procedure (the "RMP") under development by the IWC is designed to operate with two inputs: (1) past catch data, and (2) results of sighting surveys. The JARPA program is not designed to provide input data for running the RMP; it is intended to improve the RMP software itself. In light of this understanding, the Committee's full statement yields quite a different picture than might be seen at a glance:

> [T]he results of the JARPA program, while not required for management under the RMP [Revised Management Procedure], have the potential to improve management of minke whales in the Southern Hemisphere in the following ways: 1) reductions in the current set of plausible scenarios considered in *Implementation Simulation Trials*, and 2) identification of new scenarios to which future *Implementation Simulation Trials* will have to be developed.[95]

The JARPA Workshop Report, far from providing a basis for condemning Japanese research efforts, supports the conclusion that those efforts have been serious and beneficial. It contains no conclusion that the research is not legitimate scientific research.

There was disagreement at the JARPA Workshop about whether the work could be accomplished through non-lethal techniques. In fact, the Scientific Committee agreed that the "logistics and abundance of minke [whales] . . . probably precluded [the] application [of non-lethal techniques]."[96] There are strong arguments that certain studies, such as "the age of individual whales [which] is an indispensable piece of information in in-

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93. *Id.* at 65 (emphasis added).

94. *Id.* at 68.

95. *Id.* at 66. Implementation simulation trials essentially involve computer tests of the effects of the RMP developed by the Scientific Committee, looking at simulated population behavior over a long term (100 years) to determine what catch levels may be sustainable. These trials have been viewed as necessary by the Scientific Committee to evaluate how the RMP would work in practice. *See* IWC, *Estimates*, *at* http://www.iwcoffice.org/Estimate.htm (last visited Feb. 24, 2002).

96. 1997 SC Report, *supra* note 8, at 63.

terpreting stock structure," "some kinds of genetic analyses on stock structure," and "studies that are based on morphometrics, parasites, conception dates, pollutant burdens, etc." cannot be carried out using non-lethal techniques.[97] The IWC Secretariat has similarly observed:

> [A]t present there are certain data that can only be obtained (at least in the short-term) using lethal methods. These include, for example, the age of an animal (obtained from earplugs) and the reproductive status and history of females (obtained from ovaries). Such information is important *inter alia* in any consideration of biological parameters (e.g. mortality and reproductive rates) and interpretation of pollutant levels.[98]

Fishery biologists would generally agree that, as a practical matter, the age and size structure of wildlife populations simply cannot be determined by non-lethal methods.[99]

Since 1997, the IWC Scientific Committee has repeatedly confirmed its prior determinations.[100] Those determinations have not been seriously challenged. Furthermore, with specific reference to the Commission's most recent guidance (in IWC Resolution 1999-2), the Scientific Committee in 2000 continued to affirm JARPA's *relevance* for management. While the ongoing debate about the feasibility of using non-lethal research techniques continues, there is still "no consensus" on whether the information could be obtained by non-lethal means.[101]

Ultimately, it must be emphasized that the role of the IWC Scientific Committee is not to endorse or reject particular research studies or scientific permits. Rather, it is to provide useful advice and guidance to members and the Commission. That there is healthy debate within the Scientific Committee and that no consensus may be reached on certain issues, including the consistency of proposed research permits with IWC guidelines, scarcely

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97. JARPA *Workshop Report*, *supra* note 85, Annex H, at 25.

98. IWC Scientific Permits Page, *supra* note 50.

99. In the United States, for example, the National Oceanic and Atmospheric Administration ("NOAA") has repeatedly emphasized that "fishery-dependent research" is an important component of any number of studies supporting the management of ocean resources, especially those relating to the age and size structure of the resources in question. *See, e.g.*, NOAA, THE SALTONSTALL-KENNEDY GRANT PROGRAM: FISHERIES RESEARCH AND DEVELOPMENT 5-8 (2000). *But see* Gillespie, *supra* note 78, at 43-44 (arguing that non-lethal research can provide the information necessary for the IWC's comprehensive assessment of the effects of the moratorium).

100. *See Report of the Scientific Committee*, I.W.C. Scientific Committee at 71-79, IWC Doc. IWC/52/4 (2000) [hereinafter 2000 SC Report]; *Report of the Scientific Committee*, I.W.C. Scientific Committee at 73-75, I.W.C. Doc. IWC/51/4 (1999); *Report of the Scientific Committee*, IWC Scientific Committee at 54-56, I.W.C. Doc. IWC/50/4 (1998). *See also Report of the Scientific Committee*, IWC Scientific Committee at 75-76, I.W.C. Doc. IWC/53/4 (2001) [hereinafter 2001 SC Report].

101. 2000 SC Report, *supra* note 100, at 79. When JARPA was discussed again at the 2001 Scientific Committee meeting, little new was added to the debate. Rather, parties on both sides of the issue essentially reiterated views expressed in prior meetings. *See* 2001 SC REPORT, *supra* note 100, at 75-76.

means that the science is bad or that the proponent of the research is acting in bad faith or for improper purposes. Because of the value placed on whales in both pro- and anti-whaling nations, debates are often heated, but in the deliberations of the IWC Scientific Committee, Japan is not isolated. Scientists from other countries often support the Japanese position. The debate about lethal vs. non-lethal research techniques will undoubtedly continue without "consensus," but that scarcely suggests that the arguments for lethal research techniques are without scientific merit. In spite of these disagreements, the Scientific Committee has not only characterized the JARPA program as "relevant," but has also stated that it has "the potential to improve management of minke whales in the Southern Hemisphere." In such circumstances, there is no basis for concluding that JARPA is not a legitimate scientific enterprise.

2. North Pacific Research—the JARPN Program

In 1994, Japan initiated a second component of its research program, a five year (1994-1999) study focused on the North Pacific and usually referred to as "JARPN." The purpose of JARPN was to elucidate the stock structure of minke whales in the North Pacific and to study their feeding ecology.[102] Among other things, the program was designed particularly to "improve the design of RMP *Implementation Simulation Trials* for the North Pacific."[103] Under this program, Japan issued a scientific permit allowing the taking of 100 minke whales annually in the North Pacific.

Like JARPA, JARPN has been reviewed at each annual meeting of the IWC. It also was the subject of an IWC scientific workshop. This workshop was held on February 7-10, 2000, in Tokyo. Its results were reported to the IWC Scientific Committee meeting held in Adelaide, Australia, in July, 2000, and the Scientific Committee endorsed recommendations of the Workshop's report.[104] The 2000 workshop reviewed the methods and results of JARPN, assessed the further potential of existing data for meeting JARPN and other objectives, and evaluated whether the program achieved its main objectives. It made detailed recommendations for future directions of JARPN research. It did not conclude in any way that the science was without validity.

When the Scientific Committee considered JARPN in the summer of 2000, it also considered the research in light of the criteria set out in IWC Resolution 1999-2. As with JARPA, the Scientific Committee made no specific determination that the research was "required for management."[105] However, the workshop found, and the Committee agreed, that "information

102. *See* 2000 SC REPORT, *supra* note 100, at 71.
103. IWC Scientific Permits Page, *supra* note 50.
104. *See* 2000 SC REPORT, *supra* note 100, at 74.
105. *Id.*

obtained during JARPN had been and will continue to be used in the refinement of *Implementation Simulation Trials* for North Pacific minke whales, and consequently was relevant to their management."[106] With respect to the feasibility of conducting the research using non-lethal techniques, the Scientific Committee simply referred to its prior discussions of this issue, noting that "no consensus view was reached."[107]

In sum, JARPN, like JARPA, has received continuing and comprehensive review from the IWC Scientific Committee. The Scientific Committee has provided no basis for concluding that the research is not valid and beneficial.

3. North Pacific Research—the JARPN II Program

In 2000, Japan proposed to expand its research in the North Pacific to include two new species, Bryde's whales and sperm whales. This initiative is usually referred to as "JARPN II." Sperm and Bryde's whales were added to the study because they are likely major components of the total whale biomass in the area.[108] Despite the controversy surrounding JARPN II, including U.S. certification under the Pelly Amendment, JARPN II is no more than a two-year feasibility study during the years 2000 and 2001. The project involves an annual take of 50 Bryde's whales and 10 sperm whales, plus 100 minke whales (as were previously taken under JARPN), to study feeding ecology, stock structure and "environmental effects on cetaceans and the marine ecosystem."[109] Its priority is feeding ecology.[110]

The JARPN II proposal, like all proposed Japanese scientific permits, was circulated to the Scientific Committee in advance of its 2000 meeting in Adelaide, Australia. While there obviously has not yet been time to review JARPN II at a workshop comparable to those held for JARPA and JARPN, the Scientific Committee did consider the proposal in some detail at its 2000 meeting. It applied the criteria discussed above, examining the proposal, its objectives, its methodology, effects of catch on the stock, and research cooperation.[111] It is fair to say that debate was heated. As described by the IWC Secretariat, "There was considerable disagreement within the Committee over most aspects of this research programme, including objectives, methodology, likelihood of success and effect on stocks."[112] Again, however, vig-

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106. *Id.*

107. *Id.* In 2001, JARPN was not discussed directly by the Scientific Committee, having essentially been subsumed by the successor program discussed below. *See* 2001 SC REPORT, *supra* note 100, at 74-75.

108. *See* ICR, *Questions and Answers: Japan's whale research programs*, *at* http://www.whalesci.org/Q&Ajapanswhaleresearchpro2.html (last visited May 17, 2001).

109. IWC Scientific Permits Page, *supra* note 50.

110. *See id.*

111. *See* 2000 SC REPORT, *supra* note 100, at 74-78.

112. IWC Scientific Permits Page, *supra* note 50.

orous disagreements scarcely demonstrate that the research is somehow without scientific merit. For example, with respect to the objectives of JARPN II, some members of the Scientific Committee "expressed concern that most of the objectives of the programme did not address questions of high priority for the rational management of the stocks concerned."[113] Even these members, however, agreed that "the primary objective of the proposal . . . was scientific in nature."[114]

Moreover, the critics' views were countered by those of other members who

> drew attention to the ambitious nature of the programme and drew parallels with the feeding ecology programme carried out by Norway, which also began with a feasibility study and has now made a valuable contribution towards multispecies modelling [sic] and management. They also noted the need to determine the impact of cetaceans on fish stocks as a matter of some urgency. Thus in addition to the information on North Pacific minke whale stock structure relevant to *Implementation Simulation Trials*, they believed that it represented an attempt to address a critically important research need.[115]

Some members raised methodological issues, relating to sample size and methods proposed, noting that, in their judgment, "it was unlikely that several of the objectives of the programme would be met," especially with respect to sperm whales.[116] Still, others responded "that this was a feasibility study and that one of the aims was to investigate the methodology. They referred to the success of the earlier Norwegian programme. They felt that the sperm whale component was important in the context of trophic levels."[117] These same members "felt that all aspects of the programme would improve as data became available."[118] In short, the debate was not different than much of the debate in the past about the scientific details of Japan's research proposals, with strongly expressed opinions on many aspects of the proposal.

The Scientific Committee did not address the criteria of IWC Resolution 1999-2 in great detail in its deliberations on JARPN II. The Committee reached no consensus on whether the studies were "required for management" or whether the research could be accomplished by non-lethal techniques. With respect to the former, however, the criterion is only marginally relevant at the feasibility study stage. With respect to the latter, where, as is apparent from the discussions above, the Scientific Committee is consistently unable to come to unanimous agreement, it was pointed out yet again, to those who believed "insufficient use had been made of presently existing

113. INT'L WHALING COMMISSION, CHAIRMAN'S REPORT OF THE 52ND ANNUAL MEETING 40 (2000) [hereinafter 2000 CHAIRMAN'S REPORT].

114. IWC Scientific Permits Page, *supra* note 50.

115. 2000 CHAIRMAN'S REPORT, *supra* note 113, at 40.

116. *Id.* at 41.

117. *Id.*

118. IWC Scientific Permits Page, *supra* note 50.

samples and data," that "detailed information" is unavailable from biopsy samples and that such samples, in any case, are difficult to obtain.[119]

In sum, contrary to the opinions of Secretary Mineta and Greenpeace, JARPN II, like its predecessors, represents legitimate science. One's views about the importance of whales and their place in the ecosystem, the ethics of whale harvest or the hypothetical desirability of non-lethal techniques should not cloud one's judgment on this fundamental point.

C. The Japanese Research Program and IWC Resolutions

Despite the history of the IWC's scientific review of Japan's research program, the Commission has adopted a series of resolutions calling upon the Japanese to refrain from undertaking various aspects of their program. For example, in 2000, the IWC adopted two resolutions related to Japan's program. The first, IWC Resolution 2000-4, after noting that certain questions have been raised about the size of minke whale populations in the Antarctic,[120] "REQUESTS that the Government of Japan refrains from issuing any Special Permits for the 2000/2001 season for the take of minke whales in the Southern Ocean Sanctuary."[121] The second, IWC Resolution 2000-5, after reciting that "concerns" were raised by the Scientific Committee about JARPN II and that the Committee "did not endorse the JARPN II proposal,"

> AFFIRMS that gathering information on interactions between whales and prey species is not a critically important issue which justifies the killing of whales for research purposes;
>
> PROPOSES that information on stock structure, which may be relevant to management, be obtained using non-lethal means;
>
> STRONGLY URGES the Government of Japan to refrain from issuing special permits for whaling under JARPN II.[122]

In 2001, the IWC also adopted two resolutions related to Japan's program that were very similar to those adopted in 2000. The first, IWC Resolu-

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119. 2000 CHAIRMAN'S REPORT, *supra* note 113, at 41. At the 2001 Scientific Committee meeting in London, JARPN II was discussed largely by reference to what had been said in 2000. *See* 2001 SC REPORT, *supra* note 100, at 74-75. For example, while some "questioned again the need for lethal sampling of minke whales in the North Pacific in the context of stock structure," nonetheless "counter-arguments" were also presented. *Id.* at 75. *See also id.*, annexes Q3 and Q4. In addition, at least one non-Japanese member of the Committee affirmed that the program "would . . . provide useful information for managing fishery resources in the Caribbean and the wider international community." 2001 SC Report, *supra* note 100, at 75.

