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A Conflict of 'Public Interests' Between International Law and Domestic Law with Respect to Whaling and the Environment:

A Lesson from the *Kyodo Senpaku* Case

Taisaku IKESHIMA*

Ⅰ Introduction

In *Humane Society International Inc.* (HSI) *v. Kyodo Senpaku Kaisha Ltd.* (hereinafter the *Kyodo Senpaku* case)[1], Australian courts have provided a series of very controversial rulings in the cases concerning the exercise of jurisdiction in the maritime areas of its own claim in Antarctica[2]. In this case, the Federal Court, at the appeal stage, supported the argument made by the applicant, declaring that an act of whaling by a Japanese company in the 'Whale Sanctuary' in the Australian Antarctic Territory (AAT) established under the Environmental Protection and Biodiversity Conservation Act of 1999 (hereinafter the EPBC Act) breached the Act, and that future conduct against the Act shall be refrained[3].

In the first instance, the reasoning of the court that led to the dismissal of the applicant's argument heavily relied on the statement submitted by the Attorney-General of the Commonwealth as an *amicus curiae*[4] that, upon its decision, the court should take into consideration the political, diplomatic and international circumstances therein and, specifically, the futility of the enforcement of a judgment[5].

However, the Federal Court on appeal (full court of three judges)[6] dismissed the original decision on the ground that the discretion exercised by the judge in the first instance was erroneous. Consequently, in the retrial of 2008, the order of the Federal Court was issued on the basis of the applicant's argument, and the judge himself discarded his own original judgment[7].

The significance of the judgment of 15 January 2008 is, largely, twofold. Firstly, some domestic implications in terms of the exercise of unilateral domestic jurisdiction over the matter concerning environmental protection and the conservation of biodiversity; i.e., these are the points that are concerned with the significance of the EPBC Act in the Australian domestic legal system. Secondly, the *Kyodo Senpaku* case as a whole has some legal implications concerning the effects of a domestic legal system on international and diplomatic relations in light of the international legal system. On the one hand, the practical effect of the rulings in the case seems to have considerable impact upon the bilateral relations between Japan and Australia, and, on

the other, upon the international relations in the framework of the Antarctic Treaty System (ATS)[8] and the International Whaling Commission (IWC)[9].

II Some Domestic Jurisdictional Points in the *Kyodo Senpaku* Case

There are apparently various points for discussion in this case, but, due to lack of space, this chapter of the present paper focuses only on several important issues in the context of the domestic legal system of Australia[10].

1 The *Amicus Curiae* Statement[11]

In the first instance, the Attorney-General of the Commonwealth had an opportunity to make written submissions concerning issues relating to the exercise of the court's discretion. In short, the essence of those submissions may be that the subject matter of the proceedings was not a matter 'appropriate' for the Court but 'a matter best dealt with by the Executive Government'[12].

In its submissions, the *de facto* official standpoints of the then Australian government were clarified as follows: (1) the territorial sovereignty of Australia in the exclusive economic zone (EEZ) of the AAT has not necessarily been recognized by all members of the international society; (2) the lack of full support of the international society with respect to the Australian viewpoints should not be overlooked; (3) the relationship between Japan and Australia must be taken into account; (4) the official position of the Australian government and its long-term interest should be taken into consideration; and (5) the futility of the enforcement of a judgment should be of great importance. Thus, on the one hand, the Australian government in the original phase was cautious enough to consider '[n]on-recognition of Australia's claim to the AAT and associated EEZ by other States' as a 'key consideration to be taken into account in deciding whether or not to seek to enforce that legislation in relation to persons and vessels with the nationality of the States concerned'[13] and, furthermore, even to propose diplomatic solutions as 'generally more appropriate' ways in this case[14].

On these grounds, and due to the nature of 'the most careful and helpful

submissions'[15], the judge of the original instance found it 'non-justiciable'[16] to adjudicate the case. In other words, there seems to have been a diplomatic and political consideration made by the judge in the first phase of this case. However, the same judge, in the injunction phase, exercised his discretion not to take into account the particular feature of the 'political' questions involved in this case but to follow the reasoning of the appeal court with respect to the issue of granting leave. This is, for the judge, because political matters 'are irrelevant at the point of *final relief*'[17].

2 The Standing of the 1999 EPBC Act

The litigation is of a civil nature, requesting a prohibitive injunction under the 1999 EPBC Act. One of the most fundamentally controversial points of the injunction matter in this litigation comes from the standing of an applicant; i.e., under this Act, the door is wide open favourably to various types of persons, natural or legal, for an environmental litigation[18]. Under sections 475(1)(b) and (7) of the Act, an NGO such as the HSI may become an 'interested person' qualified to request a judicial court in Australia to issue an injunction.

