Litigation over Marine Resources: Lessons for Law of the Sea, International Dispute Settlement and International Environmental Law

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Australia has been involved in international litigation[1] as both an applicant and respondent in cases related to the protection of ocean resources.[2] As the world's largest island state, Australia has considerable interests in the surrounding vast expanses of ocean space. Aspects of Australia's wealth and security are intimately connected with its maritime domain and recognition of the importance of marine resources to Australia has been evidenced through Australia's pursuit of a range of options to protect and enhance those resources. Litigation has provided one such avenue, both as a means of asserting particular rights and defending steps Australia has taken. Australia has sought to assert its rights over marine resources through litigation in relation to France's nuclear testing in the Pacific and Japan's research program on southern bluefin tuna. Australia is now considering whether it should take such a step again over Japan's present whaling activities in Antarctic waters. Australia has defended its use of marine resources in response to Portugal's

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1 The term 'litigation' is used here to encompass both adjudication (for cases heard before permanent judicial bodies) as well as arbitration (for cases heard before ad hoc tribunals). The format, constitutions and procedures are likely to be different in relation to adjudication and arbitration, and each offer their own distinct advantages and disadvantages as a result. See generally C Gray and B Kingsbury, 'Developments in Dispute Settlement Inter-State Arbitration Since 1945' (1992) 63 *British Yearbook of International Law* 97, 101; J Collier and V Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (2000) 263. Nonetheless, both adjudication and arbitration share the fundamental characteristics of involving the resolution of legal disputes by third parties and result in a legally binding outcome. It is on this basis that they are referred to under the one rubric of litigation in this article.

2 *Nuclear Tests (Australia v France) (Provisional Measures)* [1973] ICJ Rep 99 ('*Nuclear Tests – Provisional Measures*'); *Nuclear Tests (Australia v France) (Judgment)* [1974] ICJ Rep 253 ('*Nuclear Tests – Judgment*'); *Southern Bluefin Tuna Cases (New Zealand v Japan, Australia v Japan)* (*Provisional Measures*) (1999) 38 ILM 1624 ('*SBT (PM)*'); *Southern Bluefin Tuna* Cases (*New Zealand v Japan, Australia v Japan*) (*Jurisdiction* and *Admissibility*) (2000) 39 ILM 1359 ('*SBT (J&A)*'); *East Timor (Portugal v Australia)* [1995] ICJ Rep 90; *The 'Volga' Case (Russian Federation v Australia) (Prompt Release)* [2002] <http://www.itlos.org/case_documents/2002/document _en_215.doc> at 26 April 2009 ('*Volga Prompt Release*').

challenge to exploitation of the Timor Sea as well as the measures adopted for the conservation and management of Patagonian toothfish, and may need to contemplate a challenge to the conservation measures it has put in place to protect the vulnerable marine environment of the Torres Strait from international shipping.

Australia's past experience in litigation is examined in this article as it is instructive not only for the judicial scrutiny of relevant legal principles, but also for assessing when states might resort to litigation and what may be the longer term consequences of this particular method of dispute settlement, especially for the law of the sea and international environmental law. This article further assesses how well the protection of marine resources was served through this experience in litigation for two purposes. First, to consider whether Australia, as an applicant, should rely on litigation in pursuit of its anti-whaling policies and whether as a respondent, Australia should be unduly concerned about the prospect of litigation for its compulsory pilotage regime in the Torres Strait. Second, what does the Australian experience, as one of the main litigants in relation to the international protection of the marine environment, teach us more broadly about the development of the law of the sea, international environmental law and international dispute settlement? The current situation appears to be that while litigation offers much potential for the pursuit of environmental goals and the development of the law of the sea, there is cause to doubt that this potential is likely to be realised.

I. Past Experience

A core subject area of Australia's involvement in international litigation has related to the marine environment.[3] This point underlines the importance that Australia attaches to its marine resources in view of the fact that litigation is commonly perceived as a mode of dispute settlement of last resort,[4] and is generally utilised infrequently as a dispute settlement option compared to other modes of dispute settlement.[5] The litigated cases are important to consider in view of the

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3 Australia has been involved in seven cases as a complainant and in ten cases as respondent before the dispute settlement bodies of the World Trade Organisation, as well as participating as a third party in numerous trade cases. See Disputes by Country, <http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm> at 15 December 2008. It is clear that trade is another subject matter triggering Australian involvement in litigation but is outside the scope of this article. For further detail, see Gavin Goh, 'Australia's Participation in the WTO Dispute Settlement System' (2002) 30 *Federal Law Review* 7. Australia was also a party in four disputes resolved under the General Agreement on Tariffs and Trade 1947. See 'Adopted panel reports within the framework of GATT 1947' <http://www.wto.org/english/tratop_e /dispu_e/gt47ds_e.htm> at 28 April 2009.

4 Collier and Lowe, above n 1, 87; A Serdy, 'The Paradoxical Success of UNCLOS Part XV: A Half Hearted Reply to Rosemary Rayfuse' (2005) 36 *Victoria University of Wellington Law Review* 713, 715.

5 The other common methods of international dispute settlement are encapsulated in Article 33 of the Charter of the United Nations: negotiation, enquiry, mediation, conciliation, and resort to regional agencies or arrangements. The availability of international organisations for dispute settlement has also been important. See J G

opportunities they provide for the articulation and development of legal principles relevant to substantive international law,[6] as well as for the effect that the judgments have in restoring or otherwise influencing the inter-relationship of the states concerned. Both of these aspects are considered for each of the cases addressed here, as well as some of the likely motivations for turning to litigation and policy perspectives on the issues involved. In undertaking an examination beyond the legal principles at stake, there is greater scope for broadening understanding of the role of litigation for the law of the sea and international environmental law.

(a) As applicant – *Nuclear Tests*

Australia's first appearance as a party before the International Court of Justice (ICJ or Court) occurred in 1973 when it instituted proceedings against France arguing that France's atmospheric nuclear tests in the South Pacific Ocean were not consistent with applicable rules of international law and must cease.[7] New Zealand also commenced proceedings at this time, arguing similarly that tests giving rise to radioactive fall-out were in violation of New Zealand's international law rights and sought a declaration to this effect.[8] France had been carrying out atmospheric tests in the South Pacific since the early 1960s, but opposition only strengthened at the start of the 1970s. At that time, sentiment in the international community had been steadily increasing in opposition to atmospheric testing of nuclear weapons in light of growing concerns for the protection of the environment.[9] Within Australia, the new Labor government took a stronger view against France's tests than had been the case under the previous Liberal and Country Party governments.[10] The impetus

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Merrills, *International Dispute Settlement* (4th ed, 2005) 279–307 (discussing regional organisations in this regard); Collier and Lowe, above n 1**,** 87.

6 Although the judgments themselves are only binding between the parties to the case itself (as is seen, eg, in Article 59 of the Statute of the International Court of Justice), it is undeniable that the principles set forth in the judgment are influential in guiding or determining state conduct in the future.

7 *Application Instituting Proceedings Submitted by the Government of Australia* [1973] 1 ICJ Pleadings, 14–15. D'Amato argued at the outset of the French nuclear tests that they were legally and strategically questionable. See A D'Amato, 'Legal Aspects of the French Nuclear Tests' (1967) 61 *American Journal of International Law* 66.

8 *Application Instituting Proceedings Submitted by the Government of New Zealand* [1973] 2 ICJ Pleadings 9. The distinction made in the applications between "atmospheric nuclear weapons tests" and tests "that give rise to radioactive fall-out" was critical to New Zealand's efforts to re-open the case in 1995. See below nn 30–36 and accompanying text.

9 See J B Elkind, 'French Nuclear Testing and Article 41 – Another Blow to the Authority of the Court?' (1974–1975) 8 *Vanderbilt Journal of Transnational Law* 39, 39–40; W K Ris Jr, 'French Nuclear Testing: A Crisis for International Law' (1974) 4 *Denver Journal of International Law and Policy* 111, 126–27.

10 See Cesare R P Romano, *The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach* (2000) 282 (noting also that New Zealand had a new Labour government that was similarly inclined towards 'political neutralism and support of general world disarmament'). Kós has similarly commented that the cases were the implementation of electoral promises by both New Zealand and Australian

for Australia's case had been driven by the Attorneys-General of Tasmania, South Australia and Western Australia, who had first advanced the idea of resorting to the Court, based on a legal opinion submitted by Professor D.P. O'Connell, who was then Professor of International Law at the University of Oxford.[11]

In litigation, Australia and New Zealand relied on France's acceptance of the Court's compulsory jurisdiction as well as the General Act for the Pacific Settlement of Disputes as bases for jurisdiction.[12] For its part, France contested the Court's jurisdiction and refused to participate in the proceedings, leaving the matter to be resolved *in absentia*.[13] Australia and New Zealand alleged that the French nuclear tests were in violation of international law because of modifications to the physical conditions of and over their respective territories in the South Pacific; pollution of the atmosphere and marine resources; and interference with the freedoms of navigation and overflight on the high seas. Australia considered these first two factors were in violation of Australia's sovereignty over its territory and impaired its right to determine what acts would occur within its territory.[14]

At the time that Australia and New Zealand instituted proceedings, France's next series of tests were scheduled to commence two months subsequent. The applicants sought interim measures from the ICJ, requesting that France desist from any further atmospheric nuclear tests pending judgment of the Court.[15] Prior to the tests beginning, the ICJ was satisfied that it had *prima facie* jurisdiction,[16] and ordered that 'the French Government should avoid nuclear tests causing the deposit of radioactive fall-out' on Australian and New Zealand territory.[17] France nonetheless continued with the series of tests, but public pressure from states bordering the Pacific increased, as did the activities of non-governmental

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governments. See J S Kós, 'Interim Relief in the International Court: New Zealand and the Nuclear Test Cases' (1984) 14 *Victoria University Wellington Law Review* 357, 358.

11 See Department of Foreign Affairs 'International Court Interim Decision on French Nuclear Tests' (Press Release, 22 June 1973) <http://www.whitlam.org/collection/1973/19730622_French_Measures/> at 7 December 2008. See also J S Kós, above n 10, 363. Kós provides an account at 364–7of New Zealand's decision-making process in joining Australia in instituting proceedings before the ICJ. See Ibid.

12 *Nuclear Tests — Judgment*, above n 2, [21].

13 The Court has the power to resolve disputes in the absence of one of the parties under Article 53 of its Statute. France sent a letter to the Court setting out that the Court was manifestly not competent to decide the dispute and that it could not accept the Court's jurisdiction. See Ibid [4].

14 See Australian Application, above n 7, 26–27.

15 *Request for the Indication of Interim Measures of Protection Submitted by the Government of Australia* [1973] ICJ Rep 43, 57, [74].

16 An aspect of the order that was controversial both among the dissenting judges, as well as in academic literature. See, eg, Romano above n 10, 285.

17 *Nuclear Tests — Provisional Measures*, above n 2, 106. This order was viewed as appropriate by some commentators because it showed the Court acting to prevent any possibility of environmental harm pending the outcome of the litigation. See, eg, L F E Goldie, 'The Nuclear Tests Case: Restraints on Environmental Harm' (1973–1974) 5 *Journal of Maritime Law and Commerce* 491.

organisations opposed to the testing.[18] In June 1974, the French President issued a communication that France would commence underground explosions, rather than atmospheric tests, upon the completion of the current round of tests.[19]

In July 1974, a year after the provisional measures order, the case proceeded to hearing, with Australia and New Zealand addressing issues of jurisdiction and admissibility before the ICJ, again in the absence of France. After the hearing and prior to the delivery of the Court's judgment, France issued further declarations from its President, Defense Minister, Foreign Affairs Minister and Ambassador to New Zealand, all reaffirming the June 1974 commitment of the French President.[20] In light of these statements, the ICJ decided that the object of the case had been rendered moot since Australia and New Zealand had sought the end of the atmospheric tests (as characterised by the Court),[21] and France had proffered a commitment to do so.[22] By judicial fiat, France's unilateral declarations became binding international obligations.[23] The ICJ did at least contemplate that the dispute could be re-enlivened in the future, ruling:

> Once the Court found that a State has entered into a commitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it. However, the Court observes that if the basis of this Judgment were to be

18 See Romano, above n 10, 288.

19 *Nuclear Tests — Judgment*, above n 2, [34].

20 Ibid [35]–[40].

21 See Ibid [26]–[28]. Commentators have noted that the Court essentially merged the claims of Australia and New Zealand rather than distinguishing between their respective descriptions of what each was claiming. See, eg, Romano, above n 10, 284, 302; B Kwaitkowska, 'New Zealand v. France Nuclear Tests: The Dismissed Case of Lasting Significance' (1996) 37 *Virginia Journal of International Law* 107, 128–29 (referring to New Zealand's arguments on this point in the 1995 proceedings).

22 *Nuclear Tests — Judgment*, above n 2, [59] ('no further pronouncement is required in the present case. It does not enter into the adjudicatory functions of the Court to deal with issues *in abstracto*, once it has reached the conclusion that the merits of the case no longer fall to be determined. The object of the claim having clearly disappeared, there is nothing on which to give judgment').

23 The basis for unilateral declarations constituting binding commitments was set forth as follows:

> It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a quid pro quo nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the state was made.

Nuclear Tests — Judgment, above n 2, [43].

affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute.[24]

The decision of the ICJ reflected its hesitancy to be embroiled in such a highly political dispute, where the security concerns of a powerful state were pitted against the environmental concerns of an entire region.[25] The Court would have also been concerned about any detrimental impact to its authority,[26] and wished to avoid alienating a large number of states from the processes of the Court.[27] Equally, there were concerns that a legal decision that permitted atmospheric nuclear testing as a matter of international law may have been viewed as inflammatory given developments outside the Court seeking to ban such tests.[28] The decision to allow for the possibility of the case being re-opened was quite innovative in its own right and, as it turned out, showed a certain degree of foresight.[29]

New Zealand ultimately sought to rely on this jurisdictional savings clause in 1995, when France announced that it would resume underground tests in the South Pacific, in spite of a self-imposed moratorium that had been in place since 1992.[30] Australia did not seek to do the same, but rather requested to intervene in the case, along with four other states.[31] These applications were said to send a signal to the

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24 *Nuclear Tests — Judgment*, above n 2, [60].

25 Fiji had sought to intervene in the case, but the Court decided to defer consideration of this application until it had determined the jurisdiction and admissibility of the dispute. See Ibid [7]. As the dispute was considered moot, Fiji's application never went any further. D'Amato notes the opposition to the testing within French Polynesia. See D'Amato, above n 7, 67. There was also concern expressed among other Pacific Island states, as well as South American countries bordering the Pacific. See J M Regnaut, 'The Nuclear Issue in the South Pacific: Labor Parties, Trade Union Movements, and Pacific Island Churches in International Relations' (2005) 17 *The Contemporary Pacific* 339, 344.

26 See P Taylor, 'Testing Times for the World Court: Judicial Process and the 1995 French Nuclear Tests Case' (1997) 8 *Colorado Journal of International Environmental Law and Policy* 199, 206 (referring to the comparable political factors at play in the 1974 and 1995 judgments).

27 See P Lellouche, 'The International Court of Justice, Nuclear Tests Cases: Judicial Silence v Atomic Blasts' (1975) 16 *Harvard International Law Journal* 614, 636–37.

28 See Ibid 616, 617.

29 See N L Wallace-Bruce, *The Settlement of International Disputes: The Contribution of Australia and New Zealand* (1998) 187. Romano has commented similarly. See Romano, above n 10, 289.

30 *New Zealand Application*, above n 8.

31 *Application for Permission to Intervene under the Terms of Article 62 of the Statute submitted by the Government of Australia* [1995] <http://www.icj-cij.org/docket/files/97/13317.pdf> at 15 December 2008. Samoa, the Solomon Islands, the Marshall Islands, and the Federated States of Micronesia also sought to intervene under Articles 62 and 63. See M C R Craven, 'New Zealand's Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the *Nuclear Tests (New Zealand v France) Case*, Order of 22 September 1995' (1996) 45 *International and Comparative Law Quarterly* 725, 727.