120. *See infra* Section I.D (discussing the status of minke whales in the Antarctic).

121. *Resolution on Whaling Under Special Permit in the Southern Ocean Sanctuary*, IWC Resolution 2000-4, *in* 2000 CHAIRMAN'S REPORT, *supra* note 113, at 66 app. 1.

122. *Resolution on Whaling Under Special Permit in the Northern Pacific Ocean*, IWC Resolution 2000-5, *in* 2000 CHAIRMAN'S REPORT, *supra* note 113, at 66 *in* app. 1. IWC Resolution 2000-5 also cites IWC Resolution 1995-9, which "recommended that scientific research involving the killing of cetaceans should only be permitted in exceptional circumstances where the questions address critically important issues which cannot be answered by the analysis of existing data and/or use of non-lethal research techniques." *Id.*

tion 2001-7, after expressing concern "that the [2001] Scientific Committee report cannot rule out that the Southern Hemisphere minke whale population may have suffered a precipitous decline over the past decade," "STRONGLY URGES the Government of Japan to halt the lethal takes of minke whales conducted under the JARPA programme, at least until the Scientific Committee has reported to the Commission on the impacts of the JARPA programme on the stocks of minke whales in Areas IV and V."[123] The second, IWC Resolution 2001-8, after "NOTING the concern of many members of the Scientific Committee [regarding] the lack of any quantifiable objectives in JARPN II" and "FURTHER NOTING that the data collected by lethal sampling of sperm, minke and Bryde's whales in JARPN II are not essential in the context of the RMP,"

> AFFIRMS that data gathered under JARPN II on interactions between whales and prey species are not sufficient to justify the killing of these whales for research purposes;
>
> PROPOSES that any information needed on stock structure can and should be obtained using non-lethal means;
>
> STRONGLY URGES the Government of Japan for the reasons given above to refrain from issuing any special permit for whaling under JARPN II.[124]

It is important to understand that, whatever its nominal obligation to rely on the advice of its Scientific Committee, at least when amending the Schedule,[125] the Commission is essentially a political body, and its resolutions are adopted by simple majority vote. At the same time, there is little doubt that the IWC is dominated by "anti-whaling" countries with little sympathy for efforts, however valid scientifically, that might establish a predicate for the resumption of commercial whaling. That a majority of Commissioners may vote in favor of a particular resolution calling upon Japan to refrain from certain whale research does not signify that in fact such resolution is based on an objective scientific assessment of the merits and demerits of the Japanese program.[126]

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123. *Resolution on Southern Hemisphere Minke Whales and Special Permit Whaling, IWC Resolution 2001-7, at* http://eelink.net/~asilwildlife/53IWC.html [hereinafter Resolution 2001-7].

124. *Resolution on Expansion of JARPN II Whaling in North Pacific, IWC Resolution* 2001-8, *at* http://eelink.net/~asilwildlife/53IWC.html.

125. ICRW, *supra* note 1, art. V, ¶ 2. The Convention specifies that amendments to the Schedule "shall be based on scientific findings."

126. *See generally* TOWARD A SUSTAINABLE WHALING REGIME (Robert L. Friedheim ed., 2001) (for a comprehensive discussion of the sharp divisions between "anti-whaling" and "pro-whaling" countries currently marking the deliberations of the IWC). Indeed, in the forward to this work, the former U.S. IWC Commissioner, John Knauss, pointedly remarks, "As an example of good faith international negotiations, the IWC is mostly a disaster." John A. Knauss, *Forward* to TOWARD A SUSTAINABLE WHALING REGIME, at vii, viii (Robert L. Friedheim ed., 2001). Professor Friedheim notes, "How science has been used in the IWC . . . is a dismal story." Robert L. Friedheim, *Introduction: IWC as a Contested Regime, in* TOWARD A SUSTAINABLE WHALING REGIME 3, 22 (Robert L. Friedheim ed., 2001).

In connection with the resolution adopted in July 2000 in Adelaide, the divergence between the Commission action and the report of the Scientific Committee was most manifest. As noted above, IWC Resolution 2000-5 expressly emphasized the purported position of the Scientific Committee, noting that it "did not endorse" JARPN II. The action by the Commission led the Chair of the Scientific Committee to deliver an unusual rebuke to the Commission. As reported in the IWC Chairman's 2000 Report:

> The Chair of the Scientific Committee indicated that she was disturbed by the way the Scientific Committee's deliberations were misrepresented in the discussions of JARPN II by some delegations. The Scientific Committee neither endorsed nor rejected Japan's research proposal. Its role is to provide constructive criticism and report all views to the Commission.[127]

In short, it was simply unfair and erroneous for the Commission to premise its action on the asserted failure of the Scientific Committee to endorse JARPN II.

Moreover, the actions of the Commission have been far from unanimous. Environmental groups like Greenpeace have referred to the "overwhelming majority" of Commission members urging Japan not to proceed and "call[ing] [JARPN II's] scientific value into question."[128] This leaves the impression that Commission action is taken scarcely without debate. In fact, the Commission action in July 2000 was taken after extensive debate, with a substantial number of dissenters. Thus, during discussion of IWC Resolution 2000-5, many countries, including Norway, China, St. Lucia, Antigua and Barbuda, harking back to discussions within the Scientific Committee, defended the scientific basis for JARPN II and its value to the Commission's management responsibilities.[129] The final vote on the resolution was 19 to 12, with two abstentions—something less than an overwhelming majority.[130] Similarly, IWC Resolution 2000-4, dealing with the JARPA program, was adopted only by a vote of 20 for and 10 against, with three abstentions.[131] At the IWC's 2001 meeting, Resolutions 2001-7 and 2001-8 were adopted by votes of 21 for, 14 against and 1 abstention, and 20 for, 14 against and 2 abstentions, respectively.[132]

Finally, the official IWC Secretariat descriptions of Commission action, as opposed to the gloss put on that action by individual governments and non-governmental organizations, are much more even-handed in their pres-

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127. 2000 CHAIRMAN'S REPORT, *supra* note 113, at 44.

128. Greenpeace, *Japan Disregards Blair and Clinton and Starts New Whale Hunt in North Pacific* (July 29, 2000), *at* http://www.greenpeace.org/pressreleases/oceans/2000jul29.html.

129. *See* 2000 CHAIRMAN'S REPORT, *supra* note 113, at 43-44.

130. *See id.* at 44. Several Commission members noted that there was not "clear guidance" from the Scientific Committee on the matters addressed in the Resolution. *Id.*

131. *See id.* at 45.

132. Personal communication from Julie Creek, IWC Secretariat (Oct. 4, 2001) (on file with the authors).

entation. The Secretariat is careful, for example, to explain that there are views on all sides within the Scientific Committee and that," the review of any permits rarely result [sic] in unanimity."[133] Implicitly, the Secretariat is saying that, no matter what Commission resolutions may say, it is not fair to rely upon the purported views of the Scientific Committee in asserting that the JARPA or JARPN research activities are bad science or otherwise scientifically unjustified. A fair reading of the Secretariat's entire description of the scientific permit question certainly leaves the impression that Japanese research activities are within the bounds of legitimate inquiry. As noted at the outset of this article, the IWC Secretary, Dr. Gambell, has made it clear that these activities address important management questions and fall "within the terms of the Convention that we operate."[134]

While the IWC resolutions may accurately convey the political positions of the majority of the Commissioners, they scarcely establish that Japanese research activities lack scientific merit or are inconsistent with the Convention.

D. Japanese Research and Its Impact on Whale Stocks

Last of all, it might be claimed that, even if the Japanese research program is consistent with the rights recognized under Article VIII of the Convention and constitutes good science, it would cause biological harm to whale populations and should not be permitted. The argument would be that research cannot and should not conflict with the purpose of the Convention, embodied in the Preamble, to assure the viability of whale stocks. To some extent, this concern is reflected in the most recent IWC resolutions (2000-4 and 2001-7) concerning research in the Antarctic.[135] Yet, the Scientific Committee has never suggested that the numbers of animals taken in the Japanese program are a cause for concern, and there is little, if any, support for the proposition that the removal levels are not biologically sustainable.

JARPA involves the taking of a single whale species, the minke whale, in the Southern Ocean. In 1990, based upon surveys conducted in the 1980s, the Scientific Committee estimated the population of this species to be ap-

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133. IWC Scientific Permits Page, *supra* note 50.

134. BBC News Online Forum Interview with Dr. Ray Gambell, IWC Secretary (July 5, 2000), *at* http://newsvote.bbc.co.uk/hi/english/talking_point/forum/newsid_817000/817116.stm.

135. *Resolution on Whaling Under Special Permit in the Southern Ocean Sanctuary*, IWC Resolution 2000-4, *in* 2000 CHAIRMAN'S REPORT, *supra* note 113, at 66 *in* app. 1. The resolution notes that recent estimates of minke whale populations in the Antarctic are "appreciably lower" that previously accepted by the Scientific Committee, and recognizes "the urgent need for the Scientific Committee to proceed with the planned review of the estimates of population sizes of minke whales . . . prior to seeking advice from the Commission on how to assess the impact of JARPA on these stocks." *Id. See also* Resolution 2001-7, *supra* note 123, (noting the *possibility* that "Southern Hemisphere minke whales may have suffered a precipitous decline over the past decade.").

proximately 760,000, and this figure was generally accepted for a number of years.[136] In 1992, the IWC Scientific Committee calculated that 2000 minke whales could be taken from the Antarctic each year for the next 100 years without any threat to the stock.[137] In 1993, the IWC Secretary, Dr. Gambell, observed, "[i]n all reasonableness we would have to say that a commercial catch could be taken without endangering [minke] stocks."[138] Taking a maximum of 440 animals a year from this population for research purposes raises no significant biological questions.

More recently, as reflected in IWC Resolution 2000-4 and IWC Resolution 2001-7 some concerns have been raised about the accuracy of the 1990 minke whale population estimate. At the 2000 IWC meeting, the Scientific Committee noted that the 760,000 animals were "no longer appropriate estimates of current minke whale abundance."[139] The Committee stated, "Some initial crude extrapolations . . . led to a point estimate that was appreciably lower than the total of the previously agreed point estimates by Area from the Comprehensive Assessment."[140]

Still, the Committee's inability to provide "reliable estimates" of the current minke whale population does not necessarily mean that the Japanese scientific taking permits are problematic. In fact, the Scientific Committee observed that "it was not possible to conclude whether the appreciable difference noted . . . was statistically significant."[141] It was suggested, moreover, that the 1990 assessment of 760,000 did not include dwarf minke whales, and, based upon earlier population estimates, it was possible that the 760,000 number was above the "carrying capacity" for the species.[142] In any event, the Scientific Committee in 2000, while identifying the issue of stock size, did not provide advice to the Commission indicating that the level of take would or could have an adverse impact on the stock. It simply agreed to work intersessionally on questions related to possible impacts, including "questions of changing carrying capacity."[143] And, again in 2001, the Scientific Committee affirmed that "further modelling approaches need to be examined and abundance estimates agreed before specific advice on the effect

136. IWC, *Estimates*, *at* http://www.iwcoffice.org/Estimate.htm (last visited Feb. 24, 2002).

137. *See* Annex I, Report of the Working Group on Implementation Trials, app. 2, table 1, at 161-66, *in* INTERNATIONAL WHALING COMMISSION, REPORT OF THE 43RD INTERNATIONAL WHALING COMMISSION (1993).

138. Michael Hornsby, *Britain tells Norway to choose between EC and whaling*, TIMES (LONDON), May 4, 1993, LEXIS, Nexis Library.

139. 2000 CHAIRMAN'S REPORT, *supra* note 113, at 28.

140. *Id. See also* IWC Scientific Permits Page, *supra* note 50 (noting "the Committee agrees that it does not have current best estimates for Southern Hemisphere minke whales, noting that in some areas they may be appreciably lower"). In 2001, the Scientific Committee made no new pronouncements on this issue. *See* 2001 SC REPORT, *supra* note 100, at 75-76.

141. 2000 CHAIRMAN'S REPORT, *supra* note 113, at 28.

142. *Id.* at 33.

143. 2000 SC REPORT, *supra* note 100, at 79.

of JARPA on Antarctic minke whales can be provided."[144] In such circumstances, even if the population is "appreciably lower" than 760,000 animals, there is no basis for concluding at this time that an annual take of no more than 440 animals is unacceptable.