Court of the importance of the matter and that it was not one that could be simply dealt with as an administrative question.[32] The main reason for Australia not seeking to re-open the case in its own right appears to have been due to the fact that its earlier application was clearly limited to atmospheric nuclear tests whereas New Zealand's claims had not been so specific.[33] The Court rejected New Zealand's efforts, applying a strict, formalistic interpretation of its earlier decision.[34] It decided that the 1974 judgment only referred to atmospheric nuclear tests and so it was only in the event that France resumed that particular type of testing that the case could be resumed.[35] All the applications to intervene were therefore dismissed as well.[36]

There was considerable potential for the ICJ to contribute to the development of international environmental law in both the 1974 and 1995 cases. These opportunities were missed, however. Equally, as negotiations for the UN Convention on the Law of the Sea (UNCLOS) were underway, the Court may have elucidated standards on the exercise of high seas freedoms, particularly in relation to weapons tests, and obligations on the pollution of the marine environment. The ICJ instead passed on the moment to provide any influence over these normative developments. Such reticence by the Court could be viewed as consistent with the limited role that litigation may play, focusing on it as an avenue for dispute settlement between specific states, rather than as a means for at least clarifying, if not advancing, the legal principles at stake. This position is reflected in the Court's comment in the 1974 judgment:

> The Court therefore sees no reason to allow the continuance of proceedings which it knows are bound to be fruitless. While judicial settlement may provide a path to international harmony in circumstances of conflict, it is none the less true that the needless continuance of litigation is an obstacle to such harmony.[37]

This approach of the ICJ, apparent in both 1974 and 1995, tempers expectations as to what may be achieved through litigation, both in an area of law that evolved relatively rapidly (international environmental law) and an area of law grounded in long-held principles and, arguably, in need of evolution (law of the sea).

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32 Wallace-Bruce, above n 29, 186.

33 See D MacKay, 'Nuclear Testing: New Zealand and France in the International Court of Justice' (1995–1996) 19 *Fordham International Law Journal* 1857, 1875.

34 See M A Fitzmaurice, 'International Protection of the Environment' (2001) 293 *Recueil des Cours: Collected Courses of the Hague Academy of International Law* 9, 375 ('The Court assessed the case before it from the point of view of classical international law coupled with a narrow interpretation of its jurisdiction.') See also M C R Craven, above n 31, 733 (noting that the ICJ disposed of the case in a 'fairly conservative and formalistic manner').

35 *Nuclear Tests Case (New Zealand v France)* 1995 ICJ Rep 288 [65].

36 Ibid [67].

37 *Nuclear Tests — Judgment*, above n 2, [58].

(b) As applicant — *Southern Bluefin Tuna*

Australia turned to litigation for the protection of marine resources at the end of the 1990s in response to perceived infringements of its maritime rights and conservation efforts in relation to southern bluefin tuna. Southern bluefin tuna are a highly migratory species,[38] and states that fish this species are required to 'cooperate 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 (EEZ).[39] Australia and Japan's history of cooperation in the exploitation of southern bluefin tuna dates back to the 1960s.[40] Informal cooperation between these states as well as New Zealand led to the adoption in 1993 of the Convention for the Conservation of Southern Bluefin Tuna (CCSBT),[41] and the establishment of a Commission to enable member states to cooperate in the conservation and management of the species (SBT Commission).[42]

Within the SBT Commission, the member states have struggled to agree on a total allowable catch and how that catch should be allocated among the member states; a decision that must be made by consensus.[43] While there was agreement that the informal catch levels established in 1989 should be maintained at the time the CCSBT was adopted, no further consensus on changing that amount could be reached in the immediate following years.[44] The situation in 1998 was exacerbated when Japan not only sought to increase the catch quotas, but also proposed that a joint experimental fishing program (EFP) be undertaken as a means of resolving differing scientific views. When negotiations with Australia and New Zealand failed to produce any agreement on these issues,[45] Japan notified Australia and New Zealand that it would commence a three-year unilateral EFP resulting in an estimated catch of 1464 tonnes of southern bluefin tuna.[46]

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38 United Nations Convention on the Law of the Sea (10 December 1982), 21 ILM 1261, Annex 1 ('UNCLOS').

39 Ibid art 64.

40 See generally Shirley V Scott, 'Australia's First Tuna Negotiations with Japan' (2000) 24 *Marine Policy* 309; M Hayashi, 'The Southern Bluefin Tuna Cases: Prescription of Provisional Measures by the International Tribunal for the Law of the Sea' (2000) 13 *Tulane Environmental Law Journal* 361; S Yoichiro, 'Fishy Business: A Political-Economic Analysis of the Southern Bluefin Tuna Dispute' (2002) 28 *Asian Affairs American Review* 217.

41 Convention for the Conservation of Southern Bluefin Tuna (10 May 1993), [1994] ATS 16.

42 Ibid art 8.

43 Ibid art 7 ("Decisions of the Commission shall be taken by a unanimous vote of the Parties present at the Commission meeting.").

44 Agreement was not reached on a new total allowable catch until 2003.

45 See L Sturtz, 'Southern Bluefin Tune Case: Australia and New Zealand v Japan' (2001) 28 *Ecology Law Quarterly* 455, 469–70 (referring to different diplomatic meetings held from November 1998 until May 1999).

46 D Horowitz, 'Southern Bluefin Tuna Case (Australia and New Zealand v Japan)

In deciding on the most appropriate means to resolve this dispute, the states faced a situation of considerable scientific uncertainty due to differing views over the rate of recovery of the stock overall.[47] One of the conflicts underpinning this question was the age that southern bluefin tuna reach maturity, as this determines reproductive age and affects projections about how quickly population numbers may increase.[48] The existence of the SBT Commission and the work of its Scientific Committee were unable to resolve this impasse. A further consideration for pursuing dispute settlement options was the economic importance of the species,[49] as Australia earns up to $AUD450 million annually from the sale of southern bluefin tuna,[50] with the vast majority of the catch being exported to Japan for sale on the lucrative sashimi market.[51]

When Japan commenced its EFP and refused to suspend it pending any mediation or arbitration under the terms of the CCSBT, Australia and New Zealand decided to refer the matter to arbitration under the UNCLOS.[52] In alleging that

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(Jurisdiction and Admissibility): The Catch of Poseidon's Trident: The Fate of High Seas Fisheries in the Southern Bluefin Tuna Case' (2001) 25 *Melbourne University Law Review* 810, 813. See also *SBT (J&A)*, above n 2, [24]. Japan had initially sought agreement to catch 6000 tonnes for the EFP annually for three years but subsequently reduced this request to 3000 tonnes. Ibid.

47 S Yoichiro, above n 40, 222. ('The major disagreement between Australia and Japan has been over the projection of the stock recovery.'). See also R Tanter, 'Death by Sashimi-the Survival of the Southern Bluefin Tuna' 14 (1999) *Arena Journal* 31, 32 ('The dispute between the three countries has both legal and scientific aspects, but the most important is the difference of scientific opinion about the state of the stocks').

48 With Japanese scientists favouring eight years, whereas Australian scientists tend to support twelve years. M Hayashi, above n 40, 365. Scientists from each state challenged the other's mathematical techniques, assumptions underpinning research design and execution, and have disagreed over ecological modeling. See R Tanter, above n 47, 33. See also *In the Dispute Concerning Southern Bluefin Tuna (Australia v Japan) (Australia's Statement of Claim and Grounds on Which it is Based)* 15 July 1999 [17] (setting out various reasons as to why Australia was opposed to Japan's EFP proposals).

49 See R Tanter, above n 47, 35 (referring to Australia's desire to support the tuna aquaculture industry as a motivation for the litigation).

50 A 2004 assessment of the SBT fishery by Australia's Department of the Environment and Heritage estimated the value of the commercial harvest from AUD $57m up to AUD $450m after value adding. Australian Government, Department of Environment and Heritage, *Strategic Assessment of the Southern Bluefin Tuna Fishery* (2004) 3. Value adding refers to the process of younger southern bluefin tuna being caught off the Australian coast and then held in nets for growth and fattening prior to harvest. See S Yoichiro, above n 40, 222; D Campbell, D Brown and T Battaglene, 'Individual Transferable Catch Quotas: Australian Experience in the Southern Blue Fin Tuna Fishery' (2000) 24 *Marine Policy* 109, 116.

51 See USDA Foreign Agricultural Service, *Japan, Fishery Products, Japan's Annual Southern Bluefin Tuna Catch Halved, 2006* (25 October 2006) Gain Report 3 <www.fas.usda.gov/gainfiles/200610/ 146249374.pdf> at 8 December 2008; G Geen and M Nayar, 'Individual Transferable Quotas in the Southern Bluefin Tuna Fishery: An Economic Appraisal' (1988) 5 *Marine Resource Economics* 365, 373.

52 Under Part XV of the UNCLOS, states are able to institute compulsory procedures entailing binding decisions for disputes concerning the interpretation or application of

Japan was in violation of the UNCLOS, Australia and New Zealand argued that Japan had breached obligations under Article 64 and Articles 116–119 concerning the conservation and management of the species, particularly as the EFP would result in tuna being taken in excess of Japan's allocation, and that Japan had failed to cooperate in good faith with a view to ensuring conservation of southern bluefin tuna.[53] Japan's position was that no legal dispute existed, but the case involved 'the proper method for assessing the southern bluefin tuna stock and the formulation of an EFP that would further such an assessment and contribute necessary scientific data.'[54] This dispute concerned science, according to Japan, and was not amenable to judicial resolution.

In the first instance, Australia and New Zealand were successful in securing provisional measures from the International Tribunal for the Law of the Sea (ITLOS).[55] In prescribing provisional measures, ITLOS took into account, *inter alia,* the 'scientific uncertainty regarding measures to be taken to conserve' southern bluefin tuna,[56] and that 'the parties 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'.[57] ITLOS therefore ordered Japan to halt its EFP (by prohibiting any of the parties from conducting an EFP without the agreement of the others, or otherwise only within the national allocation accorded to the party conducting the EFP), and that the parties not exceed the annual national allocations at the levels last agreed.[58]

The matter was then before an *ad hoc* arbitral tribunal,[59] which decided that it lacked jurisdiction to resolve the dispute. The tribunal disagreed with Australia and New Zealand that they could proceed with litigation under the UNCLOS given the

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that treaty. Once a state becomes a party to the UNCLOS, it consents to the possible institution of litigation under the procedure set out in Part XV. UNCLOS, above n 38, art 287(3).

53 *SBT (PM)*, above n 2, [28] and [29] (setting out New Zealand and Australia's claims respectively).

54 M Hayashi, above n 40, 375.

55 Article 290 allows for parties to seek provisional measures 'to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environment, pending the final decision': See UNCLOS, above n 38, art 290. When proceedings are to be determined by an ad hoc arbitral tribunal, Article 290(5) permits parties to seek provisional measures from the ITLOS pending the constitution of the arbitral tribunal 'if it [ITLOS] considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires'.

56 *SBT (PM)*, above n 2, [79].

57 Ibid [77].

58 Ibid [90].

59 In accordance with the operation of Article 287, which refers cases to ad hoc tribunal where the parties in dispute have elected different fora for dispute resolution, or not made any election at all: UNCLOS, above n 38, art 287. Australia has selected either the ITLOS or the ICJ, but Japan has not made any selection. See Settlement of Disputes Mechanism, <http://www.un.org/Depts/los/settlement_of_disputes/choice_procedure.htm.> at 6 December 2008. At the time of the dispute, neither party had made a declaration under Article 287. See *SBT (PM)*, above n 2, preamble.

availability of an alternative dispute settlement scheme under the CCSBT.[60] Because the CCSBT had its own dispute settlement procedure, Australia and New Zealand were effectively precluded from resorting to the UNCLOS dispute settlement procedures.[61] This conclusion had to be reached irrespective of the view that the substantive aspects of the dispute arose under the UNCLOS as well as the CCSBT.[62]

As a result of this finding, there was no opportunity for the tribunal to flesh out the requirements imposed on states by the UNCLOS for fishing on the high seas. In this respect, an opportunity to elucidate what standard of conduct is appropriate for conservation and management of living resources in the high seas was lost. Instead, the tribunal's holding indicates that treaties dealing with law of the sea issues and including their own dispute settlement clauses are unlikely to be subject to the compulsory jurisdiction available under the UNCLOS.[63] The decision of the tribunal therefore denies the possibility of litigation pursuant to the UNCLOS playing a significant role in elaborating on substantive duties in relation to high seas fishing if states have taken additional steps to elaborate on these obligations in separate agreements. It is only in the absence of such agreements that a court or tribunal would retain an important normative role to play.[64]

The parties were thus compelled to return to the SBT Commission, where it was agreed that independent external scientists should be engaged to devise an acceptable programme,[65] and they were able to work towards setting new agreed catch limits.[66] Although the litigation itself left a variety of legal questions

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60 SBT (J&M), above n 2, [59].

61 Relying on Article 281(1) of the UNCLOS, which reads:

> If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.

UNCLOS, above n 38, art 281(1).

62 *SBT (J&M)*, above n 2, [52].

63 N Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (2005) 41–42.

64 Ibid 41.

65 B Mansfield, *Southern Bluefin Tuna – Comments* (Paper presented to the SEAPOL Inter-Regional Conference on Ocean Governance and Sustainable Development in East and Southeast Asian Seas: Challenges in the New Millennium, 21–23 March 2001) <www.mft.govt.nz/support/legal/seapol.html>, cited in R Rayfuse et al 'Australia and Canada in Regional Fisheries Organizations: Implementing the United National Fish Stocks Agreement' (2003) 26 *Dalhousie Law Journal* 47, 71. See also S Yoichiro, above n 40, 218. See further A Cameron, 'Is there Hope for the Fish?: The Post-Arbitration Effectiveness of the Convention for the Conservation of Southern Bluefin Tuna' (2007) 15 *New York University Environmental Law Journal* 247, 260–62 (discussing the role of scientific advice in the work of the SBT Commission).

66 See T Stephens, 'The Limits of International Adjudication in International Environmental Law: Another Perspective on the Southern Bluefin Tuna Case' (2004) 19 *International Journal of Marine and Coastal Law* 177, 185; A Cameron, above n 65, 253.

unanswered, several commentators have taken the view that the process itself contributed to the restoration of cooperative relationships in various ways.[67] The case could therefore be characterised with the ICJ's language from the *Nuclear Tests* cases, as "a path to international harmony".[68]

(c) As respondent — Case concerning East Timor

The background to Portugal's case against Australia before the ICJ concerned Portugal's withdrawal from its colony of East Timor and the subsequent invasion and annexation of East Timor by Indonesia in 1975. At the time, Indonesia claimed that the people of East Timor had exercised their right of self-determination by opting for incorporation within Indonesia.[69] Resolutions within the Security Council and the General Assembly called on all states, *inter alia,* to respect the territorial integrity of East Timor and its people's right to self-determination.[70]

Australia had a keen interest in these events, particularly given the importance of Australia's economic, security and political interests in relation to its large northern neighbour and the desire to access the resources of the Timor Sea.[71] By 1972, Australia had already delimited its maritime boundary with Indonesia to the east and west of East Timor,[72] leaving an undelimited area in the Timor Sea, which became known as the Timor Gap.[73] Fixing the maritime boundary was of some

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67 See T Stephens, above n 66, 187; W R Mansfield, 'Correspondence' (2001) 95 *American Journal of International Law* 624, 624.

68 See above n 37 and accompanying text.

69 *East Timor*, above n 2, [13].

70 SC Resolutions 384 (1975) and 389 (1976), and GA Resolutions 3485 (XXX) (1975), 31/53 (1976) 32/34 (1977) 33/39 (1978), 34/40 (1979), 35/27 (1980), 36/50 (1981) and 37/30 (1982). For discussion of the effect of these resolutions: see T D Grant, 'East Timor, The U.N. System, and Enforcing Non-Recognition in International Law' (2000) 33 *Vanderbilt Journal of Transnational Law* 273, 277.

71 See P Gorjão, 'The End of a Cycle: Australian and Portuguese Foreign Policies and the Fate of East Timor' (2001) 23 *Contemporary Southeast Asia* 101, 108. Gorjão sums up the tension between Australia and Indonesia over East Timor as follows: 'The primacy given to closer economic and security relations with Indonesia implied a clash adopted by the policies of the politicians, constrained by a realist assessment of the national interests, and the views held by many among the public at large, influenced as they were by their perceptions of national values.' Ibid at 101–02. Australia's ongoing ties to Indonesia over subsequent decades were criticised as hindering its support of Timor Leste's efforts to move towards independence. See J Ramos-Horta, 'Self-Determination for East Timor: Implications for the Region' (1997) 51 *Australian Journal of International Affairs* 97, 97–98.

72 Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries (18 May 1971), 974 UNTS 307. A Supplementary Agreement was signed between Australia and Indonesia in 1972, which established a boundary off West Timor: Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia Establishing Certain Seabed Boundaries in the Area of the Timor and Arafura Seas, supplementary to the Agreement of 18 May 1971 (October 1972), 974 UNTS 319. These treaties entered into force on 8 November 1973.

73 The gap remaining was approximately 130 nautical miles wide. The Timor Sea is

importance for Australia given the known presence of hydrocarbon resources in the area.[74] Portugal moved to grant concessions off the East Timorese coast in 1974, although these were protested by Australia.[75]

Following Indonesia's invasion of East Timor, Australia decided to recognise that East Timor was de facto part of Indonesia.[76] Australia's Ambassador to Indonesia at the time recommended that a pragmatic, rather than principled, approach would be in accordance with Australia's national interests.[77] In 1979, Australia and Indonesia commenced negotiations over the delimitation of the Timor Gap, and these discussions were viewed as *de jure* recognition of East Timor's incorporation into Indonesia.[78] Agreement was reached in 1989 on a joint exploration and exploitation regime, in what was named a Zone of Cooperation.[79] When the Timor Gap Treaty entered into force in 1991 through the implementation of legislation in Australia,[80] Portugal instituted proceedings against Australia at the ICJ based on each state's acceptance of the Court's compulsory jurisdiction.[81]

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estimated to contain the world's 23rd largest oil field, with reserves of five billion barrels of oil and 50 trillion feet of liquid natural gas. K Ishizuka, 'Australia's Policy towards East Timor' (2004) *The Round Table* 271, 277.

74 The Northern Territory and Western Australia had granted mining and petroleum rights in the Timor Sea area before 1967 and in 1968–1969. See *Petrotimor Companhia de Petroleos SARL v Commonwealth* (2003) 126 FCR 354, 389. These were protested by Portugal in 1970, particularly as Portugal was intending to grant concessions itself in the area at the time. See ibid 391.

75 See ibid 394–95.

76 The Minister for Foreign Affairs made a statement to this effect on 20 January 1978. *East Timor*, above n 2, [17]. The statement is reprinted in (1983) 8 *Aust YBIL* 279.

77 'We leave events to take their course … and act in a way which would be designed to minimize the public impact in Australia and show private understanding to Indonesia of their problems … We do not want to become apologists for Indonesia. I know I am recommending a pragmatic rather than a principled stand but that is what national interest and foreign policy is all about.' Cable from H E Richard Woolcott, Australia's Ambassador to Indonesia, August 1975, cited in K Ishizuka, above n 73, 273. Ishizuka also notes that there was some opposition towards this position within the Australian government. See Ibid. Gorjão has commented on the opposing views between and within the different Australian political parties. See Gorjão, above note 71, 108–10. But see J N Maogoto, 'East Timor's Tortured March to Statehood: A Tale of Legal Exclusion and the Vagaries of Realpolitik', 14–15 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1079377> at 6 December 2008 (noting that Australia's policies of recognition of Indonesia's sovereignty over East Timor were driven by its interests in the resources of the Timor Gap).

78 *East Timor*, above n 2, [17]. The relevant statements are reprinted in (1983) 8 *Aust YBIL* 279. See further S B Kaye, 'Australia and East Timor during the Howard Years: An International Law Perspective' (2008) 27 *Aust YBIL* 69, 70.

79 Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia (11 December 1989), 1991 ATS 9.

80 Petroleum (Australia-Indonesia Zone of Cooperation) Act 1990 (Cth) (repealed).

81 *East Timor*, above n 2, [1].

Portugal was unable to institute proceedings against Indonesia as that state has not accepted the Court's jurisdiction.[82]

Portugal alleged that in entering into the Timor Gap Treaty, Australia had failed to observe its obligations to respect the rights of Portugal as Administering Authority of East Timor as well as the rights of the East Timorese to self-determination and related rights, including the right to permanent sovereignty over its wealth and natural resources. Australia, following the usual path of respondents, sought to challenge the admissibility of the dispute and the Court's jurisdiction over the case.[83] Considering these issues to be inextricably linked to the merits, the Court decided to hear and determine questions of jurisdiction and admissibility at the same time as the merits.[84] Australia thereby asserted strongly at the outset that its position, including the right to exploit the resources of the Timor Gap, was legally defensible in all aspects.

This case raised fundamental questions of international law, particularly related to the jurisdiction of the Court,[85] treaty law, self-determination and the obligation of non-recognition, as well as various law of the sea issues. Among the latter was the right of states with overlapping maritime zones to settle their boundaries through agreement between themselves without the involvement of any external body.[86] While such agreements are to be based on international law,[87] there is considerable scope for a large number of factors to be brought to bear during these negotiations.[88] Australia had been able to adopt a strong negotiating position with Indonesia, arguing that the boundary should follow the natural prolongation of its continental shelf and thereby pushing the maritime boundary closer to Indonesia and granting Australia greater access to the marine resources. Indonesia's position

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82 Ibid 21. To the present day, Indonesia has still not accepted the Court's compulsory jurisdiction. See Declarations Recognizing the Jurisdiction of the Court as Compulsory, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3> at 6 December 2008.

83 *East Timor*, above n 2, [4].

84 Ibid.

85 See generally N Klein, 'Multilateral Disputes and the Doctrine of Necessary Parties in the *East Timor* Case' (1996) 21 *Yale Journal of International Law* 305.

86 The reliance on states to reach agreement between them on their mutual maritime boundaries was highlighted in discussions in the International Law Commission in their initial drafts on the delimitation of the continental shelf prior to the 1958 UN Conference on the Law of the Sea. See N Klein, above n 63, 233–34. Australia considered that it was acting within its sovereign rights in seeking an agreement with Indonesia in the delimitation of their overlapping continental shelf entitlements. See *East Timor (Portugal v Australia) (Counter-Memorial of the Government of Australia)*, 1 June 1992, 174–75, 177, <http://www.icj-cij.org/docket/files/84/6837.pdf> at 23 November 2009.

87 As required under Articles 74 and 83 of the UNCLOS, in relation to the delimitation of overlapping EEZ areas and continental shelves, respectively.

88 These factors have been highlighted in chapters examining state practice in the negotiation of maritime boundaries. See generally J I Charney and L M Alexander (eds), *International Maritime Boundaries* (vol 1, 1993); Malcolm Evans, *Relevant Circumstances and Maritime Delimitation* (1989).

was weaker in these negotiations in as much as Australia was the only state to recognise its sovereignty over East Timor and Indonesia could not turn to any third-party forum where it was likely that Portugal, among others, would have the opportunity to criticise Indonesia's occupation of East Timor.[89] Portugal's case before the ICJ challenged Australia's rights in this regard.

In seeking to halt the litigation before issues on the merits could be addressed, a central contention raised by Australia was that Indonesia was the true respondent in the case and it was not possible to rule on Portugal's arguments without considering the legality of Indonesia's incorporation of East Timor.[90] On the merits, Australia argued that there was no obligation of non-recognition and Australia was not prevented from negotiating with Indonesia as the state in actual and effective control of the territory.[91] Australia therefore considered it was entitled to conclude a treaty with Indonesia to give effect to its sovereign rights in the sea.[92] For Australia, then, Portugal's resort to litigation could be viewed as a mechanism that sought to deny rights accruing to Australia under the law of the sea. For Portugal, the preservation of maritime rights was a necessary consequence of upholding the various rights of the East Timorese as well as Portugal's rights as the administering power of East Timor.

The Court agreed that Australia's own actions relevant to the maritime boundary could not be assessed without first judging Indonesia's conduct and as Indonesia had not consented to the Court's jurisdiction for the resolution of the dispute, it could not resolve the matter.[93] Even though Portugal correctly posited that the right to self-determination is *erga omnes*, the nature of this obligation was not able to overcome the fundamental importance of states consenting to the adjudication of their disputes.[94] This finding remains significant in relation to

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89 See K Ishizuka, above n 73, 277. Australia's negotiating position was tempered by the shift away from the use of natural prolongation in maritime boundaries under international law. See Kaye, above n 78, 77.

90 *East Timor*, above n 2, [23].

91 See *East Timor (Portugal v Australia) (Counter-Memorial of the Government of Australia)*, 1 June 1992, 143–69, <http://www.icj-cij.org/docket/files/84/6837.pdf> at 23 November 2009.

92 See Ibid 170, 173–74.

93 Ibid [28] ('[I]n the view of the Court, Australia's behaviour cannot be assessed without first entering into the question why it is that Indonesia could not lawfully have concluded the 1989 Treaty, while Portugal allegedly could have done so; the very subject-matter of the Court's decision would necessarily be a determination whether, having regard to the circumstances in which Indonesia entered and remained in East Timor, it could or could not have acquired the power to enter into treaties on behalf of East Timor relating to the resources of its continental shelf. The Court could not make such a determination in the absence of the consent of Indonesia.')

94 Ibid [29] ('[T]he Court considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*.').

international environmental law in that states seeking to rely on obligations *erga omnes* will still need to ensure that a definitive basis of consent to jurisdiction exists in order to pursue litigation.

Australia continued to recognise Indonesian sovereignty over East Timor until 1999 when Indonesia revoked its decree integrating East Timor into Indonesia.[95] At this point, the United Nations established a transitional authority in East Timor,[96] which then assumed Indonesia's position under the Timor Gap Treaty[97] until a Memorandum of Understanding was concluded in 2001 for a new 'Timor Sea Arrangement'.[98] Following a referendum in 1999,[99] East Timor declared its independence on 20 May 2002 and Australia subsequently undertook negotiations with the new government of Timor Leste to conclude a treaty in respect of the Timor Gap.[100] Australia and Timor Leste concluded the Treaty on Certain Maritime Arrangements in the Timor Sea in January, 2006.[101]

It is notable that in March 2002 (several months prior to Timor Leste's formal independence), Australia opted to change its acceptance of compulsory jurisdiction of the ICJ. A new declaration excluded from the Court's jurisdiction all disputes relating to maritime boundaries:

> [A]ny dispute concerning or relating to the delimitation of maritime zones, including the territorial sea, the exclusive economic zone and the continental shelf, or arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation.[102]

95 *Petrotimor Companhia de Petroleos SARL v Commonwealth* (2003) 126 FCR 354, 396. Australia announced its change in policy towards East Timor in early January of 1999. See 'Australia Shifts Policy Goals for East Timor' *International Herald Tribune* (13 January 1999) 4 cited in D C Turack, 'Towards Freedom: Human Rights and Self-Determination in East Timor' (2000) 2 *Asia-Pacific Journal on Human Rights and the Law* 55, 71.

96 SC Res 1272 (1999).

97 This was achieved through an exchange of notes between Australia and the UN Transitional Authority in East Timor (UNTAET) on 10 February 2000. Exchange of Notes constituting an Agreement between the Government of Australia and the United Nations Transitional Administration in East Timor (UNTAET) concerning the continued Operation of the Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia of 11 December 1989 (10 Feburary 2000), [2000] ATS 9.

98 *Petrotimor Companhia de Petroleos SARL v Commonwealth* (2003) 126 FCR 354, 397.

99 See Secretary-General Informs Security Council, 'People of East Timor Reject Proposed Special Autonomy, Express Wish to Begin Transition to Independence', (Press Release, 3 September 1999) 1, UN Press Release No. SG/SM/7119, SC/6722.

100 See generally, Kaye, above n 78, 78–83.

101 Certain Maritime Arrangements in the Timor Sea (12 January 2006), [2007] ATS 12.

102 Declarations Recognizing the Jurisdiction of the Court as Compulsory <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=AU> at 6 December 2008.

Australia also opted to exclude maritime boundary disputes from compulsory proceedings under the UNCLOS.[103] These actions made it quite clear that Australia was unwilling to accept any third party resolution of the division of marine resources in the Timor Sea. This position stands in contrast to Australia's actions, or rather lack of action, prior to *East Timor* (as well as *Phosphate Lands in Nauru*)[104] – although Australia anticipated these cases being filed against it, Australia took no steps to alter its acceptance of compulsory jurisdiction at the ICJ.[105]

Australia's current reticence for litigation over maritime boundary disputes has been reinforced in the 2006 Treaty on Certain Maritime Arrangements in the Timor Sea. This agreement has deferred the delimitation of the maritime boundary for fifty years,[106] and instead creates a new joint exploration and exploitation regime. In this regard, Article 4, entitled 'Moratorium' provides in part:

> 4. Notwithstanding any other bilateral or multilateral agreement binding on the Parties, or any declaration made by either Party pursuant to any such agreement, neither Party shall commence or pursue any proceedings against the other Party before any court, tribunal or other dispute settlement mechanism that would raise or result in, either directly or indirectly, issues or findings of relevance to maritime boundaries or delimitation in the Timor Sea.
> 5. Any court, tribunal or other dispute settlement body hearing proceedings involving the Parties shall not consider, make comment on, nor make findings that would raise or result in, either directly or indirectly, issues or findings of relevance to maritime boundaries or delimitation in the Timor Sea. Any such comment or finding shall be of no effect, and shall not be relied upon, or cited, by the Parties at any time.
> 6. Neither Party shall raise or pursue in any international organisation matters that are, directly or indirectly, relevant to maritime boundaries or delimitation in the Timor Sea. …

These provisions make it quite clear that Australia will brook no interference in the delimitation of its maritime zones with neighbouring states.

The people of Timor Leste clearly benefit more from the current maritime arrangement than was the situation at the time Portugal instituted proceedings against Australia. However, it is difficult to gauge to what extent that litigation influenced, if at all, the eventual recognition of Timor Leste as an independent state,[107] or the consequent revision of the maritime boundary arrangements with

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103 A permissible limitation under Article 298 of the UNCLOS.

104 *Phosphate Lands in Nauru (Nauru v Australia)* [1995] ICJ Rep 117.

105 'It is worth noting that although Australia had advance warning that an application against it was in the offing in each case, it took no action to frustrate the applications being filed by amending the scope of its acceptance of the Court's compulsory jurisdiction, or even withdrawing it altogether.' N L Wallace-Bruce, above n 29, 205.

106 The duration of the agreement is subject to various contingencies related to the development plan and petroleum production, as set forth in Article 12.

107 Maogoto is critical of the Court's contribution to East Timor's right to self-determination since he considers that the ICJ supported the notion that Indonesia was

Australia. The proceedings at least demonstrated Portugal's ongoing support for the people of East Timor and thereby permitted Portugal to play an important role in subsequent negotiations with Indonesia.[108]

More notable for present purposes in relation to the role of litigation in the law of the sea is that Australia has reinforced the pre-eminence of states reaching agreement on their own terms in maritime boundary delimitation and that litigation is only a fall-back for states in the event that agreement cannot be reached.[109] Australia's desire to avoid third party interference shows recognition for the significant impact that litigation may have in this regard, which is foreseeable in view of the past involvement of courts and tribunals in resolving maritime boundary disputes, and may therefore underline Australia's desire to avoid such an abdication of control in favour of third-party resolution.

(d) As respondent – *Volga Prompt Release*

Australia has been assertive in seeking to protect fish resources in its maritime areas in recent years, both in terms of physically policing Australian waters,[110] and enacting new legislation to address illegal fishing. Rose has detailed some of these efforts as follows:

> Additional resources were allocated to surveillance and interdiction, and facilities built for the detention of illegal fishers and for the destruction of their forfeited vessels. Legislation was amended to enable foreign fishers caught fishing illegally in the territorial sea to be jailed. The government found legal avenues to detain crews of foreign vessels caught fishing illegally also in the Australian exclusive economic zone, including for default on payment of a fine and for resisting apprehension. Laws increasing financial penalties for foreign illegal fishing and imposing automatic forfeiture of the vessel, gear and catch from the time of commencement of illegal fishing were imposed.[111]

Recognition of the need for cooperative efforts has been borne out in Australia's involvement in an array of multilateral initiatives, including, most relevantly for present purposes, activities under the auspices of the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR).[112] States

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the sovereign power of East Timor at the time as factual matter. See J N Maogoto, above n 77, 16–17. Even though the ICJ recognised that the people of East Timor had the right of self-determination in the *East Timor Case*, this right was described as one recognised by Australia and Portugal and not applying generally. See *East Timor*, above n 2, 34.

108 See P Gorjão, above n 71, 106–07, 111–12. See also A Roberts, 'Nation Fears for East Timor' (October 1999) *Capitals* 38–39.