In the North Pacific, initially under JARPN and now under JARPN II, Japan has taken 100 minke whales annually. The IWC reports that "[t]he most recent population estimate for minke whales in the western North Pacific and Okhotsk Sea is about 25,000."[145] Based upon standard assessment techniques and a variety of stock structure hypotheses, "the proponents [of the study] concluded that the effect on the minke whale stock is negligible."[146] There was some discussion within the Scientific Committee at the 2000 meeting as to whether the measures used to assess effects were adequate, though a number of members "believed that the approach taken used the best data available and the conclusion was valid."[147] In any event, the Scientific Committee provided no basis for concluding that this level of take was not sustainable, and, at its 2001 meeting, the Scientific Committee made no suggestion to the contrary.[148]

Finally, JARPN II involves the taking of 50 Bryde's whales and 10 sperm whales annually in the North Pacific. The IWC Secretariat has pointed out that "[a] preliminary estimate of abundance for western North Pacific Bryde's whales is about 22,000."[149] The scientists responsible for JARPN II, using the same methodology as that used for North Pacific minke whales, also concluded that the effect of this level of take was "negligible."[150] During the Scientific Committee's discussion, the validity of this conclusion was apparently not questioned.[151] As for sperm whales, the IWC has no abundance estimates for the North Pacific stocks.[152] However, as stated by the proponents of the study, "While no calculation was made for the sperm whales, the sample size is so small that [it] is clearly below the critical level to affect the stock."[153] Once again, the Scientific Committee discussion at the 2000 meeting did not call this conclusion into doubt, and, at its 2001 meet-

144. 2001 SC REPORT, *supra* note 100, at 74.

145. IWC Scientific Permits Page, *supra* note 50.

146. 2000 CHAIRMAN'S REPORT, *supra* note 113, at 41. *See also* 2000 SC REPORT, *supra* note 100, at 78.

147. 2000 SC REPORT, *supra* note 100, at 78.

148. *See* 2001 SC REPORT, *supra* note 100, at 75.

149. IWC Scientific Permits Page, *supra* note 50.

150. 2000 SC REPORT, *supra* note 100, at 78.

151. *See id.*

152. Despite the absence of current, reliable estimates of total abundance, researchers have suggested that the North Pacific population of sperm whales is measured in the hundreds of thousands and is perhaps as high as almost one million, while the regional stock of sperm whales may exceed 100,000 animals. *See* NOAA, 1998 MARINE MAMMAL STOCK ASSESSMENT REPORT 111-112 (1998). *See also* NOAA, 61(1) MARINE FISHERIES REVIEW 63 (1999). Regardless of the precise size of the stock, it is highly unlikely that taking 10 animals annually would pose any substantial threat.

153. 2000 SC REPORT, *supra* note 100, at 78.

ing, no different conclusions were suggested by the Committee's deliberations.[154]

There is little reason to believe that Japanese research is having any adverse impact on whale stocks.

II. THE NATURE OF THE ABUSE OF RIGHT DOCTRINE UNDER INTERNATIONAL LAW

Even if Article VIII of the ICWR were less specific than it is, or Japan's research program were less grounded in science than it is, Japan's program could only constitute an abuse of right if such a principle existed in international law. A review of the sources of international law suggests that there is substantial uncertainty as to the existence of the principle and, if it does exist, there is certainly no consensus as to its precise contours or how it should apply in particular cases.

Under international law, "apart from any convention, in order that a State may incur responsibility it is necessary that an unlawful international act be imputed to it, that is, that there exist a violation of a duty imposed by an international juridical standard."[155] Some commentators assert that there exists in international law an extra-treaty rule that prohibits nations from abusing their rights and thereby governs the conduct of nations regardless of whether there is a specific treaty provision prohibiting such abuse.[156] At least one such commentator not only asserts that such a principle exists in international law, based upon "'general principles of law recognized by civilized nations,'" [157] including Article 300 of the 1982 United Nations Convention on the Law of the Sea,[158] but also that Japan's whale research program may

154. *See* 2001 SC REPORT, *supra* note 100, at 75.

155. Dickson Car Wheel Co. v. United Mexican States, 4 R.I.A.A. 669, 678 (1931). *See also* B.O. Iluyomade, *The Scope and Content of a Complaint of Abuse of Right in International Law*, 16 HARV. INT'L L.J. 47, 73 (1975).

156. Among those scholars who contend that an abuse of right rule exists in international law, some take the position that abuse of right is closely related to, if not identical with, the concepts of "good faith" or "bad faith." *See, e.g.*, BIN CHENG, GENERAL PRINCIPLES OF INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 121 (1953). The term "bad faith" is thought to comprise some element of dishonesty, fraud or malice. Iluyomade, *supra* note 155, at 51. Accordingly, proof of bad faith is difficult to establish, because proof of subjective intent, *i.e.*, motive, is required. *See* G.D.S. Taylor, *The Content of the Rule Against Abuse of Rights in International Law*, 46 BRIT. Y.B. INT'L L. 323, 333 (1972-73). Consequently, some scholars take pains to distinguish "abuse of right" and "bad faith," asserting that the finding of a bad motive is not required to prove an abuse of right. *Id.* at 333-36. Although it has been stated that "[t]he prohibition of malicious injury is an important aspect of the theory of abuse of right as it has been applied in most Continental legal systems," BIN CHENG, GENERAL PRINCIPLES OF INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 121 (2d ed. 1987) [hereinafter CHENG], for purposes of this discussion, we will assume *arguendo* that abuse of right may not only be synonymous with bad faith, but may also be something other than bad faith.

157. Triggs, *supra* note 7, at 37.

158. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3,

constitute such an abuse of right. That is, that Japan may have exercised its right under the ICRW "for a purpose [contrary to the purpose] for which it was conferred" and that the program would therefore be nothing more than a "sham to avoid a legal obligation."[159]

A review of the various possible sources of an abuse of right principle fails to substantiate the premise for the argument just described. At the outset it should be noted that there is disagreement as to the appropriate source or sources of international law allegedly supporting the existence of an abuse of right doctrine even among those commentators who agree that such a doctrine in some form exists in international law. Some, such as B. O. Iluyomade, have determined that the concept of abuse of right is most likely to find a place in international law under Article 38(1)(c) of the Statute of the International Court of Justice, which refers to "'the general principles of law recognized by civilized nations' as a source of law."[160] Others, such as G. D. S. Taylor, Bin Cheng, and Sir Hersch Lauterpacht rely primarily on judicial decisions for support.[161] Still others, such as F.V. Garcia Amador and Professor Triggs, seek support from recognized general principles of law, judicial decisions, specific treaty provisions, and the writings of highly qualified juridical thinkers.[162]

Article 38 of the Statute of the International Court of Justice (which repeats the identical formulation of its predecessor, the Permanent Court of International Justice) is generally recognized as an authoritative formulation of the sources of international law both inside and outside the International Court of Justice.[163] Article 38(1) enumerates those sources as follows:

> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[164]

397, 21 I.L.M. 1261 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

159. Triggs, *supra* note 7, at 59.

160. Iluyomade, *supra* note 155, at 53.

161. *See generally* Taylor, *supra* note 156; CHENG, *supra* note 156, at 121-36; HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 162-165 (Grotius Publications Limited 1982).

162. *See generally* F.V. Garcia Amador, *State Responsibility: Some New Problems*, 94 RECUEIL DES COURS 24 (1958) [hereinafter Amador]; Triggs, *supra* note 7.

163. *See* Wolfgang Friedmann, *The Uses of "General Principles" in the Development of International Law*, 57 A.J.I.L. 279 (1963); Iluyomade, *supra* note 155, at 53; Triggs, *supra* note 7, at 37.

164. Statute of the International Court of Justice, Jun. 26, 1945, art. 38, T.S. No. 993, 3 Bevans 1179.

Since all of these sources have been relied upon to varying degrees in discussions of an abuse of right principle, we will review each, starting in this Section with municipal law and the opinion of scholars.[165] Rather than demonstrating the existence of a "general principle," the municipal laws of "civilized nations" reveal a significant diversity among them on the recognition and application of an abuse of right principle. In turn, commentators have articulated equally diverse formulations of an international obligation to avoid abuse of right, and their attempts at formulating a rule lack sufficient dimension to permit its application with any predictability.

While international courts have referred to an abuse of right, they have provided little guidance as to its substantive content. In fact, no international tribunal, including the WTO Appellate Body in the *Shrimp Case*, has expressly founded liability on such an abuse of right doctrine. Because of the arguable significance of the *Shrimp Case* to the law as developed by international tribunals, we deal with this source separately in Section III. Finally, given the importance of the *Southern Bluefin Tuna Case*, and the application of Article 300 and other parts of UNCLOS to recent arguments that Japan has abused its rights under the Convention, we discuss the significance of that case in particular and UNCLOS in general in Section IV. Neither case provides authority for an international tribunal to apply an abuse of right rule to Japan's research program.

A. Pertinent Municipal Law

B. O. Iluyomade and H. C. Gutteridge, upon whose writings Iluyomade substantially relies, have conducted perhaps the most comprehensive surveys of the law of civilized nations as it relates to abuse of right. Consequently, much of the following analysis is drawn from these surveys. Although they may be dated, the surveys conducted by Iluyomade and Gutteridge are still pertinent to this inquiry in that commentators continue to rely upon them for the proposition that a general principle of abuse of right can be gleaned from the laws of the nations surveyed.[166]

From the outset, it should be noted that Iluyomade suggests that what is involved in Article 38 is the application of "'principles, not rules.'"[167] Consequently, "[w]hat is involved in the application of a general principle of law recognized by civilized nations is, then, the use of municipal law analogies

165. While "[i]t is tempting to regard the principle of good faith or abuse of right as one of customary international law in the sense that nations always act in good faith and expect each other nation to do likewise[,] . . . this line of reasoning assumes that which must be proven." Iluyomade, *supra* note 155, at 53 n.34. Consequently, international custom is typically not relied upon as a source for supporting the existence of an abuse of right principle.

166. *See* Triggs, *supra* note 7, at 37 n.26 (referencing citations contained in IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 444 n.74 (4th ed. 1990)).

167. Iluyomade, *supra* note 155, at 54 (quoting BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 24 (1953)).

to fashion a viable system of rules for international law."[168] However, even given this distinction, these reviews of the pertinent municipal law demonstrate that there is no general principle of abuse of right which emerges and is recognized by civilized nations from which to fashion a viable international rule of abuse of right. There is little agreement among nations on what constitutes an abuse of right or even whether such a principle exists.

The differences in municipal law are manifest. Mexican and German law appear to be quite similar to each other in their recognition of an abuse of right principle. The Mexican Code contemplates a very restrictive view of an abuse of right. A complainant must prove that in exercising the right and causing the damage complained of, the actor received no benefit and the actor's sole motivation was to harm the complainant.[169] Similarly, under the German Code, an abuse of a right occurs only when there is no legitimate purpose for exercising it and the purpose is to injure another. It would also appear that the harm must be intentionally inflicted.[170] Thus, both require that a right may not be exercised where the sole motivation is to cause the injury that is the subject of the complaint. However, that is where the similarity ends. Under French law, a right must be exercised so as to avoid doing harm to others to the extent possible.[171] The Swiss Code is very broad and vague, requiring every person to exercise his rights according to the principles of good faith and stating that the manifest abuse of a right will not be protected.[172] Swiss judges, however, have placed greater emphasis on the obligation to act in good faith and have limited their review to ascertaining whether the conduct complained of is honest or not.[173] Under Soviet law, a right was to be exercised so as not to harm the community or the state. Unlike other codes, the intention to inflict harm was not a criterion and it was not required that the right was exercised in a manner that conflicted with the interests of another individual for the exercise to fall within the prohibition.[174] Instead, the only test was whether an act was injurious to the community or the state.[175] U.S. law and Ethiopian law appear to be similar to each other. Under both U.S. and Ethiopian law, a property right may not be exercised so as to intentionally inflict harm on a neighbor.[176] Australia and Canada place limits on the discretion of their governments when they act ostensibly under their permitted authority but in reality act for another purpose

168. Iluyomade, *supra* note 155, at 54.

169. *See* Iluyomade, *supra* note 155, at 56-57; BROWNLIE, *supra* note 166, at 444.

170. *See* Iluyomade, *supra* note 155, at 56; H.C. Gutteridge, *Abuse of Rights*, 5 CAMBRIDGE L.J. 22, 36 (1933).

171. *See* Gutteridge, *supra* note 170, at 35.

172. *See id.* at 39; Iluyomade, *supra* note 155, at 56.

173. *See* Gutteridge, *supra* note 170, at 40.

174. *See* Iluyomade, *supra* note 155, at 56; Gutteridge, *supra* note 170, at 41.

175. *See* Iluyomade, *supra* note 155, at 56; Gutteridge, *supra* note 170, at 41-42.

176. *See* Iluyomade, *supra* note 155, at 57-58.

unrelated to their authority and thereby cause injury.[177] British law does not recognize an abuse of right principle.[178]

What is the general principle that is recognized? Gutteridge does not find a common principle. He concludes that:

> There is . . . a *factor* which is common to all continental systems of law in the recognition of the principle that a proprietary right must not be utilized for the sole purpose of injuring one's neighbor, but when we go beyond this point the question becomes veiled in mist and it is impossible to define the limits within which effect will be given to the theory.[179]

Perhaps more importantly, the surveys of Gutteridge and Iluyomade are limited and do not include numerous "civilized nations" around the globe. Consequently, it is unclear whether their sampling is representative of the municipal laws of other "civilized nations." Thus, even if a general principle of abuse of right could be gleaned from analyzing the laws of these relatively few nations, it is uncertain if such a principle is in fact sufficiently "recognized" to "fashion a viable system of rules for international law."[180] A 1989 report to the Council of Europe compared the municipal laws of its member states on abuse of right. Its introductory remarks are quite pertinent:

> This report will bear the stamp of diversity. The European states have very few points in common as regards the definition of abuse of rights, conditions of implementation, areas of application and, finally, legal effects. So few, in fact, that it can be stated right away, as a first preliminary remark, that there are almost as many conceptions of the abuse of rights as there are member states of the Council of Europe. And that is not all: this diversity is further accentuated by the fact that, within most countries, there is no unanimous agreement as to the scope of the prohibition of abuse of rights; doctrinal disputes and contradictory judgments are commonplace.[181]

If such could be said of the then 23 European member states of the Council of Europe, what might be said of the current 43 member states? What might be said if other "civilized nations" were included in such a review?

In short, rather than demonstrating that there is a general principle prohibiting the abuse of right recognized by civilized nations,[182] the analyses conducted by Gutteridge and Iluyomade show that there is little agreement

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177. *See id.* at 60.

178. *See id.* at 57; Gutteridge, *supra* note 170, at 22 (citing *Mayor of Bradford v. Pickles* [1895] A.C. 587, 600).

179. Gutteridge, *supra* note 170, at 42-43 (emphasis added).

180. Iluyomade, *supra* note 155, at 54.

181. Joseph Voyame, et al., *Abuse of Rights in Comparative Law*, *in* COUNCIL OF EUROPE, ABUSE OF RIGHTS AND EQUIVALENT CONCEPTS: THE PRINCIPLE AND ITS PRESENT DAY APPLICATION: PROCEEDINGS OF THE NINETEENTH COLLOQUY ON EUROPEAN LAW 23, 23 (1989).

182. *See infra* Section II.B.1.

among nations on what constitutes an abuse of right, or even whether such a principle exists.

B. Teachings of the "Most Highly Qualified Publicists"

In the absence of a general principle of abuse of right recognized by civilized nations and any rules established by international tribunals , "highly qualified publicists" have fashioned their own "rules" on abuse of right. Given the basis upon which legal scholars must build, their "problem" is as much "demonstrating that such a concept does [exist]" as it is demonstrating that it "at least *ought* to exist in international law."[183] The formulations derived by legal scholars are as diverse as the municipal codes discussed above. Consequently, no general rule of abuse of right emerges. Further, such "rules" lack an articulation of the burden of proof, standards and indicia upon which to judge the general rule, and the appropriate remedies for breach. Thus, nations have no notice of the rule upon which they may be judged.

1. Specific Formulations of Abuse of Right

Although there are important variations within certain categories, the formulations of leading scholars who conclude that a rule against the abuse of right exists in international law may be categorized under five headings which characterize the thrust of each formulation: (1) "*Intent to Injure*;" (2) "*Contrary Purpose*;" (3) "*Balancing of Rights*;" (4) "*Do no Harm;*" and (5) "*Act Honestly*." A final category, which includes those who hold that there is no such rule prohibiting an abuse of right in international law, will be discussed in this Section's conclusion.

- ***Intent to Injure.*** In its formulation of an abuse of right rule, the International Law Association (the "ILA") bases wrongfulness on an intent to injure. Its formulation is as follows:

> No one may exercise his rights in such a manner as to damage another when causing this damage is the purpose of exercising such rights.[184]

Similarly, although Ian Brownlie ultimately concludes that an abuse of right principle does not exist in positive law, he defines the doctrine to be examined as exemplified by Article 1912 of the Mexican Civil Code:

> When damage is caused to another by the exercise of a right, there is an obligation to make it good if it is proved that the right was exercised only in order to cause the damage, without any advantage to the person entitled

183. Iluyomade, *supra* note 155, at 53 (emphasis added).

184. INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FIFTY-EIGHTH CONFERENCE 404 (1980).

to the right.[185]

- ***Contrary Purpose.*** B. O. Iluyomade finds that an abuse of right under international law is:

> [T]he prohibition of the exercise of a right for an end different from that for which the right was created, to the injury of another person or the community.[186]

G. D. S. Taylor constructs an abuse of right rule that focuses on the purpose of the exercise of the right as follows:

> [N]o person may, under international law, exercise a power for a reason, actual or inferred, which is contrary to the purpose or purposes for which international law contemplates the power will be used.[187]

Both Iluyomade and Taylor assert that the intent element is objective rather than subjective.[188] Thus, as Taylor puts it, "[t]he object is to find whether the facts indicate a defective reason without attempting to find that the State had that reason actually in mind."[189] Taylor differs from Iluyomade in suggesting that a complaining State need not show that the defendant State's improper actions resulted in any injury. It is enough that an obligation is avoided.[190]

- ***Balancing of Rights.*** In Wolfgang Friedmann's view, the rule against abuse of right merely says that

> [W]hatever [a nation's legal] rights are, they must not be used in such a manner that its anti-social effects outweigh the legitimate interests of the owner of the right.[191]

Sir Hersch Lauterpacht constructs a similar rule:

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185. BROWNLIE, *supra* note 166, at 444.

186. Iluyomade, *supra* note 155, at 48.

187. Taylor, *supra* note 156, at 352.

188. Iluyomade *supra* note 155, at 77; Taylor, *supra* note 156, at 333.

189. Taylor, *supra* note 156, at 333. As noted at the outset of Section II, Professor Triggs' formulation also falls into the contrary purpose category. Triggs, *supra* note 7, at 59. With respect to Japan's research activities, she suggests that the appropriate test is whether the "primary purpose" of the program is to "enable scientific research or to facilitate the supply of whale meat to a commercial market." *Id.* at 52. Subsequently, she implies a more objective test by indicating that a finding of abuse of right would depend on evidence of the commercial purpose of the program "in the absence of any significant scientific research being undertaken." *Id.* at 53.

190. *Cf.* Judge Read's *dicta* in the *Nottebohm Case (Liech. v. Guat.)*, 1955 I.C.J. 4, 370 ("The doctrine of abuse of right cannot be invoked by one unless the state which is admittedly exercising its right under international law causes damage to the state invoking the doctrine.").

191. Friedmann, *supra* note 163, at 288.

> [T]he essence of the doctrine is that, as legal rights are conferred by the community, the latter cannot countenance their anti-social use by individuals; that the exercise of a hitherto legal right becomes unlawful when it degenerates into an abuse of rights; and that there is such an abuse of rights each time the general interest of the community is injuriously affected as the result of the sacrifice of an important social or individual interest to a less important, though hitherto legally recognized, individual right.[192]

- ***Do No Harm.*** F. V. Garcia Amador posits yet another formulation of abuse of right, the practicality of which is highly questionable. Amador finds:

> [T]hat the State should conduct itself, even when exercising a right, in such a manner as to do no harm to the general interest or to the particular interests of third States.[193]

- ***Act Honestly.*** Bin Cheng views abuse of right as merely an application of the principle of good faith to the exercise of rights. Thus, an abuse of right occurs when a nation fails to exercise its rights in good faith.[194] Cheng formulates abuse of right as follows:

> Where the right confers upon its owner a discretionary power, this must be exercised honestly, sincerely, reasonably, in conformity with the spirit of the law and with due regard to the interests of others. All rights have to be exercised reasonably and in a manner compatible with both the contractual obligations of the party exercising them and the general rules and principles of the legal order. They must not be exercised fictitiously so as to evade such obligations or rules of law, or maliciously so as to injure others.[195]

Because the concept of "good faith" is broad and largely undefined, Cheng's formulation of abuse of right is the broadest. It can be viewed as a conglomeration of each of the preceding rules, although it is unclear to what extent motive or intent is required to be shown.

2. Analysis of Formulations

Scholars have fashioned international abuse of right rules as diverse as the formulations under municipal law. The very fact that they have suggests that the concept of abuse of right remains a policy abstraction and not a rule to be used to judge a nation's conduct. To which of these rules must a nation adhere? Given their foundation, is such adherence a valid expectation?

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192. HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 286 (2d ed. 1966).

193. Amador, *supra* note 162, at 381.

194. CHENG, *supra* note 156, at 121.

195. *Id.* at 136.

Because there is so little agreement on the content of an abuse of right principle and such a diverse basis upon which to formulate a rule, many scholars have concluded that a rule prohibiting the abuse of right does not exist in international law. For example, after reviewing the sources of international law with respect to abuse of right, Brownlie concludes:

> [I]t may be said that the doctrine is a useful agent in the progressive development of the law, but that, as a general principle, it does not exist in positive law. Indeed it is doubtful if it could be safely recognized as an ambulatory doctrine . . . .[196]

Georg Schwarzenberger and Edward D. Brown find:

> In view of the diversity on this subject in the municipal laws of civilized countries, it would also be difficult to accept the proposition that the prohibition of the abuse of rights is a general principle of law recognized by civilized nations.[197]

Similarly, Brian D. Smith concludes:

> [T]he principles of good neighborliness and abuse of rights . . . do not . . . appear to have advanced from policy abstractions to concrete rules of decision which limit state prerogatives with respect to the environment.[198]

Such scholarly conclusions seem more defensible than the claim that there is a concrete rule of abuse of right that is capable of application in a contested case by an international tribunal, given the variety and vagueness of the efforts of the proponents of the rule to define it. Similarly, no international tribunal has yet found the principle concrete enough to base any decision on it.

III. THE *SHRIMP CASE* AND *DICTA* IN OTHER DECISIONS OF INTERNATIONAL TRIBUNALS AND THEIR APPLICATION TO THE JAPANESE RESEARCH PROGRAM

Although the *dicta* of decisions by international tribunals have been cited to demonstrate that an extra-treaty rule prohibiting the abuse of right exists in international law, no international tribunal has expressly founded liability on this concept.[199] Because international tribunals have not had occasion to apply the concept, other than as an indication of what the law would

196. BROWNLIE, *supra* note 166, at 446.

197. GEORG SCHWARZENBERGER & E.D. BROWN, A MANUAL OF INTERNATIONAL LAW 85 (6th ed. 1976).

198. BRIAN D. SMITH, STATE RESPONSIBILITY AND THE MARINE ENVIRONMENT 85 (1988).

199. *See* Triggs, *supra* note 7, at 37 (accepting this proposition until the *Shrimp Case* was decided; *see infra* Section III.B); Iluyomade, *supra* note 155, at 92 ("The present writer has also not come across any decision of an international tribunal in which liability has been expressly founded on abuse of right.").

have been had the facts been different, "the principle has lacked legal content."[200] Notwithstanding claims that the findings of the Appellate Body of the WTO in the *Shrimp Case* are evidence of the viability of the abuse of right principle in international law, a close reading of the ruling in that matter indicates that the Appellate Body rejected reliance on such general principles, and instead grounded its decision on the detailed wording of the relevant trade agreement, language that is not present in the ICRW.

A. Dicta *in Decisions of International Tribunals*

Scholars have cited to *dicta* contained in a variety of decisions of international tribunals and relied upon inferences that could be drawn from such statements to fashion a rule. Still other cases are cited simply because *dicta* demonstrate general support for the notion that an abuse of right rule exists in international law, although it is not defined.

For example, in *Certain German Interests in Polish Upper Silesia*, the Permanent Court of International Justice held that "Germany undoubtedly retained until the actual transfer of sovereignty the right to dispose of her property, and only a misuse of this right could endow an act of alienation with the character of a breach of the Treaty."[201] Scholars often cite to the following additional language:

> [S]uch misuse has not taken place in the present case. The act in question does not overstep the limits of the normal administration of public property and was not designed to procure for one of the interested Parties an illicit advantage and to deprive the other of an advantage to which he was entitled.[202]

Thus, presumably, by inference, an abuse of right would occur if it could be proved that a right was exercised in such a manner as to secure an illicit advantage while depriving another of an advantage to which he was entitled.

In the *Free Zones Case*, the Permanent Court of International Justice recognized France's right to maintain its cordon and to apply its fiscal legislation to the frontier zones adjoining France and Switzerland. However, the Court added the following language which scholars often cite:

> A reservation must be made as regards the case of abuses of a right, since it is certain that France must not evade the obligations to maintain the zones by erecting a customs barrier under the guise of a control cordon.

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200. Triggs, *supra* note 7, at 38.

201. Certain German Interests in Polish Upper Silesia (Germ. v. Pol.), 1926 P.C.I.J. (ser. A) No. 7, at 30.

202. *Id.* at 37-38, *cited in e.g.*, Triggs, *supra* note 7, at 37-38; Iluyomade, *supra* note 155, at 61-62; LAUTERPACHT, *supra* note 160, at 162-63; Amador, *supra* note 162, at 378.

> But an abuse cannot be presumed by the Court.[203]

Thus, presumably, by inference, an abuse of right would occur if it could be proved that a right were used for a purpose other than that for which it were conferred in order to evade a legal obligation to the injury of another.

Other references are too vague to infer even the semblance of a workable rule. For example, in the *Rights of Nationals of the United States of America in Morocco Case*, the International Court of Justice considered the methods used by the customs authorities in the French Zone in fixing the valuation of imported goods for customs purposes, and suggested several factors that the customs authorities might take into consideration in making future decisions. The Court warned that:

> The power of making the valuation rests with the Customs authorities, but it is a power which must be exercised reasonably and in good faith.[204]

Still other references appear to support the notion that a rule against the abuse of right exists or ought to exist in international law, but give little inkling as to what that rule might be. For example, in the *Barcelona Traction Case*, Judge Ammoun declared, "Abuse of right, like denial of justice, is an international tort . . . enshrined in a general principle of law which emerges from the legal systems of all nations."[205]

Similarly, in the *Corfu Channel (Merits) Case*, Judge Alvarez stated:

> I consider that in virtue of social interdependence, this condemnation of the misuse of a right *should be transplanted* into international law. For in that law, the unlimited exercise of a right by a state as a consequence of its absolute sovereignty may sometimes cause disturbances or even conflicts which are a danger to peace.[206]

However, as aptly put by Iluyomade, "[i]t is true enough that all of the pronouncements were unnecessary to the determination of the issue at hand, or were no more than guarded warnings against abusive exercise of right."[207] In short, as even advocates of the abuse of right principle are forced to ad-

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203. Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.), 1932 P.C.I.J. (ser. A/B) No. 46, at 167, *cited in e.g.*, Triggs, *supra* note 7, at 38; Iluyomade, *supra* note 155, at 62; LAUTERPACHT, *supra* note 160, at 163; CHENG, *supra* note 156, at 123; Amador, *supra* note 162, at 378.