109 See above nn 86–89 and accompanying text.

110 Australia's pursuits of the *Viarsa I* and the *South Tomi*, lasting 21 and 14 days respectively, underlined the seriousness of Australia's intent in preventing illegal fishing in its waters. See generally L Blakely, 'The End of the Viarsa Saga and the Legality of Australia's Vessel Forfeiture Penalty for Illegal Fishing in its Exclusive Economic Zone' (2008) 17 *Pacific Rim Law and Policy* 677.

111 G Rose, 'Australian Approaches to International Environmental Law during the Howard Years' (2008) 27 *Aust YBIL* 1, 12–13 (footnotes omitted).

112 Opened for signature 20 May 1980, 1329 UNTS 48 (entered into force 7 April 1982).

party to this treaty have been particularly active in seeking to manage and conserve the Patagonian toothfish, which are highly valued deep-sea fish found in Antarctic waters.[113]

Australia's laws relating to fisheries, and specifically Australia's efforts relating to the management and conservation of Patagonian toothfish, were challenged indirectly before ITLOS as a result of prompt release proceedings under the UNCLOS. Article 292 of that treaty allows a state to challenge the detention of one of its vessels for unlawful fishing when that vessel, or its crew, has not been promptly released upon the posting of a reasonable bond or other financial security.[114] Russia instituted proceedings against Australia on this basis, to challenge Australia's detention of and bond requirements for the *Volga* and certain crew members, following their arrest for illegal fishing operations in Australia's EEZ around the Territory of Heard and McDonald Islands.

It should be noted that the dispute was not precisely one between Australia and Russia, particularly as the latter is also a party to the CCAMLR, but rather that Russia authorised the owners of the vessel to pursue the action under Article 292 on its behalf.[115] Nonetheless, the *Volga* case followed three other prompt release cases, the *Grand Prince*,[116] the *Monte Confurco*[117] and the *Camouco*,[118] and these all tested the limits of permissible actions of coastal states in arresting and detaining vessels alleged to be fishing unlawfully in the coastal state's Antarctic waters. In a broader context, Russia's position against Australia could be seen as that of a distant water fishing state protesting the coastal states' enforcement of their conservation regimes.

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113 For discussion, see A J Oppenheim, 'The Plight of the Patagonian Toothfish: Lessons from the Volga Case' (2004) 30 *Brooklyn Journal of International Law* 293, 294–303, 308–10. The Patagonian toothfish is commonly marketed as a type of sea bass.

114 Article 292(1) reads in full:

> Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security, the question of release from detention may be submitted to any court or tribunal agreed upon by the parties or, failing such agreement within 10 days from the time of detention, to a court or tribunal accepted by the detaining State under article 287 or to the International Tribunal for the Law of the Sea, unless the parties otherwise agree. UNCLOS, above n 38, art 292(1).

115 Under Article 292(2), an application for prompt release may be made 'on behalf of' the flag state. See further Rules of the International Tribunal for the Law of the Sea, Article 110(2). In these cases, '[t]he flag State may regain control of the proceedings at any time'. P Chandrasekhara Rao and P Gautier (eds), *The Rules of the International Tribunal for the Law of the Sea: A Commentary* (2006) 310.

116 *The 'Grand Prince' Case (Belize v. France) (Prompt Release)* [2001] <http://www.itlos.org/start2_en.html> at 26 April 2009.

117 *The 'Monte Confurco' Case (Seychelles v. France) (Prompt Release)* [2000] <http://www.itlos.org/start2_en.html> at 26 April 2009.

118 *The 'Camouco' Case (Panama v. France) (Prompt Release)* [2000] <http://www.itlos.org/start2_en.html> at 26 April 2009.

Russia sought a declaration from ITLOS that the conditions set by Australia for the release of the *Volga* and three of its crew members were neither permissible nor reasonable.[119] These conditions included disclosing information about the ownership of the vessel, carrying a vessel monitoring system for the duration of the Australian court proceedings as well as observing conservation measures required by the Commission for the CCAMLR.[120] Russia argued that conditions for release of the vessel must 'relate to the provision of a bond or security in the pecuniary sense'.[121] Among the key legal issues at stake were thus the range of conditions that a coastal state may impose on a fishing vessel for its release to resume fishing as part of a 'reasonable bond' and whether those conditions may serve as a deterrent against unlawful fishing. The parameters for decision-making by ITLOS under Article 292 are quite limited, and the Tribunal is not to consider issues that may go to the merits of any subsequent proceedings before domestic courts.[122]

For the assessment of the reasonableness of the bond, Australia argued that among the circumstances to be taken into account was the serious problem of illegal fishing in the Southern Ocean as well as 'the role of vessels like the "*Volga*" in repeated and flagrant violations of applicable national and international conservation measures'.[123] Australia pointed out that it was not alone in its conservation efforts for Patagonian toothfish but is part of a multilateral effort undertaken under the auspices of the Commission established by the CCAMLR.[124] Judge Cot, in his separate opinion, discussed the efforts of states party to the CCAMLR in response to illegal, unregulated and unreported fishing and particularly that '[i]f the parties to the Convention do not manage to put an end to these practices, stocks of Patagonian toothfish will be completely wiped out within about ten years'.[125]

However, in prompt release proceedings the rights of the coastal state must be balanced with those of the flag state.[126] This balance requires consideration of the vessel being promptly released in view of the financial implications of the vessel missing part of the fishing season as well as consideration of the efforts of the

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119 *Volga Prompt Release*, above n 2, [28], [29].

120 The parties also disputed what dollar amount should be set for the bond, which involved discussion of the value of the catch, the vessel and its equipment and the penalties likely to be imposed in the Australian court proceedings. Issues relating to the conservation measures sought to be pursued by Australia are the focus here.

121 *The Volga – Application for Release of Vessel and Crew, Memorial of the Russian Federation,* [7] <http://www.itlos.org/case_documents/2002/document_en_209.doc> at 26 April 2009.

122 UNCLOS, above n 38, art 292(3).

123 *The 'Volga' Case (Russian Federation v Australia) Statement of Response of Australia*, <http://www.itlos.org/case_documents/2002/document_en_210.doc> at 26 April 2009, 11 [12].

124 See *Volga Prompt Release*, above n 2, [67] (setting out Australia's arguments in this regard).

125 Ibid. Separate Opinion of Judge Cot, [6].

126 See, eg, *The 'Monte Confurco' Case (Seychelles v France) (Prompt Release)*, <http://www.itlos.org/start2_en.html> at 26 April 2009, [71], [72].

coastal state in conserving and managing its fish stocks.[127] While this trade-off may have been appropriate at the time of the adoption of the UNCLOS, the problems of over fishing and illegally fishing have escalated since then. Yet the approach of the Tribunal has tended to favour the need for prompt release over the conservation concerns of the coastal state.[128] This emphasis is further seen in that Australia's efforts to ensure greater compliance by the temporary use of a vessel monitoring system was also disallowed on the basis that bond conditions had to be financial in nature.[129]

While this dispute was concerned with the detention of the *Volga* under the terms of Article 292 of the UNCLOS, Russia raised the issue that Australia's arrest of the vessel had been in violation of the right of hot pursuit accorded under Article 111. Russia claimed that this question would be referred for dispute resolution under the relevant provisions of the UNCLOS,[130] and the prompt release proceedings therefore proceeded under the threat of further legal proceedings being instituted against Australia. While it is difficult to ascertain how realistic this threat was, Australia asserted the hot pursuit was lawful but that the issue was outside the scope of the prompt release proceedings.[131] As a deterrent to any further proceedings, Australia further noted a potential objection to jurisdiction it could raise, explicitly referring to Russia's exclusion from jurisdiction of any disputes concerning military activities by government vessels as well as disputes concerning law enforcement activities in the EEZ.[132] This argument signaled a key submission

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127 In this regard, Judge Cot advocated that 'The Tribunal has a duty to respect the implementation by the coastal State of its sovereign rights with regard to the conservation of living resources, particularly as these measures should be seen within the context of a concerted effort within the [Food and Agriculture Organisation] and CCAMLR.' *Volga Prompt Release*, above n 2, Separate Opinion of Judge Cot [12].

128 Judges in their separate opinions in the *Volga* did, however, refer to this aspect and suggest greater weight should have been accorded to this element. See, eg, ibid, Separate Opinon of Judge Cot, [12], [22]; ibid, Declaration of Judge Marsit, [2]–[3]. See further Tim Stephens and Donald R Rothwell, 'Case Note: *The Volga (Russian Federation v Australia)*' (2004) 35 *Journal of Maritime Law and Commerce* 283, 288 ('The Tribunal therefore appears to have accorded little weight to the serious problem of IUU fishing or the uncontested evidence that the *Volga* was part of a fleet of vessels systematically violating Australian fisheries laws and CCAMLR conservation measures.').

129 *Volga Prompt Release*, above n 2, [77], [80].

130 Ibid [25] ('The Applicant intends to invite the Respondent to agree to submit the dispute to the Tribunal. … If the Respondent declines, the dispute will be referred to arbitration in accordance with the applicable provisions of part XV of the Convention.').

131 See Statement of Response of Australia, above n 123, 9 [1], [4].

132 Ibid 20 [58]. States are permitted to exclude certain categories of disputes from compulsory arbitration or adjudication under the UNCLOS by virtue of art 298. Both Russia and Australia have opted to exclude disputes concerning law enforcement in the EEZ as well as military activities. See 'Declarations and Statements' <http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm> at 7 May 2009.

for Australia should Russia have decided to pursue further litigation, and may have potentially been sufficient to prevent such proceedings.[133]

Ultimately, even though Australia was not permitted to impose non-financial conditions in releasing the vessel, Russia was unsuccessful in convincing the Tribunal that the bond should be reduced to AUD $500,000 from AUD $3,332,500.[134] Instead, ITLOS set the bond or other security at AUD $1,920,000.[135] Commentators have noted that the case therefore entailed successes and losses for each state.[136] In terms of protection of marine resources, Australia's loss may seem greater. Setting conditions of release that create a financial disincentive to illegal fishing would constitute a stronger deterrent to this practice.[137] Australia's efforts to modify the requirement of Article 73(2) of the UNCLOS within the confines of the CCAMLR, whereby a bond for release be 'sufficient to deter further illegal fishing' rather than 'reasonable', was rejected.[138] For those looking for varied mechanisms to support fisheries conservation efforts, the *Volga* decision would have been a disappointment in as much as the Tribunal disallowed the use of non-financial conditions for a bond and generally avoided over-emphasising efforts to combat illegal, unregulated and unreported fishing. A possible avenue to support the work of regional fisheries organisation was effectively denied.[139]

(e) General trends from Australia's past experience

From each of these cases, it is evident that litigation was just one piece of a broader puzzle in the resolution of the differences arising between the states concerned. This aspect has some inevitability to it since each of them ended before any

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133 For any court or tribunal deciding on this question of jurisdiction, the critical point would have been if the case was purely viewed as one concerning law enforcement in the EEZ or whether the fact that it also concerned fishing and law enforcement on the high seas and therefore fell within the scope of jurisdiction for compulsory proceedings under the UNCLOS.

134 *The Volga – Application for Release of Vessel and Crew, Memorial of the Russian Federation,* [17], [32] <http://www.itlos.org/case_documents/2002/document_en_209.doc> at 26 April 2009.

135 *Volga Prompt Release*, above n 2, [90]

136 See S Derrington and M White, 'Australian Maritime Law Update: 2002' (2002) 34 *Journal of Maritime Law and Commerce* 363, 366.

137 Oppenheim, above n 113, 298. Australia has instead adjusted its domestic legislation whereby ownership is automatically transferred to the Australian government at the time a vessel commences unlawful fishing in Australian waters. Fisheries Management Act 1991 (Cth) s 106A; Rose, above n 111, 15, fn 69.

138 See *Volga Prompt Release*, above n 2, Declaration of Vice-President Vukas, [9]. Australia based this proposal on the terms of Article 311(3) of the UNCLOS, which permits two or more states to conclude agreements modifying the operation of the UNCLOS. Ibid.

139 See M Gorina-Ysern, 'World Ocean Public Trust: High Seas Fisheries After Grotius – Towards a New Ocean Ethos?' (2004) 34 *Golden Gate University Law Review* 645, 687 (noting that efforts to compel states to require vessel monitoring systems would be less effective in the absence of support from international courts). See also Ibid 690.

decision on the merits could be reached. The availability and the processes of litigation still served purpose in shaping and reconciling, to varying degrees, the disagreements at play, particularly because the effort at litigation highlighted the seriousness of the issue to the applicant and the potential costs that could be faced by the respondent. The lack of final judgments meant that substantive questions relating to the law of the sea, international environmental law and international law more generally were not addressed by any of the judicial bodies concerned. This absence of judicial commentary is disappointing in terms of a missed occasion to clarify or elaborate on relevant legal principles. The significance of these general trends is discussed further in Part II below in assessing the impact of litigation in Australia's current disputes over marine resources.

II. Future Experience? Lessons for Australia

The prospect of Australia being involved in litigation over marine resources presently exists in view of differences that have arisen between Australia and other states over appropriate conservation measures in relation to the marine environment. Australia has challenged Japan's scientific whaling program in Antarctic waters as contrary to a variety of international obligations binding on Japan and continues to consider whether litigation should be pursued in this matter.[140] Australia also faces the possibility that measures it has taken to protect the resources and environment of the Torres Strait will be challenged, most likely by Singapore, because of the restrictions being imposed on shipping through an international strait.[141] This Part addresses what disputes have arisen between Australia and these other states and the incentives that may exist for litigation to be pursued. The legal issues at stake as well as the role that litigation may play in resolving these disputes are also analysed.

(a) As applicant against Japan — *Whales*

Australia and Japan's disagreement with regard to conservation and management obligations for whales has mainly played out in the International Whaling Commission (IWC), which was established under the 1946 International Convention on the Regulation of Whaling (ICRW).[142] A prominent feature of the IWC at present is the division between its members as to whether they are in favour of commercial whaling (pro-whaling), like Japan, or in favour of conservation over commercial utilization (anti-whaling), like Australia.[143] Despite an agreement on a zero-catch limit (or moratorium) in 1982,[144] Japan continues whaling through

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140 See Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Canberra, 20 October 2008, 57 (Bill Campbell QC).

141 See below Part II(b).

142 International Convention for the Regulation of Whaling (2 December 1946), 161 UNTS 72 (entered into force 10 November 1948) ('ICRW').

143 See G Rose and S Crane, 'The Evolution of International Whaling Law' in P Sands (ed), *Greening International Law* (1993) 159, 165.

144 See para 10(e) to the Schedule of the ICRW. The moratorium came into effect in 1985-86.

various scientific research programs, which may be conducted lawfully under Article VIII of the ICRW while the moratorium is in effect.[145] Anti-whaling states have continuously opposed Japan's scientific whaling, and one of the key arguments raised is that the quantity of whales killed by Japanese whalers pursuant to its scientific programs is equivalent to a commercial harvest.[146] For the moment, diplomatic initiatives are being undertaken at a bilateral level and within the IWC.[147] There is no formal dispute settlement procedure laid out in the ICRW.

Australia has been particularly concerned about the Japanese whaling program in Antarctic waters, the current phase of which is known as JARPA II and is intended to target minke, humpback and fin whales.[148] The option of litigation against Japan has been mooted by Australia,[149] but so far no such step has been taken. Australia's motives for pursuing litigation in this instance may be derived from the large amount of interest in the issue among the Australian public. This interest is not limited to the matter of whaling itself, but extends to the appropriate form of action the public believes the government should take in responding to the issue. The current government included litigation against Japan as part of its platform in the 2007 federal elections,[150] and when it appeared that the new Prime Minister was retreating from this position prior to his first state visit to Japan in

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145 Art VIII(1) provides in relevant part:

> 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….

ICRW, above n 142, art VIII(1).

146 These arguments have been explored by a panel of eminent international lawyers who were commissioned by the International Fund for Animal Welfare. See *Report Of The International Panel Of Independent Legal Experts On: Special Permit ("Scientific") Whaling Under International Law* (Paris, 12 May 2006) 83 ('Paris Report') <http://www.ifaw.org/ifaw/general/default.aspx?oid=167943> at 6 December 2008. The Panel was comprised of Laurence Boisson de Chazournes, Pierre-Marie Dupuy, Donald R Rothwell, Philippe Sands, Alberto Székely, William H Taft IV, and Kate Cook.