204. Rights of Nationals of the U.S. in Morocco (Fr. v. U.S.), 1952 I.C.J. 176, 212 (Aug. 27), *cited in, e.g.*, Triggs *supra* note 7, at 40; Iluyomade, *supra* note 155, at 63; CHENG, *supra* note 156, at 136 n.49; LAUTERPACHT, *supra* note 160, at 164 n.14.

205. Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 1, 324 (Feb. 5) (Ammoun, J. dissenting), *cited in, e.g.*, Triggs, *supra* note 7, at 38; Iluyomade, *supra* note 155, at 65; Taylor, *supra* note 156, at 325 n.4.

206. Corfu Channel (Merits) (U.K. v. Alb.), 1949 I.C.J. 1, 48 (April 9), *cited in* Iluyomade, *supra* note 155, at 63 (emphasis added).

207. Iluyomade, *supra* note 155, at 65.

mit, because international tribunals have not had occasion to apply the concept, the principle referenced in these and other cases "has lacked legal content."[208] Thus, at least until the *Shrimp Case*, there was little law to be gleaned from decisions of international tribunals to apply upon invocation of the abuse of right principle.

B. The Shrimp Case

It has been contended that the *Shrimp Case* fundamentally changed the legal landscape and "strengthened"[209] the principle of abuse of right because the WTO's Appellate Body "founded liability on this concept."[210] Indeed, the argument goes, the *Shrimp Case* provides the necessary legal context for a challenge to Japan's research program. This is to load onto the decision of the WTO Appellate Body more weight than it can bear.

Under review in this WTO dispute was a U.S. law (Section 609(b) of Pub. L. No. 101-162[211]) prohibiting shrimp imports from countries failing to adopt in their shrimp fisheries measures comparable to those in the United States designed to protect sea turtles.[212] The imposition of embargoes under Section 609 directly contradicted the basic principles of open trade enshrined in the WTO agreements. The Appellate Body found[213] that the way that the United States was implementing the law was inconsistent with the General Agreement on Tariffs and Trade.[214] The Appellate Body, while mentioning the principle of good faith as an interpretative aid,[215] did not rely upon it in reaching its conclusions. Instead, it relied upon specific evidence of a violation of explicit and objective standards contained in GATT 1994 itself. Thus, the decision has little application to an evaluation of Japan's program of scientific research under the ICRW, which lacks the specific language contained in Article XX of GATT 1994.

1. Basis of the Appellate Body Decision

The Appellate Body grounded its decision almost entirely on two parts of Article XX of GATT 1994, which describe the circumstances under which a WTO member country can restrict trade in order to protect ex-

208. Triggs, *supra* note 7, at 38.
209. *Id.* at 41.
210. *Id.* at 37.
211. 16 U.S.C.A. § 1537 note (West 2001).
212. *See Shrimp Case*, *supra* note 10, ¶ 3.
213. *Id.* ¶ 186.
214. Final Act Embodying the Results of the Uruguay Round of Multilateral trade negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994) *available at* http://www.wto.org/english/docs_e/legal_e/06-gatt.pdf [hereinafter GATT 1994].
215. *See Shrimp Case*, *supra* note 10, ¶¶ 158-60.

haustible natural resources.[216] Article XX(g) provides for a "general exception" from the agreement's prohibitions against import restraints for measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." The Appellate Body concluded that, while the U.S. action met the standards established in Article XX(g), it failed to meet the standards in the introductory language to Article XX, the so-called "*chapeau*" language.[217] This requires that, in addition to satisfying any one of the specific exemptions enumerated in Article XX, including Article XX(g), the proposed measures "are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade."

The Appellate Body first ruled that the U.S. action was consistent with the language in Article XX(g) authorizing certain conservation methods otherwise inconsistent with the requirements of GATT 1994.[218] In reaching this conclusion, it necessarily endorsed "[t]he legitimacy of the declared policy objective of the measure, and the relationship of that objective with the measure itself and its general design and structure."[219] Specifically, it held that the "the measure of the United States in dispute in this appeal serves an environmental objective that is recognized as legitimate under paragraph (g) of Article XX of the GATT 1994."[220]

Unlike Article VIII of the ICRW, GATT Article XX also contains the additional specific standards in the *chapeau*, and it was this language that the Appellate Body relied upon in finding against the United States. The Appellate Body's ruling rested squarely on a detailed discussion of the ways in which the United States engaged in "arbitrary or unjustifiable discrimination" in violation of the *chapeau*'s specific standard. This can be readily seen by a brief summary of the basis of the Appellate Body's ruling. It ruled that the United States violated the prohibition against unjustifiable discrimination because in implementing Section 609, the United States failed to take into account the different conditions in the waters of different countries;[221] because its actions were discriminatory and unjustifiable because of the way the United States consulted with some but not other countries before unilaterally imposing the law's requirements;[222] because of the way that some countries were given considerably longer to comply with the new United States requirements than other countries;[223] and because the United States

216. GATT 1994, *supra* note 213 (incorporating by reference Article XX and the other provisions of the General Agreement on Tariffs and Trade 1947, Oct. 30, 1947, as amended).
217. *Shrimp Case*, *supra* note 10, ¶ 186.
218. *Id.* ¶¶ 144-45.
219. *Id.* ¶ 149.
220. *Id.* ¶ 186.
221. *Id.* ¶ 165.
222. *Id.* ¶ 172.
223. *Id.* ¶¶ 174-76.

made a greater effort to provide certain countries with the technology required to comply with United States' requirements than others.[224] The Appellate Body also ruled that the United States' action constituted arbitrary discrimination in violation of the specific language in Article XX because of the rigid way it implemented the law's requirements, because its process for reviewing compliance by other countries was neither transparent nor predictable, and because the way the United States imposed import sanctions against particular countries was lacking in due process.[225]

The Appellate Body's ruling rested squarely on the specific prohibition against "arbitrary or unjustifiable discrimination" in the *chapeau* of Article XX. Given the existence of this language and the Appellate Body's reliance upon it, the ruling in the *Shrimp Case* provides no support for the proposition that in the absence of such treaty language an international tribunal can rely on any principle of abuse of right in international law to hold a government's action under an agreement invalid.

2. Discussion of Theories of Abuse of Right

As a preliminary matter the Appellate Body observed that the "chapeau of Article XX is, in fact, but one expression of the principle of good faith."[226] After briefly describing the principles of good faith and abuse of right in international law, it stated that "[a]n abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting."[227] As several other WTO cases have determined, the Appellate Body recognized that the *chapeau* language in Article XX was adopted to prevent the abuse of the exceptions in Article XX.[228]

Immediately after referring to the general principle of abuse of right, it quickly emphasized that, "[h]aving said this, our task here is to interpret the language of the chapeau, seeking additional interpretative guidance, as appropriate, from the general principles of international law."[229] In support of this statement, it cited Article 31 of the Vienna Convention on the Law of Treaties.[230] Thus, the Appellate Body decision is explicit that the principle of abuse of right is only an aid in interpreting the governing language in GATT 1994, rather than as a separate and independent ground for holding the U.S. actions in violation of international law.

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224. *Id.*

225. *Id.* ¶¶ 180-84.

226. *Id.* ¶ 158.

227. *Id.*

228. *See, e.g.*, United States—Standards for Reformulated and Conventional Gasoline, Report of the Appellate Body, W.T.O. Doc. WT/DS2/AB/R, at 22 (Apr. 29, 1996), http://www.wto.org/english/tratop_e/dispu_e/gasoline.wp5. *see also* GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 519-20 (6th ed. 1994).

229. *Shrimp Case*, *supra* note 10, ¶ 158.

230. *Id.* ¶ 158 n.157.

In the discussion that followed, the Appellate Body also made it clear that it was not relying on any principle of abuse of right as an independent basis of its decision. While finding against the United States, the Appellate Body noted that the United States was acting in good faith to protect endangered sea turtles. It found that none of the parties challenging the United States measures questioned the "genuineness of the commitment" of the United States to the policy of protecting and conserving endangered sea turtles.[231] It found that the measure "serves an environmental objective that is recognized as legitimate under paragraph (g) of Article XX of the GATT 1994."[232] Thus, the Appellate Body decision was not based on any finding that the United States had acted in bad faith by adopting a trade-restrictive measure for ostensibly conservation reasons, when its actual motive was commercial or some other reason not recognized by the exemption in Article XX(g). A subsequent ruling by another WTO panel reviewing U.S. compliance with the Appellate Body's decision formally held that the U.S. import ban was motivated by conservation, rather than some impermissible commercial considerations. [233]

The Appellate Body in the *Shrimp Case* actually criticized the decision of the initial WTO dispute settlement panel in the same case for relying on a broad reading of the purpose of Article XX and GATT 1994, rather than grounding its findings on the actual standards in Article XX. The initial panel found that upholding U.S. implementation of its measure would "undermine the WTO multilateral trading system."[234] In the initial panel's view, it was necessary to determine "not only whether the measure *on its own* undermines the WTO multilateral trading system, but also whether such type of measure, if it were to be adopted by other Members, would threaten the security and predictability of the multilateral trading system."[235] The panel concluded that the U.S. rules did threaten the multilateral trading system since,

231. *Id.* ¶ 135.

232. *Id.* ¶ 186.

233. Following U.S. changes to its guidelines in response to the Appellate Body ruling, Malaysia complained that the United States was still not in compliance with Article XX and the Appellate Body decision. Malaysia formally requested referral of the matter to a dispute settlement panel in October 2000. The panel considering Malaysia's concerns determined that implementation of the U.S. import ban on certain shrimp, as modified by it following the ruling of the Appellate Body, was consistent with WTO rules and the Appellate Body's decision. In the course of reviewing U.S. compliance with the requirements of WTO rules, as explicated in the Appellate Body's decision, the panel specifically held that the U.S. ban was not a disguised restriction on trade in violation of the chapeau language in Article XX. United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia, Report of the Panel, W.T.O. Doc. WT/DS58/RW, ¶ 5.143 (Jun. 15, 2001), *available at* http://www.wto.org/english/tratop_e/dispu_e/58rw_e.pdf [hereinafter *Shrimp Article 21.5 Panel*]. Subsequently, the Appellate Body upheld the panel ruling. *See infra* note 251.

234. United States—Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Panel, W.T.O. Doc. WT/DS58/R, at 291 (May 15, 1998), *available at* http://www.wto.org/english/tratop_e/dispu_e/58r01.pdf [hereinafter *Shrimp Panel*].

235. *Id.* (emphasis in original).

since, if the United States could adopt such trading restrictions, other countries could as well, leading to a multitude of different and at times conflicting requirements that would restrict trade. In that event, "the WTO Agreement could no longer serve as a multilateral framework for trade among Members as security and predictability of trade relations under those agreements would be threatened."[236]

In justifying its broad reading of the *chapeau* language, the initial panel explained that it was invoking the principle that "international agreements must be applied in good faith, in light of the *pacta sunt servanda* principle."[237] It cited both Article 26[238] and Article 18[239] of the Vienna Convention.[240] Article 26 states, "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Article 18 states, "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty." The ruling of the initial WTO panel concluded that Article 18 expresses a "generally applicable principle," even though the specific provision only applies to the period between a State's expression of intent to be bound by a treaty, and the entry into force of the treaty.[241]

The Appellate Body found that the initial panel's expansive reading of the *chapeau* language in light of the broad objective and purpose of GATT 1994 was legally incorrect and a misreading of Article XX. It did not cite the *pacta sunt servanda* principle in its own discussion of the relevance of the principles of abuse of right. It emphasized that the initial panel's approach to interpreting Article XX was inconsistent with the "customary rules of interpretation of public international law," which all panels and the Appellate Body must follow pursuant to the specific requirements of the WTO rules.[242] In language that is equally applicable to any effort to apply any vague notions of abuse of right to Japan's actions under Article VIII of the ICRW, the Appellate Body rebuked the initial panel and its reasoning as follows:

A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought.

In the present case, the Panel did not expressly examine the ordinary meaning of the words of Article XX.[243]

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236. *Id.* at 292.
237. *Id.* at 290.
238. *Id.* at 290 n.644.
239. *Id.* at 290.
240. Vienna Convention, *supra* note 61, arts. 26, 18.
241. Shrimp Panel, *supra* note 234, at 290-91, 290 nn. 644-45.
242. *Shrimp Case*, *supra* note 110, ¶ 114.
243. *Id.* ¶¶ 114-15.