147 See Joint Doorstop Interview with Stephen Smith, Minister for Foreign Affairs, and Peter Garrett, Minister for the Environment, Heritage and the Arts, Canberra, 'Government Actions to Stop Whaling', 19 December 2007 <http://www.foreignminister.gov.au/ transcripts/2007/071219-ds.html> at 6 December 2008. See also C Juma, 'The Future of the International Whaling Commission' IWC/60/12rev (2008).

148 See Government of Japan, *Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) — Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources*, SC/57/01 (2005) 1.

149 See Joint Doorstop Interview, above n 113.

150 Australian Labor Party, National Platform and Constitution 2007, ch 9, principle 131 <http://www.alp.org.au/platform/chapter_09.php#9greening_our_institutions> at 8 December 2008.

June 2008,[151] public opinion compelled a reaffirmation that litigation remained an option.[152]

A further incentive for Australia in settling this dispute as a means of ensuring the conservation of whales is the increasing economic value derived from the whale-watching industry. The International Fund for Animal Welfare has reported that: 'Whale watching is worth almost AU$300 million to Australia's economy and an estimated 1.6 million people go whale watching there each year.'[153] It has been suggested that visitor expenditure on whale watching will grow to AUD$3–4 billion over the next twenty years,[154] prompting Australia's Minister for the Environment to claim that whales are worth more alive than dead.[155]

A central difficulty for Australia in pursuing litigation against Japan over JARPA II rests in the fact that it implicates rights claimed by Australia over part of Antarctica and in adjacent maritime zones.[156] These concerns have already been brought to light by domestic litigation pursued by Humane Society International under the Environment Protection and Biological Diversity Act 1999 (Cth).[157] In the course of this litigation, the former Attorney-General observed that 'Japan would consider any attempt to enforce Australian law against Japanese vessels and its nationals … to be a breach of international law on Australia's part'.[158] Moreover, 'a significant adverse reaction' could be expected from other parties to the 1959 Antarctic Treaty,[159] if Australia was seen to be asserting jurisdiction that was not widely accepted as existing.[160] Australia may not wish to disturb the

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151 P Coorey, 'Leaders agree to cool it on whaling' *Sydney Morning Herald* (13 June 2008).

152 M Franklin and P Alford, 'PM Kevin Rudd Sticks to Legal Guns on Whaling' *The Australian* (13 June 2008) <www.theaustralian.news.com.au/story/0,25197,23850129-5013871,00.html.> at 7 December 2008.

153 International Fund for Animal Welfare, *Slaughtering Science: The Case against Japanese Whaling in the Antarctic* (2006), <http://www.ifaw.org/ifaw/dimages/custom/whale_watching_au/pdf/Slaughtering_Science.pdf.> at 7 December 2008. A recent report commissioned by the Australian Government estimated that 1.3 million people went whale watching in 2007, which was a 100 percent increase over the previous nine years. Australian Government, *Conservation and Values: Global Cetacean Snapshot: A Progress Report* (2008) 1, <www.environment.gov.au/coasts/publications/cetacean-snapshot.html> at 15 December 2008.

154 Australian Government, '*Conservation and Values: Global Cetacean Snapshot: A Progress Report* (2008) 1 <www.environment.gov.au/coasts/publications/cetacean - snapshot.html> at 15 December 2008.

155 See 'Whales Worth More Alive Than Dead: Report' *ABC News,* (14 June 2008) <www.abc.net.au/news/stories/2008/06/14/2274751.htm > at 7 December 2008.

156 See R Davis, 'Enforcing Australian Law in Antarctica: The HSI Litigation' (2007) 8 *Melbourne Journal of International Law* 143, 153.

157 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3.

158 *Humane Society International v Kyodo Senpaku Kaisha Ltd* – Outline of Submissions of the Attorney-General of the Commonwealth as *Amicus Curiae*, [14] < http://www.hsi.org.au/editor/assets/legal/Attorney-General%5c's_submissions_25_January_2005.pdf> at 23 November 2009.

159 Antarctic Treaty (1 December 1959), 402 UNTS 71 (entered into force 23 June 1961).

160 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664, [13].

diplomatic status quo in relation to the governance of Antarctica or bring its own claims to the area under scrutiny before an international court or tribunal.[161]

If Australia was to pursue litigation, its choice of forum will determine what substantive claims may be resolved. If it was to institute proceedings before the ICJ, as both Australia and Japan have accepted the Court's compulsory jurisdiction,[162] claims relating to violations of the ICRW as well as customary international law related to international environmental law and law of the sea could be presented.[163] Australia would seek to argue that JARPA II is unlawful because it is commercial whaling in the guise of scientific whaling and hence in violation of the ICRW.[164] Japan could also be potentially faulted for not following required procedures in the IWC in issuing its special permits,[165] and that its actions amount to an abuse of treaty rights.[166] These arguments would require that any assessment of the ICRW and its operations take into account the considerable development in international environmental law since the treaty was adopted.[167] Japan would instead argue for strict interpretations of the provisions of the ICRW that permit it to conduct scientific research under the terms and conditions that it thinks fit and would further submit that resolutions of the IWC are not binding obligations and hence do not amount to a violation of international law.[168]

If Australia was to turn to the dispute settlement procedure available under the UNCLOS, it would argue that Japan was in violation of its obligations to conserve

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Rose has noted that Australia gave paramount consideration to the protection of its sovereign rights in this regard. See G Rose, above n 111, 18.

161 See, eg, D Rothwell, 'Dispute Threatens Antarctic Claims' *Sydney Morning Herald* (17 January 2008) <http://www.smh.com.au/articles/2008 /01/16/1200419882499.html> at 8 December 2008; S Blay and K Bubna-Litic, 'The Interplay of International Law and Domestic Law: The Case of Australia's Efforts to Protect Whales' (2006) 23 *Environmental Planning Law Journal* 465; D Anton, 'False Sanctuary: The Australian Antarctic Whale Sanctuary and Long-Term Stability in Antarctica' *ANU College of Law Research paper No 08-08* <ssrn.com/abstract=1117022> at 7 December 2008.

162 See Declarations Recognizing the Jurisdiction of the Court as Compulsory <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3&code=> at 7 December 2008.

163 See N Klein, 'Whales and Tuna: The Past and Future of Litigation between Australia and Japan' (2009) 21 *Georgetown International Environmental Law Review* 143, 199–207. Claims under other multilateral environmental treaties may also be considered. See Sydney Panel Executive Summary in IFAW, *Australian Government Can Stop Japan Whaling* (2008) (copy on file with author) (referring to the Convention on the International Trade in Endangered Species, the Convention on Biological Diversity and the Protocol on Environmental Protection to the Antarctic Treaty).

164 Paris Report, above n 146, [5], [137], [138].

165 Ibid [86].

166 Ibid [82]–[87].

167 N Klein, above n 163, 201.

168 See Ibid 208–09. The arguments supporting Japan's position may also be seen in E V C Greenberg, P S Hoff and M I Goulding, 'Japan's Whale Research Program and International Law' (2002) 32 *Californian Western International Law Journal* 151; N Yagi, 'The Status of Scientific Research Whaling in International Law' (2002) 8 *ILSA Journal of International and Comparative Law* 487.

and manage marine mammals on the high seas.[169] Australia and Japan are required under the UNCLOS to cooperate with a view to the conservation of marine mammals and work through the appropriate international organisation for their conservation, management and study.[170] The 'appropriate international organisation' is widely recognised to be the IWC and Australia could therefore be in a position to argue that an assessment of Japan's conduct under the ICRW would allow for an assessment of whether it has violated obligations of cooperation and to work through the appropriate international organisation. As will be discussed in more detail below,[171] questions arise as to the extent that any court or tribunal operating under the UNCLOS would be willing to look beyond that treaty in establishing standards of conduct for states.

A further issue is whether judicial involvement in this dispute is desirable at all. The nature of international litigation is such that it seems unlikely that either a clear 'win' for Australia that JARPA II is completely unlawful or a clear 'win' for Japan that JARPA II is lawful in all aspects woud be achieved.[172] Litigation may still prove beneficial if the judgment discusses the questions of interpretation and application currently at issue between anti-whaling and pro-whaling states in the IWC and so indicate how their various differences may be resolved.[173] Most pertinent in this regard would be some indication as to the legality of the number and species of whales that may be killed in the course of lawful scientific research under the ICRW. The possible role for litigation as a means of dispute settlement is considered further in Part III, below.

(b) As Potential Respondent — *Compulsory pilotage in the Torres Strait*

Australia presently faces the prospect that steps it has taken to improve the protection of the marine environment in the Torres Strait will be subjected to legal challenge on the basis of alleged unlawful restrictions on the freedom of navigation. In particular, Australia's prescribed compulsory pilotage regime, and concomitant assertion of enforcement jurisdiction, within an international strait subject to the regime of transit passage has proven controversial with states, notably here the United States and Singapore, that do not want to see encroachments on rights of transit passage.[174] Despite this opposition, Australia has refused to rescind the compulsory pilotage regime and maintains that it is

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169 UNCLOS, above n 38, arts 117–120.

170 Ibid art 65.

171 See below nn 218–230 and accompanying text.

172 N Klein, above n 163, 208.

173 Ibid 214.

174 Transit passage was a new passage regime created under the UNCLOS to ensure that rights of navigation through important straits would not become subject to the requirements of innocent passage due to the extension of breadth of coastal states' territorial seas. Transit passage permits a greater range of navigational rights and less coastal state control than innocent passage. See generally B B Jia, *The Regime of Straits in International Law* (1998).

consistent with international law. 'Therefore, it appears that, if no state is willing to challenge the legality of the pilotage system before an international court or tribunal, it is likely that the compulsory pilotage system will remain in place.'[175]

The Torres Strait lies between the northernmost point of Australia (the Cape York Peninsula) and Papua New Guinea and is well-recognised for its marine biological diversity, considerable conservation significance as well as its cultural and economic importance to indigenous inhabitants of the area.[176] Although the Torres Strait is 90 miles wide and 150 nautical miles long, it poses substantial difficulties to large vessels navigating through the Strait in view of the shallow water and its copious reefs, islets and islands.[177] Not only is the sheer volume of traffic through the area posing risks to the surrounding area, but there has also been an increasing number of ships carrying hazardous substances through the Strait.[178]

Australia has taken steps to prevent possible environmental damage to the Torres Strait, including the creation of a voluntary pilotage regime in 1991.[179] However, from 1995 to 2003, the level of compliance with the recommended pilotage requirement declined from 70% to 35%.[180] Research undertaken for Australia suggested that 'compulsory pilotage could reduce the risk of groundings by between 45% and 57% and collisions by 57% to 67%, depending on the specific location within the Torres Strait.'[181] Through the imposition of a compulsory

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175 R C Beckman, 'PSSAs and Transit Passage – Australia's Pilotage System in the Torres Strait Challenges the IMO and UNCLOS' (2007) 38 *Ocean Development & International Law* 325, 340. See also 'Compulsory Pilotage in the Torres Strait' *Maritime Studies*, March–April 2007, 23, 25–26 ('Only a formal determination through an international dispute settlement procedure will decide whether the measure is in accordance with the international law of the sea.') Australia has previously contemplated the possibility of international litigation in the steps it has taken to improve protection for the marine environment. The prospect of international litigation was contemplated in the late 1960s and 1970s when Australia considered enclosing the Great Barrier Reef and Gulf of Carpentaria as internal waters. See N L Wallace-Bruce, above n 29, 199, citing H Burmester, 'Australia and the ICJ' in *Australian and New Zealand Society of International Law*, *Colloquium to Celebrate the 50th Anniversary of the International Court of Justice* (1996) 251, 253.

176 J Roberts, 'Compulsory Pilotage in International Straits: The Torres Strait PSSA Proposal' (2006) 37 *Ocean Development & International Law* 93, 99. See also 'Compulsory Pilotage in the Torres Strait' *Maritime Studies* (March–April 2007) 23; A McCarthy, 'Protecting the Environment and Promoting Safe Navigation: Compulsory Pilotage in the Torres Strait' [2007] IHL Res 6.

177 J Roberts, above n 176, 99.

178 Ibid at 102 (citations omitted).

179 Kaye has explained that Australia initially applied a voluntary system of pilotage in the Torres Strait precisely because the government had doubts that it was possible to impose a system of pilotage in an international strait. See S B Kaye, 'Regulation of Navigation in the Torres Strait: Law of the Sea Issues' in D R Rothwell and S Bateman (eds), *Navigational Rights and Freedoms and the New Law of the Sea* (2000) 126.

180 J Roberts, above n 176, 102 (citations omitted); A McCarthy, above n 176.

181 J Roberts, above n 176, 102 (referring to research undertaken by Canadian and United States Coast Guard on behalf of Australia).

pilotage system in the Strait, Australia is acting pre-emptively to avert environmental catastrophe, rather than following the 'disaster-led'[182] approach that has characterised other developments in international environmental law.[183]

Australia took this step with Papua New Guinea in seeking to have the area designated as a Particularly Sensitive Sea Area (PSSA) through the International Maritime Organisation (IMO).[184] This designation further enabled Australia to create Associated Protective Measures to respond to the needs of the area; in this instance a compulsory pilotage scheme.[185] Australia had already taken this step with respect to the inner route of the Great Barrier Reef in 1987, and had gained IMO approval for compulsory pilotage through this designated PSSA in 1990.[186]

During discussions at the IMO, Australia dropped explicit reference to a compulsory pilotage regime because of conflicting views over the legality of its proposal.[187] Instead, Australia followed the language of the resolution that had been used in relation to the compulsory pilotage regime for the inner route of the Great Barrier Reef, as this language had previously proved acceptable to IMO member states and had still allowed the imposition of a mandatory system.[188] Australia's position has been quite clear that it sought and intended to impose a compulsory pilotage regime, particularly in view of the fact that a voluntary scheme was already in place in the Torres Strait and little was therefore gained in having this reaffirmed by the IMO.[189]

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[182] Y Uggla, 'Environmental Protection and the Freedom of the High Seas: The Baltic Sea as a PSSA from a Swedish Perspective' (2007) 31 *Marine Policy* 251, 252 (referring to the Particularly Sensitive Sea Area concept as typically 'disaster-led').

[183] For example, the Torrey Canyon incident, involving the first major oil spill at sea and the air bombing of the vessel by the United Kingdom to reduce pollution levels, led to the adoption of the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (29 November 1969), 970 UNTS 211.

[184] The IMO has defined a PSSA as 'an area that needs special protection through action by IMO because of its significance for recognized ecological, socio-economic, or scientific reasons and because it may be vulnerable to damage by international shipping activities.' IMO Res A.22/Res. 927 (2001) annex 2 [1.2].

[185] The types of Measures available to states, including the use of compulsory pilotage, are set forth in IMO Res A.22/Res. 927 (2001) [6].

[186] Identification of the Great Barrier Reef Region as a Particularly Sensitive Area, IMO Res MEPC.44(30).

[187] Identification and Protection of Special Areas and Particularly Sensitive Sea Areas, Review of Ship Safety and Pollution Prevention Measures in the Great Barrier Reef Submitted by Australia, MEPC 48/INF.14 (2 August 2002) 2.

[188] 'Australia argued that, since the Resolution establishing a system of pilotage in the Great Barrier Reef used the same recommendatory language and Australia had implemented that Resolution by adopting legislation making pilotage compulsory subject to heavy penalties, it could follow the same practice in implementing the new resolution on the Torres Strait.' R C Beckman, above n 175, 339–40.

[189] In other words, there would have been no point in Australia and Papua New Guinea pursuing the adoption of a resolution at the IMO concerning the status of the Torres Strait as a PSSA if no new Measures could be adopted to reflect and protect this new status. See J Roberts, above n 176, 104.

Following the adoption of Resolution MEPC.133(53), Australia issued Marine Notice 8.2006,[190] citing the IMO resolution, and advising shipowners and operators that a compulsory pilotage regime would be put into operation and that failure to comply with that regime would entail significant penalties for the master or owner. Australia clarified in a subsequent Marine Notice that the penalties would be imposed on the vessel's next entry into an Australian port, rather than any suspension, denial, hampering or impairment of passage in the Torres Strait.[191] The issuance of this Marine Notice met with protests from IMO member states, as well as on a bilateral basis from Singapore and the United States.[192] There has, however, been 100% compliance with the compulsory pilotage regime.[193]

Australia and Papua New Guinea have taken the position that the compulsory pilotage regime is consistent with Articles 39(2), 42(1)(a), 194(1) and 211(6) of the UNCLOS.[194] Rather than detail the arguments related to each of these provisions here,[195] focus will be accorded to those arguments primarily addressing Articles 42 and 39 of the UNCLOS as these provisions go to the heart of the transit passage regime in international straits and also bring to light most clearly the difficulties surrounding any possible litigation against Australia in relation to the compulsory pilotage regime.