Other Appellate Body rulings have made similar points. In a ruling particularly relevant to any question about the relationship of Article VIII of the ICRW to the remainder of the Convention, the Appellate Body in the *Beef Hormone Case* warned about the danger of redoing the balance struck between the parties in another of the WTO agreements as follows:

The standard of review appropriately applicable in proceedings [*sc.*, under the Agreement on the Application of Sanitary and Phytosanitary Measures], of course, must reflect the balance established in that Agreement between the jurisdictional competences conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves. To adopt a standard of review not clearly rooted in the text of the *SPS Agreement* itself, may well amount to changing that finely drawn balance; and neither a panel nor the Appellate Body is authorized to do that.[244]

The decision of the Appellate Body in the *Shrimp Case* thus rejects creative uses of the abuse of right principle to rule against a country invoking its rights under a treaty. Such a finding has broad applicability beyond WTO jurisprudence because in making its decisions the WTO Appellate Body and initial panels are charged with responsibility "to clarify" the provisions of the WTO agreements "in accordance with customary rules of interpretation of public international law."[245] The Appellate Body's ruling thus argues strongly against any argument that Japan may not continue its scientific research program because the program somehow undermines the purposes and intent of the ICRW.[246]

Nor is the *Shrimp Case* authority for the proposition that a country may not exercise its rights under an agreement unless it first achieves the agreement of other members. It has been suggested that the Appellate Body placed weight on the fact that "the US had failed to seek consensus through consultations" with the countries in Asia that were challenging the U.S. import ban.[247] The conclusion, so the argument goes, is that "[a] unilateral imposition of a ban in Asia was, the Appellate Body concluded, discriminatory and arbitrary."[248] The Appellate Body did indicate that the United States violated the specific prohibition in the *chapeau* against discriminatory action

244. European Community—Measures Concerning Meat and Meat Products (Hormones), Report of the Appellate Body, W.T.O. Doc. WT/DS26/AB/R, ¶ 115 (Jan. 16, 1998), *available at* http://www.wto.org/english/tratop_e/dispu_e/hormab.pdf. *See also* Japan—Taxes on Alcoholic Beverages, Report of the Appellate Body, W.T.O. Doc. WT/DS8/AB/R, at 12 (Oct. 4, 1996), *available at* http://www.wto.org/english/tratop_e/dispu_e/alcohpr.wp5 ("Article 31 of the *Vienna Convention* provides that the words of the treaty form the foundation for the interpretive process: 'interpretation must be based above all upon the text of the treaty.'").

245. Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2 to Agreement Establishing World Trade Organization), Apr. 14, 1994, *available at* http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf.

246. It is the case in any event that Japan's program is fully consistent with the purposes of the ICRW. *See supra* Section I.

247. Triggs, *supra* note 7, at 42.

248. *Id.*

when it "negotiated [an international conservation agreement] seriously with some, but not with other Members (including the appellees) that export shrimp to the United States."[249]

The decision does not mean, however, that the some general principle of abuse of right required the United States to reach consensus with all affected parties before imposing its trade restrictions. Nothing in Article XX of GATT 1994 in fact prohibits unilateral action so long as a party implements such measures in a way that complies with the specific requirements in Article XX. If Article XX required consensus before a party acted, the Article would be superfluous. The subsequent WTO panel reviewing U.S. compliance with the Appellate Body decision ruled that the Appellate Body's decision only required the U.S. to make "serious good faith efforts" over a period of time to negotiate a multilateral conservation agreement with interested Indian Ocean states.[250] The panel ruled that the U.S. had demonstrated that it had made such "serious good faith efforts," and that this was sufficient to comply with the requirements of Article XX. The U.S. was not required to reach agreement with all other interested members before imposing any import restrictions consistent with the WTO trade rules.[251] This finding was subsequently upheld by the Appellate Body of the WTO which reviewed the June 15, 2001 panel report at the request of Malaysia.[252]

By the same token, nothing in the ICRW, including Article VIII, requires Japan to obtain agreement from all the other parties to the agreement before acting under it. To the contrary, as noted in Section I.A., *supra*, no such obligation can be read into the Convention or the rules and procedures of the IWC Scientific Committee. And nothing in the *Shrimp Case* suggests that a tribunal is free to read such requirement for consensus into an agreement when none is expressly provided.

In summary, the *Shrimp Case* rests on the specific language of Article XX of GATT 1994, even though in interpreting the requirements of that language the WTO decisions may refer to general principles of good faith. The *Shrimp Case* does not rest on any independent principle of abuse of right. It is therefore inapplicable to any review of Japan's conduct under Article VIII

249. *Shrimp Case*, *supra* note 10, ¶ 172.

250. Shrimp Article 21.5 Panel, *supra* note 234, ¶¶ 5.60, 5.63, 5.76. The panel relied upon general principles of good faith to conclude that the U.S. obligation to make a serious effort to negotiate a multilateral agreement implied an obligation to continue to make such efforts over a sustained period of time. In doing so, the panel was using the principle of good faith to interpret Article XX, not as an independent source of a separate legal obligation of the U.S.

251. *Id.* ¶¶ 5.67, 5.87.

252. United States—Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia, Report of the Appellate Body, W.T.O. Doc. WT/DS58/AB/RW, ¶ 134 (Oct. 22, 2001), *available at* http://www.wto.org/english/ tratop_e/dispu_e/58abrw_e.pdf. The Appellate Body Report also upheld all other major findings of the panel.

of the ICRW because Article VIII contains no comparable language to that found in the *chapeau* of Article XX of GATT 1994.

Apart from the very different language at issue in Article XX of GATT 1994 and the ICRW, the factual nature of the disputes is also very different. Indeed, the *Shrimp Case* noted that "a balance must be struck between the right of a member to invoke an exception under Article XX and the duty of that same Member to respect the treaty rights of other Members."[253] The very nature of such a balancing requires an evaluation of the extent to which an action by one member undermines the rights of the other members. The Appellate Body held the United States to a high standard because, as it noted, the United States was seeking "to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, without taking into consideration different conditions which may occur in the territories of those other Members."[254]

The circumstances of the Japanese scientific research program require balancing a very different set of rights and obligations. When Japan engages in its research it does not directly interfere with the activities of other parties to the ICRW. Japan, by engaging in such activities, is not forcing other countries to engage in the same research activities, as the United States in fact was forcing other countries to follow its own turtle conservation policies in the *Shrimp Case*. The Japanese program, moreover, does not discriminate against some IWC member countries to the advantage of others. Japan has kept all members of the IWC fully informed in advance of the nature and extent of its research activities. Unlike the United States in the *Shrimp Case*, Japan has engaged in extensive consultations with the Scientific Committee of the IWC throughout the history of its program. Thus, even if the *Shrimp Case* were precedent for deciding the validity of Japan's conduct under the ICRW on the basis of the principle of abuse of right—and as discussed it is not—the factual differences between the two controversies would eliminate in any event the precedential value of the *Shrimp Case*.

IV. JAPAN'S RESEARCH PROGRAM AND THE *SOUTHERN BLUEFIN TUNA CASE*

A final source of international law is found in treaties and international agreements. It has been argued that UNCLOS, as invoked in the recent dispute between Australia and New Zealand on the one hand, and Japan on the other, over southern bluefin tuna (the "*Southern Bluefin Tuna Case*"), provides further evidence of the existence of the principle of abuse of right in positive law, and further authority for holding Japan's research program in violation of international law. In the *Southern Bluefin Tuna Case*, Australia and New Zealand questioned the scientific validity of a Japanese experimen-

253. *Shrimp Case*, *supra* note 10, ¶ 156.
254. *Id.* ¶ 164.

tal fishing program. When the three countries failed to resolve the matter to their satisfaction under the regional fishery agreement known as the Convention for the Conservation of Southern Bluefin Tuna,[255] Australia and New Zealand initiated an action before ITLOS, charging Japan with violations of UNCLOS. In a decision announced August 27, 1999, ITLOS required Japan to cease its experimental fishing program, until an arbitration panel convened under the procedures of UNCLOS had an opportunity to decide on the merits whether Japan's actions violated UNCLOS.[256]

Such an Arbitral Tribunal was organized pursuant to Part XV of UNCLOS. After hearing extensive arguments from all three governments, it ruled August 4, 2000, by a 4 to 1 vote, that it had no jurisdiction over the dispute.[257] It pointed out that the issues in controversy arose under both the CCSBT and UNCLOS, and the parties had agreed in the CCSBT on various ways to resolve any dispute that arose under that agreement.[258] The CCSBT did not give one party the right to unilaterally invoke compulsory arbitration. The Arbitral Tribunal concluded that the CCSBT precluded the right of one CCSBT party to initiate compulsory arbitration against another CCSBT party under UNCLOS.[259] Accordingly, the Arbitral Tribunal revoked the provisional orders adopted by ITLOS and dismissed the matter.[260] Quite apart from the fact that the Tribunal decision rendered the ITLOS determination moot, neither the arguments nor result in the *Southern Bluefin Tuna Case* suggest that Japan is conducting its activities in violation of its obligations under UNCLOS.

A. Role of Abuse of Right Principle

The *Southern Bluefin Tuna Case* illustrates the insubstantiality of any theory that the principle of abuse of right provides meaningful grounds for finding a country in violation of its treaty obligations. Unlike the ICRW, UNCLOS contains a specific provision referring to the obligations of the parties to UNCLOS to comply with the agreement in good faith and to exercise their rights in a manner that does not constitute an abuse of right. Article 300 states, "States parties shall fulfill in good faith the obligations assumed under the Convention and shall exercise the rights, jurisdiction and freedoms

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255. Convention for the Conservation of Southern Bluefin Tuna, May 10, 1993, 1819 U.N.T.S. 360 (entered into force May 10, 1994) [hereinafter CCSBT].

256. Southern Bluefin Tuna Case, *supra* note 11.

257. Southern Bluefin Tuna Case, Award on Jurisdiction and Admissibility (Austl. and N.Z. v. Japan), ¶ 65 (Aug. 4, 2000), *at* http://www.worldbank.org/icsid/bluefintuna/award080400.pdf [hereinafter *Southern Bluefin Tuna (Arbitration)*].

258. *Id.* ¶ 54.

259. *Id.* ¶ 59. Article 281 of UNCLOS precludes a Member State from invoking the Convention's compulsory arbitration procedures if the parties to the dispute have excluded resort to such procedures. UNCLOS, *supra* note 158, art. 28. The Arbitral Tribunal interpreted Article 16 of the CCSBT as excluding resort to compulsory arbitration.

260. *Southern Bluefin Tuna (Arbitration)*, *supra* note 257, ¶ 66.

recognized in this Convention in a manner which would not constitute an abuse of right."[261]

The authoritative Virginia Commentary discussion of Article 300 does not provide significant guidance as to the substantive content, if any, of the abuse of right principle.[262] The mere reference to abuse of right without further specificity or interpretation by international tribunals adds little weight or content to the principle or its applicability. Even Iluyomade, a supporter of the notion that such a rule exists, recognized that while "[t]he provisions of certain treaties exhibit particular applications of the principle," the inclusion of such provisions only provide "some circumstantial evidence of the acceptability of the doctrine in international law."[263]

The experience with Article 300 to date suggests that it is unlikely to have much practical meaning or effect. Despite the explicit language of the provision, neither Australia nor New Zealand invoked it as the basis of an independent cause of action in the *Southern Bluefin Tuna Case.* Instead they cited the provision only as a useful guide in interpreting Japan's duty under other UNCLOS provisions. In the proceeding before ITLOS Australia and New Zealand alleged that Japan was "in breach of its obligations under international law, specifically articles 64 and 116-119 of UNCLOS, and in relation thereto Article 300 and the precautionary principle which, under international law, must direct any party in the application of those articles."[264] When ITLOS issued its decision, neither the order nor the variety of separate opinions issued by individual ITLOS judges cited Article 300, or in any way relied on allegations of abuse of right to justify the provisional relief granted.

When the controversy moved to the Arbitral Tribunal, Australia and New Zealand renewed their charges of lack of good faith, again citing Article 300 on several occasions. Their submissions, for example, alleged that Japan was in violation of various substantive provisions of UNCLOS governing highly migratory species (Articles 64 and 116-119), "and in relation thereto Article 300 of UNCLOS and the precautionary principle."[265] Subse-

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261. UNCLOS, *supra* note 158, art. 300.

262. 5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 149-52 (Shabtai Rosenne & Loius B. Sohn, eds., Myron H. Nordquist ed.-in-chief., 1985) [hereinafter Virginia Commentary]. In its view, the reference to "good faith" in article 300 reflects Article 2, paragraph 2, of the U.N. Charter and the fundamental rule *Pacta sunt servanda.* Article 26 of the Vienna Conventions of 1969 and 1986 formulate this rule in relation to a treaty in lapidary form: "Every treaty in force is binding on the parties to it and must be performed by them in good faith." *Id.* at 152. In seeking to explain the reference to "abuse of right," the Virginia Commentary refers to standard treatises discussing the concept. *Id.* The Virginia Commentary concludes that the abuse of right by one member of UNCLOS must be to the disadvantage of another member. *Id.*

263. Iluyomade, *supra* note 155, at 71.

264. Australia's Request for Provisional Measures in the Dispute Concerning Southern Bluefin Tuna, ¶ 25 (filed July 30, 1999).

265. Australia's Statement of Claim and Grounds on Which It Is Based in the Dispute Concerning Bluefin Tuna, ¶¶ 37, 45 (filed July 15, 1999), *at* http://www.worldbank.org/ icsid/bluefintuna/SBT-Statement-Claim.PDF.

quently, the submissions argued that these obligations in Articles 64 and 116-119 "are obligations which Japan is required by Article 300 of UNCLOS to fulfill in good faith."[266] Australia argued "A State party to a regional treaty which deliberately prevents the object and purpose of that treaty from being achieved through repeated unilateral action and the threat of unilateral action, can be called to account for this failure through the mechanisms that UNCLOS provides."[267]

These allegations, in the circumstances of a treaty that specifically refers to the abuse of right principle, would seem to provide an ideal situation for the parties to invoke that principle as a separate legal basis for their claims. However, in reality both Australia and New Zealand specifically ruled out any suggestion that they were relying on Article 300 as independent legal grounds for their complaint. In their reply brief the parties indicated that they were not "accus[ing] Japan of some independent breach of an obligation to act in good faith."[268] At the oral hearing, New Zealand's counsel repeated this position, suggesting only that Article 300 is "relevant to the interpretation and application of the substantive articles at the center of the dispute."[269] Thus, even in the face of a specific provision in an agreement specifically referencing the principle of abuse of right, Australia and New Zealand chose to rely upon the principle only as a tool in interpreting the meaning of the obligations of Japan under other specific provisions of UNCLOS.

The decision of Australia and New Zealand not to allege an independent breach of Article 300 indicates the extreme difficulties any country faces should it invoke the concept as an independent cause of action. This reluctance in part undoubtedly reflects a healthy awareness of the diplomatic cost one State may pay in making such allegations against another State. As a legal matter, it reflects awareness of the difficulty of proving that a State is guilty of such a substantive breach of the abuse of right principle. *Dicta* by Judge Schwebel in the Arbitral Tribunal's award in the *Southern Bluefin Tuna Case* suggest that the burden of proof on a country making such allegations is very high. He noted that the Tribunal's dismissal of the case for lack of jurisdiction "does not exclude the possibility that there might be instances in which the conduct of a State Party to UNCLOS and to a fisheries treaty implementing it would be so egregious, and risk consequences of such gravity, that a Tribunal might find that the obligations of UNCLOS provide a basis for jurisdiction, having particular regard to the provisions of Article 300 of UNCLOS."[270] Australia and New Zealand decided not to even attempt to make that showing.

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266. *Id.* ¶ 51.

267. *Id.* ¶ 54.

268. Reply on Jurisdiction of Australia and New Zealand, ¶ 182 (filed Mar. 31, 2000), *at* http://www.worldbank.org/icsid/bluefintuna/replyonjurisdictionofANZ.PDF.

269. First Round Presentation of Australia and New Zealand, vol. II, at 170 (May 8, 2000), *at* http://www.worldbank.org/icsid/bluefintuna/0508icsi.pdf.

270. Southern Bluefin Tuna (Arbitration), *supra* note 247, ¶ 64.

B. Applicability of UNCLOS to Japan's Research Program

It has been argued that the more specific provisions in UNCLOS applicable to whaling on the high seas are enough to require Japan to halt its scientific research program.[271] This would only be the case if critics of Japan's practices can demonstrate that, apart from any requirement in ICRW, Japan has independently violated one of these UNCLOS provisions. In fact, Japan's research activities are fully consistent with all relevant obligations under UNCLOS, which anticipates both the harvesting of whales and the scientific study of them.[272]

Article 64 directs, in the case of cetaceans and other highly migratory species, that coastal states and other States "shall co-operate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone."[273] Article 65 of UNCLOS provides, "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."[274] It also provides that the relatively general provisions in UNCLOS do not preclude an international organization such as the IWC from acting "to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part."[275] Article 120 provides that Article 65 applies to activities on the high seas as well as in a country's Exclusive Economic Zone.[276]

Article 116 of UNCLOS reiterates the right of any country to harvest whales on the high seas, subject to its treaty obligations, the rights of coastal states specified in articles 63-67, and further subject to Articles 117-120. Article 117 imposes on all members "the duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas."[277] Article 118 directs all member States to "cooperate with each other in the conservation and management of living resources in the areas of the high seas."[278] Article 119 directs States in determining allowable catch and other conservation measures to follow certain principles such as relying on the best scientific evidence available, and adopting catch levels to produce the

271. Triggs, *supra* note 7, at 46.

272. In reaching this conclusion, the authors do not intend to imply any conclusion as to whether an Arbitral Tribunal convened under Part XV of UNCLOS would have jurisdiction to decide a challenge to Japan's scientific research program. That, and related procedural issues, lie beyond the scope of this article.

273. UNCLOS, *supra* note 158, art. 64.

274. *Id.* art. 65.

275. *Id.*

276. *Id.* art. 120.

277. *Id.* art. 117.

278. *Id.* art. 118.

maximum sustainable yield, while maintaining or restoring populations of associated species.[279] It does not establish any standards, however, to govern the conduct of a scientific research program.

None of these UNCLOS provisions prohibits Japan's whale research program. Instead, they emphasize the importance of the continuation of such scientific programs. The language in Articles 64 and 65 lay upon all interested parties the obligation to work through the IWC to *study* as well as to conserve and manage whale stocks, with a view of promoting their optimum utilization.[280] This obligation is reinforced by Article 119, which directs that treaty parties shall take conservation measures that are designed on the basis of the "best scientific evidence available."[281] Failure to study whales through such programs as Japan's would result in the IWC taking action in an atmosphere devoid of the "best scientific evidence available." Articles 64, 65, 117 and 118 of UNCLOS direct States "to co-operate" on conservation and management matters. However, the duty to cooperate in these Articles does not mean that Japan must accede to the particular views on conservation of other members. The language of the provisions imposes no such obligation.

Article 117 requires all treaty parties to take, or in the alternative to cooperate with other States in taking, measures necessary to conserve whales as a living resource of the high seas.[282] For other UNCLOS States to demonstrate that Japan is acting in violation of this Article, they would have to demonstrate that it is necessary for Japan to cease its scientific research program in order to conserve the whaling stocks. To prevail on this point, other States would have to demonstrate that Japan's scientific research activities are endangering the whale stocks. There is no evidence based on the number of whales taken, and the status of the stocks, that this is the case.

Finally, there is nothing in the UNCLOS provisions that bars on aesthetic, cultural or ethical considerations the ability of Japan or any other State to engage in the lethal taking of whales on the high seas. If anything, the Articles suggests that, consistent with the purposes of the ICRW discussed above, the goal of UNCLOS is to make possible the continued harvest of whales along with other marine resources on the high seas.[283]

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279. *Id.* art. 119.

280. *Id.* arts. 64-65.

281. *Id.* art. 119.

282. *Id.* art. 117.

283. In addition to the reference in Article 64 to the "optimum utilization" of highly migratory species, and in Article 65 to the obligation of States to cooperate for the "conservation, management and study" of cetaceans, Article 119 speaks more generically about the goal of achieving the "maximum sustainable yield" of all living resources in the high seas. *Id.* arts. 64, 65, 119.

C. The ITLOS Order and the Precautionary Principle

Although Japan would not appear to violate any of the specific provisions in UNCLOS, it has still been contended that the ITLOS decision in the *Southern Bluefin Tuna Case* establishes a precedent requiring Japan to follow the "precautionary" approach in assessing the risks of its research activities.[284] This argument apparently rests on the fact that the ITLOS order stated that in the future the parties to the *Southern Bluefin Tuna Case* should "in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna."[285]

As a preliminary matter, it should be noted that whether or not UNCLOS adopts the precautionary principle, this has little to do with whether the ITLOS decision applied an abuse of right principle in ordering provisional relief. A State may violate certain provisions of an agreement, including any precautionary principle that may exist, without doing so in bad faith. It must also be noted that the ICRW was adopted prior to the elaboration of the precautionary principle, and there is nothing in the text of the ICRW that would suggest the applicability of any such principle in interpreting that agreement. Consequently, the precautionary principle is inapplicable to any discussion of Japan's obligation under the ICRW. At the most, any allegation that Japan has failed to show the proper caution or prudence only goes to a possible violation of the substantive provisions of UNCLOS.

In any event, the ITLOS decision in the *Southern Bluefin Tuna Case* does not provide persuasive authority for finding that the conduct of all UNCLOS member States must be assessed pursuant to the precautionary principle. In the first place, the ITLOS order did not endorse the precautionary principle or approach, or indicate that its action was based on this theory. In fact, the language of the order as drafted by ITLOS stands in stark contrast to the corresponding language requested by Australia and New Zealand. In their submissions, the two countries requested an order requiring all parties to "act consistently with the precautionary principle in fishing for SBT pending a final settlement of the dispute."[286] ITLOS chose to ignore this proposed language, and instead to adopt the general "prudence and caution" language without the suggested reference to the precautionary principle.[287] Standing on its own as a part of the remedial order ITLOS granted, an admonition to the parties to exercise in the future prudence and caution is neither very clear in its meaning nor remarkable. While referring to the future

284. Triggs, *supra* note 7, at 45. It is not evident from Professor Triggs' discussion what the difference is between the precautionary principle and the precautionary approach, although it appears generally that in her view the precautionary approach implies a less rigid or doctrinaire standard.

285. Southern Bluefin Tuna Case, *supra* note 11, ¶ 77.

286. *Id.* ¶ 34.

287. *Id.* ¶ 77.

conduct of the parties, it does not suggest that ITLOS relied upon any variation of the precautionary principle in deciding that the past conduct of Japan violated the requirements of UNCLOS. Indeed, "[i]t is not easy to recognize the orders of the ITLOS as the application of either a principle or an approach."[288]

Second, even if ITLOS had endorsed the precautionary principle or approach in its order, this would have had little relevance to whether UNCLOS includes such a principle as part of its substantive standards. Under UNCLOS, ITLOS is required to grant such provisional relief "if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires."[289] ITLOS was not asked to rule on the merits of the case, and so whatever it said about the theory was in the context of deciding whether to grant provisional relief. At the most, all ITLOS decided was that at the preliminary stage of the proceeding it should err on the side of caution, and order a halt to Japan's experimental fishing program, pending the Arbitral Tribunal's consideration of the case. Without regard to the precautionary principle or approach, under such a directive ITLOS must necessarily err on the side of preserving the *status quo*.

A few of the separate opinions of individual ITLOS members express varying degrees of support for the precautionary principle. At the same time, however, they express questions about the practicality and applicability of the precautionary principle, while recognizing that the ITLOS order does not adopt either the precautionary principle or approach. Judge Laing, for example, concluded that he personally favors the precautionary principle, but noted "it is not possible, on the basis of the materials available and arguments presented on this application for provisional measures, to determine whether, as the Applicants contend, customary international law recognizes a precautionary principle."[290] Similarly, Judge Shearer in his separate opinion expressed support for the approach, but recognized that "whether that [precautionary] principle can of itself be a mandate for action, or provide definitive answers to all questions of environmental policy, must be doubted."[291] Judge Treves noted, "I fully understand the reluctance of the Tribunal in taking a position as to whether the precautionary approach is a binding principle of customary international law. Other courts and tribunals, recently confronted with this question, have avoided to give an answer."[292]

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288. Triggs, *supra* note 7, at 44.

289. Southern Bluefin Tuna Case, *supra* note 11, ¶ 39 (citing UNCLOS art. 290, ¶5).

290. Southern Bluefin Tuna Case (N.Z. v. Japan; Austl. v. Japan), 1999 ITLOS Nos. 3 & 4 (Provisional Measures Order of Aug. 27) (separate opinion of Judge Lang, ¶ 16), *at* http://www.un.org/Depts/los/ITLOS/3Laing.htm.

291. Southern Bluefin Tuna Case (N.Z. v. Japan; Austl. v. Japan), 1999 ITLOS Nos. 3 & 4 (Provisional Measures Order of Aug. 27) (Separate Opinion of Judge Shearer), *at* http://www.un.org/Depts/los/ITLOS/3Shearer.htm.

292. Southern Bluefin Tuna Case (N.Z. v. Japan; Austl. v. Japan), 1999 ITLOS Nos. 3 & 4 (Provisional Measures Order of Aug. 27) (Separate Opinion by Judge Treves, ¶ 9), *at* http://www.un.org/Depts/los/ITLOS/3Treves.htm.

Finally, leaving aside these legal points, the factual situation confronting ITLOS in the *Southern Bluefin Tuna Case* has little relevance to Japan's whale research program. What was at issue in the *Southern Bluefin Tuna Case* was a program that by its terms involved commercial fishing. Even then, none of the parties to the controversy advocated a complete ban on harvesting the fish, only that fishing be conducted at sustainable levels. In contrast, Japan is not engaging in any commercial whaling program. As discussed above, its program involves only the catching of whales for research purposes. Further, this take is very small compared to the size of the stocks in question. That whale meat may also be sold is only incidental to the research and, in any event, is required by the terms of the ICRW itself. Whatever the ITLOS order meant by exercising prudence and caution, none of the parties interpreted it as requiring the complete cessation of commercial fishing for southern bluefin tuna. If cessation of fishing was not required under the standard of prudence and caution in the case of southern bluefin tuna, then *a fortiori* there is no basis to conclude that a scientific research take limited to just a few hundred whales per year and fully consistent with maintenance of sustainable whale populations, would be imprudent or incautious.

V. CONCLUSIONS ABOUT ABUSE OF RIGHT AND JAPAN'S WHALE RESEARCH PROGRAM

In conclusion, the principle of abuse of right does not provide a basis for challenging Japan's whale research program under international law. Not only is the program consistent with the requirements of the ICRW, but the principle itself is also too vague and ill-defined to form a predicate for an international tribunal to rely upon it in passing on the lawfulness of Japan's program. Despite suggestions to the contrary, no international tribunal has decided a matter on the basis of the principle. The questions surrounding Japan's program are in the final analysis political and diplomatic in nature. The effort to turn the controversy over the program into a juridical contest cannot withstand scrutiny under international law in the absence of any ruling of an international tribunal based on the abuse of right principle.

Even if an abuse of right was a concrete and intelligible principle on which an international tribunal could rely, it is clear that no adequate showing could be made that Japan's research program is a violation of the principle. This is evident from consideration of the burden upon a complaining party and the application of each of the various formulations of the abuse of right doctrine discussed above to the facts of Japan's whale research program.