Australia has posited that the use of a pilotage regime is a 'necessary adjunct to' its rights under Article 42 of the UNCLOS to adopt laws and regulations relating to the safety of navigation and regulation of maritime traffic in the Torres Strait.[196] Restrictive interpretations of Article 42 would not permit this extension of jurisdictional competence.[197] Australia would need to question whether such restrictive readings of 'safety of navigation and regulation of maritime traffic' or 'traffic separation schemes' are still warranted today, as well as address the scope of the reference to 'applicable international regulations'. As will be discussed in more detail below,[198] one of the fundamental issues involved in discussions concerning PSSAs centres on the appropriate balance to be achieved between the freedom of navigation on one side and the need to regulate navigation for

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190 This notice was adopted pursuant to the *Navigation Act 1912* (Cth), which had been amended following the adoption of the IMO resolution.

191 'Further Information on Revised Pilotage Requirements for the Torres Strait', Marine Notice 16/2006 (October 3 2006).

192 See R C Beckman, above n 175, 336–40; 'Compulsory Pilotage in the Torres Strait' *Maritime Studies* (March–April 2007) 23.

193 A McCarthy, above n 176; 'Compulsory Pilotage in the Torres Strait' *Maritime Studies* (March–April 2007) 25.

194 See Torres Strait PSSA Associated Protective Measure — Compulsory Pilotage Submitted by Australia and Papua New Guinea, Leg 89/15 (24 August 2004).

195 Beckman has done so and concluded that Australia has no legal justification for its prescription and enforcement of the compulsory pilotage regime. See R C Beckman, above n 175.

196 See Torres Strait PSSA Associated Protective Measure — Compulsory Pilotage Submitted by Australia and Papua New Guinea. Leg 89/15 (24 August 2004) [24].

197 R C Beckman, above n 175, 344.

198 See below nn 229–233 and accompanying text.

environmental protection on the other.[199] Where the balance is struck will determine how restrictive the interpretation should be.

Another important consideration in parsing Article 42 is that any laws or regulations adopted must not 'in their application have the practical effect of denying, hampering or impairing the right of transit passage'.[200] Australia argued before the IMO that the compulsory pilotage regime through the Torres Strait would enhance transit, rather than hamper it.[201] States opposing Australia's position argue that stopping to take on a pilot and paying for the pilotage, as well as the threat of a future fine in the event of non-compliance, have the practical effect of impairing or hampering the right of transit passage.[202] For this aspect of the dispute, the pivotal consideration will be the interpretation of 'hampering' passage and whether the actions of Australia will be seen in the light of seeking to improve and facilitate passage or will be viewed as too intrusive into the freedom of navigation.[203]

How these terms at issue are interpreted will become critical in any dispute settlement process. What might have been the expected understanding of certain terms used when the UNCLOS was drafted may evolve over time.[204] Such a shift in understanding may also be seen by reference to Article 39(2) of the UNCLOS whereby ships in transit passage are required to comply with generally accepted international regulations, procedures and practices for safety at sea, and for the prevention, reduction and control of pollution from ships. Australia's compliance with Article 39(2) is dependent on a determination that Resolution MEPC.133(53) constitutes one of these 'generally accepted international regulations, procedures and practices'.

Questions arise as to whether a treaty or treaty-like process is required to meet this standard,[205] or whether broader understandings of the UNCLOS provisions

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199 This debate was evident during the recent discussions to designate part of the Baltic Sea as a PSSA. See Y Uggla, above n 182, 256. See also K M Gjerde and D Ong, 'Protection of Particularly Sensitive Sea Areas under International Marine Environmental Law: Report of the International Meeting of Legal Experts on particularly Sensitive Sea Areas, University of Hull, 20–21 July 1992' (1993) 26 *Marine Pollution Bulletin* 9, 12 (noting that there were fears that 'accommodation of coastal States' concerns in this regard [i.e. the development of the PSSA concept] may unravel the delicate balance struck in UNCLOS between freedom of navigation and protection of the marine environment').

200 UNCLOS, above n 38, art 42(2). Article 44 also refers to a general duty imposed on states bordering straits not to hamper transit passage.

201 See Torres Strait PSSA Associated Protective Measure — Compulsory Pilotage Submitted by Australia and Papua New Guinea. Leg 89/15 (24 August 2004) [29].

202 R C Beckman, above n 175, 345.

203 See further below nn 230–232 and accompanying text.

204 A Boyle, 'Further Development of the Law of the Sea Convention: Mechanisms for Change' (2005) 54 *International & Comparative Law Quarterly* 563, 568. See further below Part III(a).

205 Beckman considers that there must be an amendment to the Safety of Life at Sea Convention or some other treaty-like process whereby all states consent to the adoption of rules on compulsory pilotage regimes in international straits. He further

might be derived through soft law instruments instead.[206] Account could also be taken of the view that the PSSA Guidelines have been perceived as an acceptable development of the UNCLOS, beyond its initial contours, in view of the increasing dangers posed by ships to the marine environment and the availability of the IMO to develop innovative responses to these dangers.[207] Litigation may serve a valuable purpose in interpreting the terms of the UNCLOS on transit passage and clarifying to what extent the work and decisions of international organisations may play in establishing lawful standards of conduct.

III. Lessons for Litigating over Marine Resources

Australia's past experiences in litigating over marine resources, and the potential for litigation to ensue in relation to whaling and compulsory pilotage in the Torres Strait, bring to light important questions for the law of the sea, international environmental law and international dispute settlement. These questions relate not only to normative principles at stake in each dispute but raise various systemic issues. One such issue is how the law of the sea is to develop to respond to new demands and challenges, especially when it is already highly regulated by an existing constitutive instrument such as the UNCLOS. Another concerns the role litigation may play when questions relating to the evolution of the law cause disputes to arise between states and judges must decide to what extent they are willing to influence this process. A final systemic issue is whether the procedures and arrangements for the regulation of international environmental law, as well as the large corpus of soft law generated within these fora, may prove influential in guiding state conduct especially in confronting and responding to these new demands and challenges. This Part addresses these particular systemic issues in view of Australia's experience and seeks to bring together the intersection of the law of the sea, international dispute settlement and international environmental law when considering litigation over marine resources.

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writes:

> If there were a clear legal basis for the IMO to adopt compulsory pilotage systems, and they were adopted by the IMO according to its authority, procedures, and practices, all ships exercising transit passage would be bound to comply with them under Article 39 of UNCLOS. Also, all states would be required to ensure that ships flying their flag complied with the international regulation establishing the pilotage system.

R C Beckman, above n 175, 347.

206 See further below nn 267–272 and accompanying text.

207 The UN Division for Ocean Affairs and the Law of the Sea has examined the inter-relationship of the PSSA concept with the UNCLOS and noted that although the PSSA Guidelines are 'far more detailed and "liberal" in their approach' compared to the UNCLOS, this 'befits a more sophisticated and comprehensive scientific understanding of the dangers posed by ships to the marine environment, as well as the broader range of protective measures available within the competence of IMO' since the UNCLOS negotiations in the 1970s. See IMO Doc. LEG.87/17 (2003), annex 7.

(a) Law of the Sea

Both the past and future disputes concerning Australia raise questions regarding the contours of the UNCLOS, and particularly the extent that any court or tribunal might be willing to look beyond the specific treaty provisions as a means of interpreting and applying that treaty in the context of particular disputes. The first point of reference in determining how to interpret the UNCLOS will be the rules of treaty interpretation codified in Article 31(1) of the Vienna Convention on the Law of Treaties.[208] That provision requires 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.' The matter does not end there, however.

It is inevitable that disputes will arise precisely because the relevant provisions of the UNCLOS are not sufficiently specific in establishing the standard of conduct or the rights and duties of states parties, or because a situation arises that was not directly addressed or foreseen in the UNCLOS. These inadequacies of the UNCLOS are highlighted in the disputes discussed in the following ways:

- Despite the very fact that weapons testing and high seas rights were litigated prior to the adoption of the UNCLOS, these issues were not specifically addressed in the UNCLOS. Instead, a more ambiguous regime related to recognition of the freedom of the high seas, showing due regard for other uses, and a nebulous requirement that the oceans be used for peaceful purposes was all that could be accepted in balancing the different interests involved;[209]
- In challenging Japan's institution of an EFP for a highly migratory species, Australia and New Zealand sought to clarify what was actually required of states in relation to duties of cooperation and duties of conservation and management of living resources on the high seas. The provisions in Section 2 of Part VII of the UNCLOS are very broad on these matters and recourse to international organisations, or other fora, as a means of supplementing and elaborating on these high seas obligations is inevitable;
- Australia's potential legal challenge against Japan's scientific whaling program may well provoke consideration of the inter-relationship of the UNCLOS with the ICRW. Questions arising include whether Japan's conduct within the IWC may be assessed in relation to its UNCLOS

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208 Vienna Convention on the Law of Treaties (23 May 1969), 1155 UNTS 331.

209 For discussion on the uncertainties regarding the regulation of military activities at sea and the peaceful purposes provision in Article 88 of the UNCLOS, see M R Shyam, 'The U.N. Convention on the Law of the Sea and Military Interests in the Indian Ocean' (1985) 15 *Ocean Development & International Law* 147, 149; K Booth, *The Military Implications of the Changing Law of the Sea*, in J K Gamble Jr (ed), *Law of the Sea: Neglected Issues* (1979) 328, 340; E Rauch, *Military Uses of the Oceans* (1985) 28 *German Yearbook of International Law* 229, 231.

obligations and whether any purported violations of the ICRW may be used to demonstrate violations of the UNCLOS;

- Challenges to Australia's compulsory pilotage regime in the Torres Strait prompt questions as to the role of the IMO in interpreting provisions of the UNCLOS, as well as a more fundamental challenge as to whether the package deal enshrined at the moment of the adoption of the UNCLOS must be preserved for all time or to what extent modern-day concerns may influence what emphasis is given to particular interests in the interpretation and application of the UNCLOS.

It is clear that within the UNCLOS itself, there is some anticipation that the terms of the treaty may need to be modified, as seen most obviously in the inclusion of provisions for the formal amendment of the treaty.[210] The terms of the UNCLOS do not, however, provide for the exclusive means by which the treaty may be modified or supplemented in the future.[211]

Beyond these formal mechanisms, states seeking to expand or develop the scope and understanding of the UNCLOS may refer to state practice and the work of international organisations. State practice may be relevant in the interpretation of a treaty by reference to Article 31(3)(b) of the Vienna Convention on the Law of Treaties, which allows for account to be taken of 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. There are limits to recourse to subsequent practice, however, as it is only likely to be taken into account if there is any uncertainty as to the meaning of the treaty, and should not be used to contradict what is otherwise the clear meaning of a particular provision.[212] Moreover, the practice in question must reflect a common understanding of the parties as to the meaning of the treaty provision.[213]

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210 UNCLOS, above n 38, arts 312–16. This point remains true despite the aspiration set forth in the preamble that the UNCLOS is 'to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea'. Ibid Preambular para1. Freestone and Oude Elferink have commented that the formal procedures set forth in arts 312 and 313 are unlikely to be used, unless the changes were 'uncontroversial and beneficial to all the major law of the sea groups', which is unlikely given that most amendments would be likely to shift the power dynamics between these groups or would be of direct concern to specific interest groups. D Freestone and A G Oude Elferink 'Flexibility and Innovation in the Law of the Sea – Will the LOS Convention Amendment Procedures Ever be Used?' in A G Oude Elferink (ed), *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (2005) 169, 180.

211 Churchill points to the 1994 Agreement, modifying Part XI of the UNCLOS, as well as the decision of the meeting of the states parties to extend the timelines for submissions to the Commission on the Limits of the Continental Shelf as clear amendments to the UNCLOS, even though they did not follow the procedures set out in Articles 312–14. R R Churchill, 'The Impact of State Practice on the Jurisdictional Framework Contained in the LOS Convention' in A G Oude Elferink (ed), *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (2005) 91, 97.

212 *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua Intervening)* [1992] ICJ Rep 351, 586.

213 See *Kasikili/Sedudu Island (Botswana/Namibia)* [1999] ICJ Rep 1045, [63], [73]–[75]. See also I M Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed, 1984)

Beyond its use in treaty interpretation, state practice is of course relevant in the formation of any new rule of customary international law,[214] which continues to exist and develop in the face of treaties dealing with similar issues.[215] In surveying the impact of state practice on the UNCLOS, Churchill has considered that there must be a high degree of consensus for any new rule of customary international law to amend the treaty whereas a new rule of customary international law that supplements, rather than amends, would not require a comparable level of support and certainty.[216] Churchill has further observed that state practice may be relevant either because its consistency with the terms of the UNCLOS reinforces, on a political level, the strength and integrity of the treaty requirements or in situations where the practice addresses a matter pertaining to the UNCLOS but on which the treaty is silent, then it may be indicative of a new rule of customary international law or agreed interpretation.[217] It is clear that the thresholds to be met for utilisation of state practice in these different ways for the interpretation of the UNCLOS are high.

With respect to the work of international organisations influencing the interpretation and application of the UNCLOS, the treaty itself refers to 'appropriate', 'relevant' or 'competent' international organisations playing a role in regulating the conduct of states parties with respect to a variety of issues.[218] Without referral to such external bodies to allow for more detailed arrangements and standards to be formulated or cooperation to be achieved, many of the general obligations in the UNCLOS 'would have remained a hollow shell'.[219] Given the designated role of international organisations, it would seem that the actions of states within these bodies will be of considerable importance in the evolution of the

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138 (clarifying that subsequent state practice is to be concordant and common to all the parties).

214 Customary international law is generally derived from state practice and *opinio juris*, the latter being the recognition of a state that it is legally bound to act (or not act) in a certain way. The formula is reflected in Article 38(1)(b) of the Statute of the International Court of Justice as follows: 'international custom, as evidence of a general practice accepted as law'. This traditional formulation has been challenged at various times. See, eg, W M Reisman, 'International Lawmaking: A Process of Communication' (1981) 75 *American Society of International Law Proceedings* 101; A E Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 *American Journal of International Law* 757. However, it is still the predominant approach followed in ascertaining whether new rules of customary international law have emerged.

215 See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (1986) ICJ Rep 14, 95.

216 See R R Churchill, above n 211, 97.

217 This practice, which does not warrant reference under art 31(3) of the Vienna Convention on the Law of Treaties nor amounts to a new rule of customary international law, has 'limited legal significance' according to Churchill. See R R Churchill, above n 211, 99.

218 See Freestone and Oude Elferink, above n 210, 170, 204 (noting that there are 91 provisions in the UNCLOS referring to either competent or relevant international organisations).

219 Ibid 205.

UNCLOS and is likely to over-shadow unilateral state practice in this regard as a result.[220]

Another important means for the evolution of the UNCLOS is through references to 'generally accepted international rules and standards' [221] or the like,[222] particularly in relation to the protection and preservation of the marine environment. Oxman has commented on the utility of this outward-looking formulation as follows:

> One of the virtues of this approach is that it emphasizes the fact of general acceptance of a standard after promulgation, rather than the legal obligation (if any) created by its initial adoption by an international organization or conference.[223]

Inclusion of this formulation precisely anticipates changing circumstances and permits the law to respond to new needs. It allows for the evolution of the standards in accordance with new information, experience, and technology, without freezing in time detailed technicalities.[224] Another rationale for this approach was to ensure that states would not act inconsistently with what was observed by the great majority of states, even if the standard in question was not accepted by all states.[225] A certain degree of consensus among states, rather than unilateral actions, is still expected. These generally accepted standards in the UNCLOS further provide the minimal level of environmental restraint and seek to reconcile, to the extent possible, coastal state interests in protecting the environment with the interests of flag states in promoting navigation.[226]

Looking to other international treaties for guidance in the interpretation of the UNCLOS is appropriate when the provisions at issue anticipate taking into account subsequent technical, economic or legal developments,[227] which is arguably the

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220 Freestone and Oude Elferink comment to this effect: 'Due to the roles attributed to international organizations under the Convention, their practice can significantly impact on the development of the rules contained in the Convention and assist in adapting it to changing circumstances': Ibid 206. It is likely to have more impact than unilateral state practice because actions of international organisations will commonly reflect some level of multilateral consensus on an issue. Freestone and Oude Elferink acknowledge that the possibility that the membership of an international organisation is not necessarily the same as the states parties to the UNCLOS may constitute a limitation in the work of international organisations instigating change to the treaty provisions. Ibid 206.

221 See, eg, UNCLOS, above n 38, arts 21(2), 211(2), 211(5), 211(6) and 226(1).

222 There are also references to generally accepted international regulations, practices and procedures. See ibid arts 21(4), 39(2), 41(3), 53(8), 94(2) and 94(5), as well as to generally accepted standards. See Ibid art 60.

223 B H Oxman, 'The Duty to Respect Generally Accepted International Standards' (1991–1992) 24 *New York University Journal of International Law and Politics* 109, 110.

224 Ibid 140.

225 Ibid 126 (referring to an explanation given by Sir Gerald Fitzmaurice at the time the language was devised for the 1958 High Seas Convention).

226 Ibid 136, 139.

227 See Conclusions of the work of the Study Group on 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law'

case in referring certain issues to be resolved through the workings of particular international organisations. Moreover, rules of international law that have developed subsequent to the adoption of the UNCLOS should be taken into account in interpreting treaty provisions that have ‘a very general nature or [are] expressed in such general terms that [they] must take into account changing circumstances’.[228] This approach is reinforced by the application of Article 31(3)(c) of the Vienna Convention on the Law of Treaties, which requires account of ‘any relevant rules of international law applicable in relations between the parties’ so that any understanding of the UNCLOS will be complemented by other rules that are binding on the states concerned. Hence, in the whaling example, it would be reasonable to take account of the requirements related to the moratorium adopted under the ICRW in interpreting the necessary conduct of states under Articles 65 and 120 of the UNCLOS.

In looking beyond the precise terms of the UNCLOS, it may be necessary for new emphases and interests in the law of the sea to be taken into account. So, for example, post-September 11 concerns about maritime security may influence how the rights of flag states over their vessels on the high seas are construed. New information about the parlous state of the marine environment may allow for greater coastal state authority in taking action to protect its maritime habitats. The traditional position on the inter-temporality of international law was stated by Judge Huber in the *Island of Palmas Case* as follows:

> …a juridical fact must be appreciated in the light of the law contemporary with it, and not the law in force at the time when a dispute in regard to it arises or fails to be settled… The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words, its continued manifestations, shall follow the conditions required by the evolution of law.[229]

The ‘continued manifestations’ of the freedom of navigation could require that its scope be modified in light of developments in international law, especially in relation to environmental concerns.[230]

The compulsory pilotage regime provides the case in point: in interpreting ‘hamper’ will a judge or arbitrator consider that the freedom of navigation is the paramount interest to be preserved and hampering should be at an absolute minimum, or will a judge or arbitrator consider the need for environmental

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ILC Report A/61/10 (2006) 23 <http://untreaty.un.org/ilc/reports/2006/2006 report.htm> at 15 December 2008.

228 See Ibid.

229 *Island of Palmas (Netherlands v US)* (1928) 2 RIAA 829, 845 (making this statement in the context of territorial claims).

230 See T Scovazzi, ‘The Evolution of International Law of the Sea: New Issues, New Challenges’ (2000) 286 *Recueil des Cours: Collected Courses of the Hague Academy of International Law* 43, 232 (‘the UNCLOS should be interpreted in an evolutionary way, especially where the most undesirable consequences of the principle of freedom of the sea and its corollary of exclusive flag State jurisdiction over ships on the high seas become evident and new concerns are not given due consideration’).

protection in PSSAs and allow for impingement on the freedom of navigation because of a stronger interest existing in favour of the environment? The ICJ has acknowledged 'the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion', but also that treaties are to be 'interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation'.[231] This position largely reflects Judge Huber's remarks on inter-temporality: it makes clear that there is ongoing deference to accepted positions in international law, but without completely shutting out the possibility for change. To address this tension, it is not necessarily a requirement that one interest must trump another or always be prioritised, but rather that a balance needs to be struck to accommodate both interests and allow for their integration.[232] The characterisation of the UNCLOS as a constitution and the very fact that sundry of its provisions refer to external reference points indicate that evolution in its interpretation and application is inevitable.[233] For Australia to prevail in any future litigation concerning whales or compulsory pilotage, these evolutionary perspectives on the UNCLOS will be important to the substantive cases. A follow-up question then becomes: what roles will courts and tribunals play in this evolution?

(b) International dispute settlement

In view of the complications that may arise in determining and interpreting the relevant substantive law to apply in any particular law of the sea dispute, the question necessarily arises as to whether litigation is the most appropriate (or even *an* appropriate) procedure for resolving competing legal views. As a *prima facie*

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231 See A Boyle, above n 170, 567 (citing the *Namibia* advisory opinion and the *Aegean Sea* case before the ICJ). Scovazzi states the need for evolution more strongly:

> Despite all its merits, the fact remains that the UNCLOS, as any legal text, is linked to the moment when it was adopted and the balance of interests which existed at that moment. Being itself a product of time, the UNCLOS cannot stop the passing of time. While it provides a solid and tendentially stable basis, it would be illusory to think that the UNCLOS is the end of legal regulation.

T Scovazzi, above n 230, 123.

232 This task of accommodation is anticipated in Article 59 of the UNCLOS, which reads:

> In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

See also P Sands, 'Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law' in T M Ndiaye and R Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes* (2007) 313, 313 323 (arguing this point in relation to the protection of foreign investors and environmental protection).

233 See further T Scovazzi, above n 230, 169–70 ('Although it was clearly intended to be a legal regime of more than transient applicability, it was equally clear that the drafters envisaged that it would need to be adapted to emerging needs and requirements.').

matter, the interpretation and application of the law in the context of a particular factual dispute is the bread-and-butter work of courts and tribunals. It is, however, just one form of dispute settlement and it is important to recall the place of litigation within a broader dispute settlement framework.

Litigation is usually placed at one end of the spectrum in canvassing dispute settlement options available to states because it involves a third party delivering decisions binding on the disputants and hence represents the greatest devolution of control as to how a dispute is settled.[234] Moreover, litigation is viewed as an adversarial process, requiring states to take concrete, and sometimes more extreme, positions than may be necessary in a less formal setting. The arguments must be aligned with specific legal rules in accordance with the jurisdiction of the relevant court or tribunal and there is less capacity (depending on the legal rules in question) to call on political, economic, security, social, or cultural factors, with these considerations more likely forming the context of the litigation rather than being decisive in their own right.

Litigation has its own peculiar formalities and procedural requirements as a form of dispute settlement, and the very process of drafting legal pleadings (including assembling evidence to support the case), and having to defend those views before a third party may prove beneficial in highlighting the strengths and weaknesses of a case.[235] These circumstances may permit the parties to compromise on certain points or encourage further negotiations. There have been occasions before ITLOS where the existence of the legal proceedings have provided an opportunity for the parties to reach agreement on certain points, or to offer particular concessions to the other side that are then enshrined within the award.[236]

The adversarial nature of litigation tends to be accompanied with an expectation that it will deliver either a 'win' or 'loss' for the parties involved. On a simplistic basis, the view could be taken that where an applicant seeks a particular order and the respondent opposes that order then whether the order is made or not may be assessed as a win or loss accordingly. There are instances where such an assessment may be warranted. However, the complexities of international cases and

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234 Negotiation is at the opposite end of the spectrum in that it involves the parties in dispute in direct communication and formulating a resolution that may or may not be legally binding and that may take into account a range of factors beyond the confines of the rights and duties under international law. Negotiation does not normally involve any direct intervention from a third party, although the dynamics of the dispute may mean that third states are bringing pressure to bear on one state or another even if those third states do not have a formal role in the dispute settlement process. This spectrum is seen in the listing of peaceful dispute settlement options available to states in Article 33 of the Charter of the United Nations.

235 See V Lowe, 'The Interplay between Negotiation and Litigation in International Dispute Settlement' in Tafsir Malick Ndiaye and Rudiger Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes* (2007) 235, 240–42.

236 As happened with the undertakings given in the *MOX Plant* and *Land Reclamation* cases. See N Klein, above n 63, 83–84.

the political nuances that shroud the legal questions often require a more detailed evaluation. Lowe has noted that a claimant may be 'playing for the rules rather than playing for a decision', and so the articulation or clarification of various legal principles may be more important than the precise outcome on the facts before the court or tribunal.[237] This perspective would indicate that litigation does not need to be perceived as a last resort given the potential benefits that may be achieved to resolve a broader, ongoing issue. Singapore could be seen as 'playing for the rules' in challenging the Torres Strait compulsory pilotage regime, as Singapore's greater interest may be in ensuring that no precedent is set in limiting transit passage rights in other straits rather than how it is affected by the particular regime in the Torres Strait.

There are occasions when the litigation serves a facilitative function rather than being predominantly an arbiter of right and wrong. This facilitative function may be seen in two ways: first, in relation to the court or tribunal's interpretation and application of the relevant law (a legal role); and second, in relation to the contribution that the very process may have in resolving differences between the parties (a diplomatic role). For the legal role, there is no gainsaying that courts and tribunals perform a vital function in elucidating the meaning of particular rules and in assessing how those rules apply in any given factual context. Given the vagueness inherent in some of the rules relating to the protection of maritime resources, as well as the reliance on external sources to provide guidance in their interpretation, the involvement of third parties may be viewed as vital in the application and evolution of the law.[238] In this regard, litigation could well be useful in bringing clarity to the rules in question and defining more precisely the rights and duties of the states concerned in a particular situation. This legal role reflects Lowe's characterisation of 'playing for the rules'.

With regards to the diplomatic role that may be performed in litigation, it is notable that the result of litigation is often that both states 'win' on different submissions and 'lose' on others. It may well be a litigation tactic to assert positions that may not be legally tenable or are in the nature of a maximalist claim as a means of providing a tribunal with the opportunity of awarding a 'loss' to that particular side.[239] This approach enables each state to tell the media and domestic constituents that the litigation was a vindication in various ways, even if the full

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237 V Lowe, above n 203, 239.

238 See T A Mensah, 'The Role of Peaceful Dispute Settlement in Contemporary Ocean Policy and Law' in D Vidas and W Østreng (eds), *Order for the Oceans at the Turn of the Century* (1999) 81, 103 ('the general and vague language of some of the provisions of the LOS Convention brings the role of the Tribunal in the settlement of certain particular disputes close to the development of the law of the sea').

239 This tactic is often seen in litigation in relation to maritime boundary disputes, where a state might argue that it is entitled to the largest possible maritime area in the expectation that the court or tribunal will inevitably award less than is claimed. See J I Charney, 'Progress in International Maritime Boundary Delimitation Law' (1994) 88 *American Journal of International Law* 227, 229 (discussing this approach in the ICJ decision of *Jan Mayen*).

demand asserted by the state is not met. Each state will inevitably have their own views as to what is the best outcome in any particular case but the 'face-saving' elements of any judgment may be important in following up the matter, both at the national and international levels, in light of the decision provided.

This diplomatic role can be seen in the *Southern Bluefin Tuna* award on jurisdiction and admissibility. Ostensibly this case was a 'loss' for Australia and New Zealand since the tribunal held that it lacked jurisdiction to decide the case they presented. However, it could still be argued that there was a 'win' in that there was no finding that Japan's EFP was lawful. The decision on provisional measures in Australia and New Zealand's favour was also lauded for its significance in enhancing conservation of marine resources.[240] To obtain such an order, which was endorsed by the arbitral tribunal deciding on jurisdiction,[241] could still be viewed positively by Australia and New Zealand for the short term gain in the temporary suspension of the program.[242] Japan may have prevailed in its jurisdictional arguments, but it failed to establish that substantive obligations in the UNCLOS were discharged or displaced by the adoption of species-specific treaties,[243] and it also 'lost' on the point that the dispute was inadmissible simply because it arose out of a scientific disagreement.[244]

The experience of Australia in this case also suggests that litigation may be beneficial as one means of resolving a broader dispute. Even following its 'win' in *Southern Bluefin Tuna*, Japan still agreed to cease the unilateral EFP that had proved so controversial to Australia and New Zealand, and the parties were able to work together to devise a mutually acceptable research program instead.[245] Counsel for New Zealand has also noted that the litigation was beneficial because of the effect that the process had on the inter-relationship of the parties, both in terms of an external third party moderating behaviour and that greater scrutiny of legal arguments permitted analysis from a wider range of perspectives.[246] Finally, the parties were ultimately able to reach agreement on the total allowable catch and respective national allocations.[247]

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240 See, eg, A Yankov, Current Fisheries Disputes and the International Tribunal for the Law of the Sea, in M H Nordquist and J N Moore (eds), *Current Marine Environmental Issues and the International Tribunal for the Law of the Sea* (2001) 223, 230.

241 See *SBT (J&A)*, above n 2, [67].

242 Although this position cannot be overstated in view of the fact that the EFP was only set to continue for a few days beyond the date of the provisional measures order. M Hayashi, above n 40, 379.

243 A Serdy, above n 4, 715–16.

244 *SBT (J&A)*, above n 2, para 65. Serdy commented in this regard: 'This meant that, in future, legal constraints would have to be taken into account as a matter of course, no doubt an unwelcome intrusion into the hitherto largely self-contained world of the Japanese fisheries authorities.' Ibid. He further described this holding as 'punctur[ing] a cherished myth among policymakers'. Ibid.

245 Stephens, above n 66, 183.

246 W R Mansfield, above n 67, 624.

247 As Stephens has described, this decision was not without its difficulties. See Stephens,

For whales, the decision of the court or tribunal may provide the catalyst to break the impasse that has been reached between pro-whaling and anti-whaling states in the IWC. The judgment may provide some indication as to what is acceptable scientific research in terms of the number of species taken, which species may be targeted, or whether lethal or non-lethal methods are to be preferred.[248] These decisions may influence the negotiations that are ongoing in the IWC. The results of any litigation may feed into this process and if the court or tribunal adopts a diplomatic role in its judgment, there may be tools provided to both sides in advancing particular positions and enable a compromise finally to be reached.

Litigation regarding Australia's compulsory pilotage regime may provide considerable scope for a court or tribunal to act in its legal role (as defined above). On a specific level, there may be repercussions for the IMO in terms of how it designates PSSAs and approves Associated Protective Measures.[249] A court or tribunal may also shed light on the interrelationship of the UNCLOS with the work of the IMO. There would also be an opportunity for judicial consideration as to what is and is not allowed in regulating the transit passage of vessels through international straits. On a broader level, the litigation may support ongoing steps to ensure that littoral states are able to take preventive steps to minimise the risk of pollution to important maritime areas, even if it is in the face of altering traditional navigational rights.

In sum, litigation, and any resulting judgment, is often just one piece of a broader interaction between states. There is an obvious opportunity for courts and tribunals to play an important role in elucidating and elaborating on the law of the sea to stay apace of current developments.[250] A judgment may produce immediate effects in terms of requiring a state to pay compensation or provoking a statement from one of the parties that there was something flawed with the process warranting a challenge or non-compliance.[251] There are, however, clearly longer term implications both in relation to the statements of law being subsequently relied upon to determine future conduct and in providing a catalyst for further negotiations within an international forum and enhancement of the relationship between the states concerned.

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above n 66, 183–85.

248 See N Klein, above n 163.

249 Although this may be minimised given that the criteria have now been changed again. See Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas, res A.982(24) (2005) 6.

250 See M Gavouneli, 'From Uniformity to Fragmentation? The Ability of the UN Convention on the Law of the Sea to Accommodate New Uses and Challenges' in A Strati, M Gavouneli and N Skourtos, *Unresolved Issues and New Challenges to the Law of the Sea: Time Before and Time After* (2006) 205, 224–29 (arguing for this role in relation to the ITLOS).

251 See V Lowe, above n 235, 236–38.

(c) International environmental law

As a final matter, consideration may be given to the implications of disputes over marine resources for international environmental law, taking into account the law of the sea and international dispute settlement dimensions. As highlighted above, there are many uncertainties surrounding the interpretation and application of the UNCLOS. The extent that any elucidation may be achieved through litigation needs to be considered in light of the role that litigation has in broader dispute settlement processes. It should be asked whether litigation is a viable option for marine resource protection specifically, particularly given the range of factors that may or may not be taken into account in the course of an adjudication or arbitration. Sands has noted various positive aspects to the treatment of environmental issues before courts and tribunals:

> For the most part the recent decisions have played an important role in enhancing the legitimacy of international environmental concerns and confirming that global rules can play a significant role in contributing to the protection of shared environmental resources. International courts and tribunals have also acted to clarify the meaning and effect of treaty norms, to identify the existence of customary norms of general application, and to establish a more central role for environmental considerations in the international legal order.[252]

Sands's observation may warrant cautious optimism for the development of international environmental law, particularly as it relates to the marine environment, through litigation.