A. The Burden on the Complaining Party

In the absence of decided cases, there is necessarily some uncertainty in determining what the burden would be on a party claiming abuse of right.

However, scholarly discussion suggests that the burden would be heavy. In Cheng's view, an abuse of a right occurs when a nation fails to act in good faith.[293] However, there is a presumption that a nation acts in accordance with the law, *i.e.,* in good faith. Judge Ecer noted in the *Corfu Channel Case* that there is a

> 'strong[] . . . presumption that States are acting in accordance with international law.'
>
> [I]n international law, there is a presumption in favor of every state, corresponding very nearly to the presumption in favour of the innocence of every individual in municipal law. There is a *presumptio juris* that a state behaves in conformity with international law. Therefore, a state which alleges a violation of international law by another state must prove that this presumption is not applicable in some special case.[294]

While serving as the Assistant to the Legal Advisor at the U.S. State Department, Sandifer described two relevant presumptions of official regularity that international tribunals have applied: "the uniform presumption of the regularity and validity of all acts of public officials" and "the legal presumption . . . of the regularity and necessity of governmental acts."[295]

This presumption of lawful behavior and good faith "amounts to a presumption against abuse of rights and imposes a heavy burden of proof on any party to a dispute which attempts to prove any abuse of rights by its opponent."[296] A complaining party would at least have to shoulder the evidentiary burden utilized in cases where bad faith has been claimed. This means that a complaining party would have to demonstrate by "clear and convincing evidence" that a nation committed an abuse of right.[297] Even if, as some scholars suggest, abuse of right is something other than bad faith, *e.g.,* that motive is not an essential element,[298] there is no persuasive reason for thinking that the standard of proof should be any lower when a complaining party

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293. CHENG, *supra* note 156, at 121.

294. Corfu Channel (Merits) Case, 1949 I.C.J. 119 (Ecer, J., dissenting) (quoting GEORG SCHWARZENBERGER, INTERNATIONAL LAW 396 (2d ed. 1945)). *See also* Free Zones Case, 1932 P.C.I.J., (ser. A/B) No. 46 at 167 (although the Court alluded to the concept of abuse of rights it added "an abuse cannot be presumed by the Court"); Certain German Interests in Polish Upper Silesia (Merits), 1926 P.C.I.J., (ser. A) No.7 at 30 (a misuse of rights "cannot be presumed, and it rests with the party who states that there has been such misuse to prove his statement"); CHENG, *supra* note 156, at 136; 1 GEORG SCHWARZENBERGER, INTERNATIONAL LAW 449 (3d ed. 1957) [hereinafter SCHWARZENBERGER]; Iluyomade, *supra* note 155, at 79.

295. DURWARD V. SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 99 (1939) (citations and footnotes omitted).

296. SCHWARZENBERGER, *supra* note 294, at 449.

297. Tacna-Arica Question (Chile v. Peru), 2 R.I.A.A. 925, 930 (1925) ("A finding of the existence of bad faith should be supported not by disputable inferences but by clear and convincing evidence which compels such a conclusion."). *See also* Iluyomade, *supra* note 155, at 70.

298. *Compare, e.g.,* Taylor, *supra* note 156, at 331-34, *with* CHENG, *supra* note 156, at 121.

seeks to rebut the presumption that a State has acted in accordance with the law, and instead has abused its rights under an international agreement.

B. Application of the Abuse of Right Principle

There are five basic formulations of the abuse of right doctrine: (1) "*Intent to Injure*;" (2) "*Contrary Purpose*;" (3) "*Balancing of Rights*;" (4) "*Do no Harm*," and (5) "*Act Honestly*." It is difficult to see how Japan's whale research program could fail to survive scrutiny under any of these formulations.

If "*intent to injure*" is the standard, then, under the ILA formulation, a complaining party must demonstrate by clear and convincing evidence that Japan exercised its rights under Article VIII of the ICRW with the intent to cause injury and the party must show that it was in fact injured.[299] Such a demonstration cannot be made. First, no one has suggested that Japan intended to cause injury to any nation through the exercise of its right to conduct scientific studies of whales, and it is hard to imagine how such a claim could plausibly be made.[300] Second, a showing of injury would be difficult, if not impossible. To demonstrate injury, a complaining party would have to show either that: (1) Japan's program results in the taking of so many whales that it has been prevented from properly conducting its own scientific program, or (2) Japan's scientific program results in the taking of so many whales that the proper and effective conservation and management of whale stocks cannot be achieved, impeding the orderly development of the whaling industry as contemplated by the Convention. However, certainly Japan's program is not interfering with any other nation's whale research, and, as we have shown in Section I.D. above, the evidence is overwhelming that the numbers of animals taken in the Japanese program are not such as to threaten the sustainability of the stocks and so threaten the prospects for future whale management. Indeed, as noted above, with respect to JARPA, IWC Secretary Gambell observed that "[i]n all reasonableness, we would have to say that a commercial catch could be taken without endangering [minke] whales,"[301] while, with respect to JARPN and JARPN II, the numbers are so small—100 minke whales, 50 Bryde's whales and 10 sperm whales annually—that it is highly unlikely that taking at these levels has any significant effects on the stocks.[302]

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299. If we look to the formulation contained in the Mexican municipal statute, *see supra* Section II.B.1, it additionally requires that the complaining party show that Japan gained no advantage through the exercise of the right, *i.e.*, that it had no legitimate purpose. As will be discussed in the context of the "*contrary purpose*" principle, Japan's program did further legitimate purposes.

300. By contrast, in the *Shrimp Case*, for example, the very purpose of the U.S. embargo was to harm shrimp exporting nations with the hope that this sanction would cause them to change their behavior.

301. Hornsby, *supra* note 138.

302. *See supra* Section I.D.; 2000 CHAIRMAN'S REPORT, *supra* note 113, at 41. *See also*

If the "*contrary purpose*" standard is used, a complaining party would have to demonstrate by clear and convincing evidence that Japan's exercise of its right to conduct scientific whale research under Article VIII of the ICRW is a sham to avoid its legal obligations.[303] Despite the loosely made claims that Japan's program is for commercial rather than for scientific ends and the science undertaken is of marginal significance,[304] the indicia that the program is legitimate science are manifold. First, since its inception, the Japanese research program has been conducted by a non-profit research foundation, in close coordination with the IWC Scientific Committee. Second, Japan has been assiduous in submitting both its proposals and research results to the Committee. Third, the program has produced numerous published and unpublished works, many of which have appeared in peer-reviewed scientific journals.[305] Fourth, the Japanese program has sought to answer numerous, valid scientific questions relating, among other things, to: (a) estimation of biological parameters (especially the natural mortality rate) to improve management; (b) elucidation of stock structure to improve management; (c) examination of the role of whales in certain ecosystems; (d) studying feeding ecology; and (e) examination of the effect of environmental changes on cetaceans. Fifth, as expressly acknowledged by the IWC Scientific Committee, the Japanese program has made important contributions to the understanding of whale biology and has been relevant to management concerns that are at the core of the IWC's mission. Specifically, with respect to JARPA, and as found by the JARPA Workshop Report, Japanese research has "given valuable information on recruitment, natural mortality, decline in age at sexual maturity and reproductive parameters of minke whales."[306] The Report further found that "the information produced by JARPA has set the stage for answering many questions about long term population changes regarding minke whales . . . [and] has already made a major contribution to understanding of certain biological parameters."[307] Similarly, with respect to JARPN, the JARPN Workshop Report found, and the Scientific Committee agreed, that "information obtained during JARPN had been and will continue to be . . . relevant to . . . [whale] management."[308] And, with respect to JARPN II, even skeptical members of the Scientific Committee agreed that "the primary objective of the proposal . . . was scientific in nature."[309] That non-binding, political resolutions may have called upon Japan to refrain

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2000 SC REPORT, *supra* note 100, at 78.

303. If we look to Iluyomade's construction of the rule, it additionally requires the complaining party show that it sustained injury. As discussed above, no such injury can be credibly asserted.

304. *See* Triggs, *supra* note 7, at 59.

305. *See* JARPA *Workshop Report*, *supra* note 85, annex E1.

306. 1997 SC Report, *supra* note 8, at 63.

307. *Id.* at 65.

308. 2000 SC REPORT, *supra* note 100, at 74.

309. IWC Scientific Permits Page, *supra* note 50.

from some research activities, or that the Scientific Committee could not reach consensus on such contentious and value-laden issues as whether the research has been "required" for management or can be carried out without lethal takes, in no way detracts from the fundamental scientific legitimacy of the research effort. Sixth, and finally, the fact that the by-products of whales taken to further Japan's scientific research are sold in its domestic market lends no support to the argument that its program must primarily be a commercial activity and, thus, a sham. As discussed above in Section I.A., Article VIII, paragraph 2, of the Convention requires that this be done. As recognized by Dr. Ray Gambell, Secretary of the IWC, "[i]f you catch whales for research purposes, the requirement is that they are fully utilized and the products disposed of in a way that the government decides. In other words, the products have to be fully utilized and Japan is doing what every other government has done in previous years."[310]

If "*balancing of rights*" is the approach taken, then, using both the formulations of Friedmann and Lauterpacht together, a complaining party would have to demonstrate by clear and convincing evidence that the harm caused by Japan's exercise of its right to conduct scientific whale research outweighs its legitimate interests in conducting the research. However, as discussed above in connection with the "*intent to injure*" formulation, the case has not been and cannot be made that Japan's program either inhibits the research programs of other nations or threatens whale populations in such a way as to jeopardize their ultimate management under the ICRW regime. Even if such harm might be hypothesized, it would have to be balanced against the legitimate interest of Japan, and indeed all members of the IWC, in conducting research pertinent to the conservation of the whale stocks in furtherance of the purposes of the IWC. Indeed, Article VIII, paragraph 4, of the Convention recognizes that "continuous collection and analysis of biological data in connection with the operations of factory ships and land stations are indispensable to sound and constructive management of the whale fisheries." The Convention states that "Contracting Governments *will* take all practicable measures to obtain such data."[311] Finally, the terms of the moratorium and the SOS contemplate that research will be undertaken so that the IWC may revisit the appropriateness of these measures and determine whether commercial whaling should be permitted to resume. The balance, if anything, thus weighs disproportionately in favor of allowing research to proceed.

If "*do no harm*" is the standard to apply, then Amador's formulation is practically unworkable. Depending upon how the harm is defined, it is difficult to contemplate how a right can be exercised to ensure that absolutely *no harm* to another's interests results. This is so because there is almost always

310. BBC News Online Forum Interview with Dr. Ray Gambell, IWC Secretary (July 5, 2000), *at* http://newsvote.bbc.co.uk/hi/english/talking_point/forum/newsid_817000/817116.stm.

311. ICRW, *supra* note 1, art. VIII, ¶ 2.

some tension between one nation's actions and another nation's rights. However, if the requisite harm is as substantial as that required to demonstrate injury under the "*intent to injure*" standard discussed above, then, for the same reasons, any claim of abuse of right would fail, first because the Japanese program does not interfere with the research of other nations, and, second, because it is unlikely to harm the stocks and impede the orderly development of the whaling industry as contemplated by the ICRW.

Last of all, if the standard is "*act honestly*," then it is apparent that the formulation of this standard by Cheng actually encompasses many of the elements of the other formulations discussed above. For example, the requirement that a right not be exercised maliciously so as to injure others is embodied in the "*intent to injure*" formulation. Similarly, although it is unclear to what extent motive or intent is required to be proven under Cheng's formulation, the requirement that a right not be exercised fictitiously to evade its obligations is embodied in the "*contrary purpose*" formulation. The requirement to exercise a right reasonably with due regard to others could be embodied in the "*balancing of rights*" formulation. As to "honesty" itself, it is difficult to see how a claim that Japan is proceeding dishonestly would differ from a claim that it is exercising its right under Article VIII of the ICRW fictitiously or in bad faith. In any event, the presumption of good faith would seem a virtually insuperable obstacle to overcome in this regard. Indeed, the objective evidence is that Japan has faithfully submitted its proposals and research results to the IWC Scientific Committee, repeatedly welcomed participation by international scientists in its research programs,[312] produced numerous published and unpublished reports, including reports in peer-reviewed scientific journals,[313] and, as affirmed by the Scientific Committee, contributed to knowledge about and management of the species. In the absence of any direct evidence that the program is simply a subterfuge to keep Japan's commercial whaling industry alive, it would not seem possible to make out a case of abuse of right under the "*act honestly*" standard. As such scholars as Iluyomade and Taylor have emphasized, in relations between sovereign nations any allegation of abuse of right must rest on the objective facts, and not what the alleged subjective state of mind of a State may be in the view of another State.[314]

C. Summary

It is far from clear that the abuse of right doctrine has sufficiently evolved from a policy abstraction to a concrete rule of decision or juridical standard that limits State prerogatives. Neither the *Shrimp Case* nor the *Southern Bluefin Tuna Case* is an example of a decision based on such a

312. *See* IWC, CHAIRMAN'S REPORT OF THE 50TH ANNUAL MEETING 55 (1998).
313. *See* JARPA *Workshop Report*, *supra* note 85, annex E1.
314. *See supra* Section II.B.1.

general principle. Indeed, it is problematic whether a "general principle," capable of application in specific cases, can be drawn from the diverse formulations of abuse of right rules contained in the municipal laws of civilized nations, the *dicta* of international tribunals, international agreements or scholarly comment. In any event, when the facts of Japan's whale research program are fairly assessed in the context of the rights and obligations of the parties to the ICRW, there is little question that Japan's program would pass muster under any reasonable formulation of a rule against abuse of right.