By contrast, Bilder has identified a range of reasons as to why states would seek to avoid litigation in relation to international environmental law:

- resort to legal proceedings could be seen as an unfriendly act, make negotiations more difficult, adversely affect the relations between the parties, or may give rise to legal or political retaliation;
- judicial proceedings tend to be long, complex and expensive;
- much of environmental law is uncertain and litigating risks and probable outcomes will be difficult to predict;
- environmental problems are likely to give rise to difficult evidentiary issues;
- traditional legal remedies may be inadequate or too late;
- many of the issues are highly technical and unsuitable for legal experts;
- complex regulatory or legislative policy issues are involved and may be difficult to analyse and fairly decide through judicial techniques;
- a losing state may refuse to comply and there are no means of enforcement;
- a judicial decision may be too inflexible and freeze the status quo, making subsequent adjustments very difficult;
- governments do not like to sacrifice control over events.[253]

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252 P Sands, above n 232, 313.

253 R B Bilder, 'The Settlement of Disputes in the Field of the International Law of the

While many of these points are extremely valid (and are true in relation to inter-state litigation irrespective of the subject matter), there are particular features of international environmental law that may permit litigation to serve a useful purpose in resolving differences related to the marine environment. In particular, the articulation or affirmation of particular standards of conduct and the opportunity to provide endorsement from an external source of decisions taken within an international organisation, as discussed below, indicate circumstances where the option may be warranted. Despite these potential advantages to pursuing litigation, there remain doubts as to whether these benefits may actually be achieved.

Australia's experience in litigating over marine resources has shown that a considerable question mark arises as to whether courts or tribunals will be willing to take steps to advance the protection and preservation of the environment in the context of litigation, particularly when the cases involving questions of international environmental law inevitably involve questions of general international law as well. There is a risk that other principles of international law may be emphasised, and opportunities to advance the development or elucidation of international environmental law will be lost. This situation has been seen in the *Gabčikovo-Nagymoros Case*,[254] the *Nuclear Weapons* advisory opinion,[255] as well as in the 1995 *Nuclear Tests Case*. In the latter, the dissenting judges were critical of the majority's failure to take a more progressive standpoint. Judge Weeramantry particularly lamented the lost opportunity:

> I regret that the Court has not availed itself of the opportunity to enquire more fully into this matter and of making a contribution to some of the seminal principles of the evolving corpus of international environmental law. The Court has too long been silent on these issues, and in the words of ancient wisdom, one may well ask "If not now, when?"[256]

Environment' (1975) 144 *Recueil des Cours: Collected Courses of the Hague Academy of International Law* 225. See also M A Fitzmaurice, above n 34, 352 (also setting forth reasons as to why states avoid litigation for international environmental law disputes).

254 *Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (Judgment)* (1997) ICJ Rep 7. But see M A Fitzmaurice, above n 34, 383–85. Fitzmaurice states, 'The Court recognized the importance of environmental considerations in interpretation of treaty provisions … In the view of the present author, the Court wisely did not specify any new norms and standards of international environmental law but left it to the parties to decide the matter by an agreement.' Ibid 385. See also S D Murphy, 'Conference on International Environmental Dispute Resolutions: Does the World Need a New International Environmental Court?' (2000) 32 *George Washington International Law and Economics* 333, 335 ('While those who support strong protections for the international environment may have been disappointed by these decisions of the international court, they were clearly principled decisions that sought to balance various competing concerns within the international legal system.').

255 *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226. 'Thus in general it appears that the Court accorded the priority to the laws of armed conflict over the rules of environmental law in cases of the use of nuclear weapons.' M A Fitzmaurice, above n 34, 391.

256 *Nuclear Tests (New Zealand v France)* [1995] ICJ Rep 288, 362 (Diss op

The relevant role for judges of international courts and tribunals in developing international environmental law raises fundamental questions concerning judicial process and judicial activism.[257] Lauterpacht's survey of the work of the Permanent Court of International Justice 'shows how novel situations are met by an application and interpretation of the law which, although based on the existing conventional and customary rules of law, is guided by a constructive consideration of the needs of the international community'.[258] This approach appears warranted today for international environmental law.[259] Taylor has commented that the *Nuclear Tests Cases* raised questions concerning the precautionary principle, the necessity of environmental impact assessments, state responsibility for environmental harm, and harm to the marine environment.[260] The views of the primary judicial organ of the United Nations may have proven helpful, if not pivotal, in developing and understanding the law in relation to these issues. The current track record does not inspire much confidence in this regard, so far.

Another difficulty with regards to the protection and preservation of the marine environment is that the processes undertaken by states, including litigation, may provide a diplomatic solution as between the states concerned but may not necessarily be the best outcome for the resource in question.[261] Similarly, Cameron

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Weeramantry) (internal citations omitted).

257 McWhinney characterised this debate as follows:

> The basic conflict goes to differing conceptions of the nature and scope of the judicial office and of the role of courts in community policy making, and to the differing approaches to the exercise of Court jurisdiction inherent in those conceptions. The appraisal of the legal merits of each of these must turn, ultimately, on political considerations such as the relative degree of common sense and realism involved, in each having regard to the necessarily dependent role of the courts, in general, as organs of community policy-making…

E McWhinney, 'International Law Making and the Judicial Process: The World Court and the French Nuclear Tests Case' (1975) 3 *Syracuse Journal of International Law and Commerce* 9, 33.

258 H Lauterpacht, *The Function of Law in the International Community* (1933) 124, cited in P Taylor, 'Testing Times for the World Court: Judicial Process and the 1995 French Nuclear Tests Case' (1997) 8 *Colorado Journal of International Environmental Law and Policy* 199, 214.

259 Craik takes this point of view, arguing:

> because the resolution to these conflicts will often affect more than the parties to the dispute, it is suggested that dispute settlement bodies must respond to community values and objectives. Accordingly, international environmental dispute settlement should be viewed from the perspective of fulfilling a public function, i.e., one that seeks to secure the wider interests of the relevant community, in addition to fulfilling its more narrow, private function of resolving a particular dispute between parties.

A N Craik, 'Recalcitrant Reality and Chosen Ideals: The Public Function of Dispute Settlement in International Environmental Law' (1998) 10 *Georgetown International Environmental Law Review* 551, 553.

260 P Taylor, above n 26, 218.

261 See Stephens, above n 66, 189**.** Craik has also been critical of "negotiated science" resulting from both legal and non-legal means of dispute settlement. See A N Craik, above n 259, 572.

has been critical of the consensus approach in the SBT Commission as one that may work for the states parties but has not necessarily improved the lot of the southern bluefin tuna.[262]

A similar concern could be voiced in relation to the whaling dispute. Even if the impasse is broken within the IWC, the final outcome of the negotiations between pro-whaling and anti-whaling states may be the resumption of commercial whaling even with strict criteria set forth. The history of cheating, despite international regulation,[263] reduces confidence that any safeguards may ultimately be sufficient. Indeed, the fact that Australia could claim that Japan is acting in bad faith in relation to its scientific program already shows that states may exploit the legal rules even if these actions are at the expense of the survival of the species concerned. In these circumstances, even if the litigation provided the catalyst to overcome the stalemated position in the IWC, the whales themselves may not necessarily benefit from the improved relations between the states concerned.

In support of the utility of litigation in the protection of marine resources, there is an alignment with the tendency to "proceduralise" matters as a particular feature of international environmental law. Koskenniemi has described this characteristic as follows:

> The strategy of environmental treaties is to treat the substance of the environmental conflict by referring its normative regulation elsewhere; into further cooperation between the parties, into unilateral measures or into cooperation within international organizations. The matter is *proceduralized* in order to make it amenable for diplomatic treatment.[264]

The very process of litigation, as one potential type of available procedure, may therefore be important for international environmental law in terms of the international publicity, diplomatic pressure and public opinion that is brought to bear on the dispute and may then prove influential in state decision-making.[265]

Koskenniemi has further observed that in the broader dimension in which international environmental law disputes are resolved:

> … the essential point is not the procedure but the outcome. In environmental conflicts, the law provides hardly more than very broad outlines for acceptable outcomes: it tells us that the relevant interests are those relating to the sovereignty or the States involved … and that whatever the outcome it should appear compatible with both States' political preferences. Balancing interests and the establishment of

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262 Cameron, above n 65, 278.

263 See C Carlarne, 'Climate Change – the New "Superwhale" in the Room: International Whaling and Climate Change Politics – Too Much in Common?' (2007) 80 *Southern California Law Review* 753, 770; A W Harris, 'The Best Scientific Evidence Available: The Whaling Moratorium and Divergent Interpretations of Science' (2005) 29 *William & Mary Environmental Law and Policy Review* 375, 396. See also A Darby, *Harpoon: Into the Heart of Whaling* (2008) 61–65.

264 M Koskenniemi, 'Peaceful Settlement of Environmental Disputes' (1991) 60 *Nordic Journal of International Law* 73, 78 (emphasis in original).

265 This effect has been noted in respect of the *Nuclear Tests* cases. See P Taylor, above n 26, 205 (discussing the 1995 case in this regard).

> 'regimes' are tasks of diplomatic persuasion and argument – in this, of course, any support that may be enlisted by invoking the rhetorical guise of rule-application may be welcome.[266]

This consideration of a wider dimension affirms the positive contribution that may be achieved through litigation over marine resources in terms of the existence of a process to be pursued, and not just be assessed by the substantive legal decisions that may be reached.

A further important feature of international environmental law that may prove useful for resolving questions regarding the marine environment via litigation is the large number of international organisations addressing these issues and the prevalent use of soft law. The plethora of fora available for discussion of international environmental law issues has the advantage of providing ample opportunity for a large number of states to reach agreement on what standards are appropriate for the protection and preservation of the environment.[267] When considering how particular norms of international law might evolve and to what extent that shift in understanding might be taken into account by a court or tribunal, the level of participation of states in the process and concomitant amount of support manifested in favour of a particular view may be critical.[268] Such consensus may be viewed as particularly desirable in relation to the UNCLOS and its provisions on the protection and preservation of the marine environment because of the emphasis that is commonly placed on preserving the integrity of the treaty as a whole.[269]

The use of soft law generated within these fora may provide a useful means of demonstrating the necessary consensus on a particular viewpoint and is a common

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266 M Koskenniemi, above n 264, 83.

267 Kelly has argued that these fora are the appropriate bodies for advancing international law as a matter of global governance, rather than the task being undertaken by an adjudicatory body. See generally J P Kelly, 'The Seduction of the Appellate Body: Shrimp/Sea Turtle I and II and the Proper Role of States in WTO Governance' (2005) 38 *Cornell International Law Journal* 459. Kelly argues the following in relation to the *Shrimp/Turtle* decision by the Appellate Body of the World Trade Organisation:

> I have an overriding concern that these decisions are empowering a weak and divisive form of lawmaking. Judicial activism is a poor process of lawmaking in a world of many different cultures, values, and interests. … Nor was there agreement on this new mode of international ordering that permits individual nations to set environmental and potentially other standards as a condition of market access. In a world of many different values and levels of economic development, important policy decisions on the appropriate balance of environmental protection and economic development, including which nations should bear the burden of international standards, are left to the vagaries of the domestic political arena in a few powerful nations.

Ibid 465.

268 See Boyle, above n 204*,* 571.

269 The General Assembly has emphasised this point in its annual resolutions on the law of the sea. See Oceans and the Law of the Sea, GA Res 63/111, UN GAOR, 63rd sess, 64th plen mtg, UN Doc A/RES/63/111 (2008) preamble. See also R R Churchill, above n 211, 104–05.

feature of international environmental law.[270] Given the difficult amendment process required under the UNCLOS for formal changes to that treaty,[271] soft law generated within intergovernmental organisations dealing with issues of the marine environment will provide an alternative tool for shaping the understanding of states' rights and duties under the law of the sea.[272] These characteristics of international environmental law, along with the need for the law of the sea to evolve and courts and tribunals providing a means to undertake this development, are arguably a positive dimension to the use of litigation in the protection of marine resources.

IV. Conclusion

As the demand for marine resources continues, along with recognition of the need to utilise these resources in a sustainable manner and afford necessary protection for this purpose, it is inevitable that disputes between claimants to those resources will arise. Bilder recognised this potential in the 1970s and was concerned that there should be means available to overcome these differences:

> It is probably beyond our powers to avoid all international environmental differences. Disputes are a normal part of the workings of any active and developing social system. They reflect the emergence of real problems, continuing processes of social change, and the inevitable readjustment of differing claims and interests. Our aim should be not wholly to repress this turbulence, but to provide approaches, procedures and facilities which will help the parties to deal with and resolve these underlying problems in effective and sensible ways. In particular, we should try to ensure that these differences do not become socially disruptive – distracting energies, impeding useful interactions, escalating into violence, or threatening international peace and stability.[273]

Litigation falls within the 'approaches, procedures and facilities' to be considered as one possibility for resolving disputes over marine resources, and is not necessarily one of last resort. As demonstrated in the discussion of Australia's past experience of litigation relating to marine resources, the litigation itself has been just one aspect of a broader dispute and provides an important mechanism for furthering the positions of the parties (by clarifying viewpoints, emphasising key interests, increasing pressure) as well as possibly improving the relationship of the parties.

There is also great potential for litigation to be used in the development of the legal principles at stake, which is consistent with the whole concept of litigation concerning the resolution of legal disputes. Even though litigation is virtually always a bilateral matter, the legal principles being scrutinised may be of relevance for a wider number of states. The normative development afforded by Australia's

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270 See, eg, P W Birnie and A E Boyle, *International Law and the Environment* (2nd ed, 2002) 24–27.

271 See generally Freestone and Oude Elferink, above n 210.

272 See Boyle, above n 204, 574 ('subtle evolutionary changes in existing treaties may come about through the process of interpretation under the influence of soft law').

273 R B Bilder, above n 253, 162.

experience in litigating over marine resources has been slight, however. This fact reflects the limitations of litigation in terms of the emphasis placed on consenting to jurisdiction and a traditional adherence to notions of judicial restraint. The latter seems to be a particular hallmark of the judicial development of international environmental law whereby the advances are often small compared to what may have otherwise been achieved through judicial examination. The failure for this potential to have been realised so far greatly tempers perspectives on the overall utility of litigation for the protection of marine resources.

When considering the future litigation in which Australia may be involved in relation to whaling and compulsory pilotage, the prospect for courts or tribunals to elucidate and develop the law relating to the protection of marine resources is clear. There is considerable scope within the law of the sea for third parties to articulate what generally accepted standards have been recognised as part of international law, to clarify the legal relevance of decisions made by states in international organisations, and to support soft law developments in organisations dealing with international environmental law issues. The endorsement by an international court or tribunal may have a positive influence on the protection of the marine environment in this regard, especially when it is reflective of the commonly held views of a majority of states. Unilateral state action may have its place in the international legal system, as it may provide the impetus for change in areas of law that are outdated or ambiguous and may ultimately reflect broad consensus and support on particular actions. [274] Political expediency and urgency may also dictate how changes are to be instigated and/or achieved.[275] Once there is litigation, a court or tribunal thereby has the option of contributing to the collective development of international law, rather than simply sanctioning an instance of unilateral action.

Overall, the prospect for litigation to provide an avenue for enhancement of the law of the sea relevant to the protection and preservation of the marine environment is undoubtedly considerable. However, as stated previously, whether the potential for this to be realised appears, from the past experience examined here, slight. Despite the possible avenues that may open up in the future, notably in the whaling and compulsory pilotage case studies concerning Australia, the situation remains unlikely to change in the future irrespective of the desirability of such change for the protection of the environmental resources at stake.

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274 See R R Churchill, above n 211, 142. Churchill otherwise considers that unilateral state practice is ‘not usually a desirable way to proceed’ because of the resulting uncertainty and controversy about the status of the law and should not be preferred over procedures that allow for consensus to be achieved. See ibid.

275 See Freestone and Oude Elferink, above n 210, 173 (‘Apart from legal considerations, questions of political expedience and the urgency to achieve certain changes will play a major role in choosing the modes for adjusting a treaty to changing circumstances.’)