There are some points that should be considered with respect to the standing. Firstly, a wide range of 'interested persons' may be qualified to apply for an injunction under this Act. The requirements under this section of the Act are less strict in terms of qualification. More and more environmental NGOs will be interested in the standing to block a possible offence under this Act. Secondly, the standing may also be given to a minister in accordance with political consideration. It can be construed that the Minister may have recourse to his or her own discretion depending on the nature of the matter. And thirdly, so far as a case is recognised to be based on 'public interest', it may be more likely to continue consequently at a judicial system. This factor was practically significant in the appeal phase, since the Federal Court, at the outset of its judgment, admitted that the appellant, HSI, was 'a public interest organisation'[19], and that the injunctive relief that the appellant sought was 'relief by way of statutory injunction under section 475 of the EPBC Act', i.e., 'a public interest injunction'[20]. The nature of this injunction was substantially focused and stressed in the majority

opinion of the judgment given in the appeal phase[21]. Rather, in its 'Reasons for Decision', this point overwhelmed the other points in rejecting the question of futility, which the original court had considerably taken into account in the context of political considerations[22]. Thus, in the 2008 Federal Court judgment, 'the public interest nature of the claim' was again visited and reinforced to support the majority opinion of the appeal court[23]. In this respect, the court deferred to the Parliament's will to enact the EPBC Act for the benefit of 'public interest' and in spite of 'the lack of wide international recognition of Australia's claim to the relevant part of Antarctica'[24].

3 Lack of Consideration for the Compatibility of the Act with International Law

The 1999 EPBC Act is, thus, widely open to any kind of criticism in terms of such legal points as the large category of the standing of an applicant and the unilateral establishment by the government of the 'Whale Sanctuary' in the 'disputed' Australian Antarctic Territory. There was, however, no occasion at any stage of the litigation of a pronouncement by the courts to consider the compatibility or conformity of the EPBC Act with international law[25]. It may be because the constitutional legitimacy of the Parliament's legislative power is not disputable before the Australian courts that, under Parliamentary legislation, the AAT is its own external territory whose maritime areas are part of its EEZ[26].

In the original trial, the *amicus curiae* statement maintains that the exercise of jurisdiction by a court over the conduct of a foreigner in the Australian EEZ would be contrary to international law, since the Australian Federation, in the sense of 'an act committed in the Australian Federation', is not purported to include its EEZ[27]. Rather, the initial court finds it 'unnecessary to decide whether the Antarctic EEZ is, or can be seen as "in the Commonwealth" ' and heavily relies on the Attorney-General's statement to dismiss the argument made by the applicant[28].

4 The Non-Appearance of the Defendant Before the Courts

The fact-finding in the Federal Court of 2008 is based on the inference from the

evidence produced solely by the applicant, since the defendant did not appear before the court throughout the whole procedure(29). Therefore, needless to say, the method and reasoning of the ruling is, naturally, lopsided.

However, from the beginning of the procedure it was apparent that the futility of the judgment and injunction order would reduce the value and effectiveness of the ruling since the defendant in this case is a foreign corporation based abroad. This is the main consideration concerning the question of futility that has been intensively considered, on the basis of the *amicus curiae* submissions, by the judge at the initial stage. But, what is a matter of curiosity is that the Federal Court, on appeal, did not hesitate to overturn the original order and to proceed(30).

It is noteworthy that the original phase of the proceeding paid attention to the lack in the 1999 EPBC Act of a relevant provision concerning the enforcement of a judgment, while the appeal court highlighted the purpose for a 'public interest injunction' in this litigation. For the latter court, as was discussed above, this type of litigation meets the objectives and purposes of enacting the Act, which advocates the promotion of the regulation and conservation of the areas and resources therein(31). Thus, the argument for the futility question was dismissed and the nature of a public interest litigation of this kind was overwhelmingly stressed. However, this aspect is only captured from a rather limited viewpoint of the Australian domestic legal system, while the aspect of 'public interest' in the international society was not at all reconsidered in the appeal phase and afterward. This may be partially understood in light of the domestic legal and judicial constraint in Australia, where no Parliament's legislation would be subject to judicial review in its judicial courts. In this sense, a question arises with regard to the meaning of 'public interest' in the context of international society, which will be addressed below.

Ⅲ　Some International Jurisdictional Points in the Case

1　The Relation Between the Australian EPBC Act and International Law

In 1999, Australia enacted the EPBC Act, which enables it to exercise its

jurisdiction in the 'whale sanctuary' in the EEZ of the Australian territory. Since then, the Australian Whale Sanctuary has been established under section 225[32] of the EPBC Act 'to protect all whales and dolphins found in Australian waters'[33]. This unilateral action of the enactment includes the establishment of a reserved area for whales in the EEZ of its own territory, including an external territory such as the Australian Antarctic Territory (AAT). Within the Sanctuary, killing, injuring or interfering with a cetacean is an offence and the perpetrator of such offences is subject to severe penalties under this Act[34].

The establishment of this kind of areas around its own maritime areas under this Act entails a possibility of the exercise of national jurisdiction over a foreigner and a foreign vessel without the consent of the state of nationality and of flag of that foreigner and that vessel, respectively. This type of unilateral actions may lead to a dispute between the states concerned since the actions would not be consistent with the relevant rules of international law. Specifically, whereas the Australian territorial claim has been categorically challenged by Japan, a non-claimant state, it is easy to say that the act of enactment of this type of law would invite an unwanted and unnecessary diplomatic conflict. Here, a question arises with regard to the legality of the EPBC Act under international law.

2 The Antarctic Treaty System (ATS)[35]

(1) The Presumption with Respect to the ATS

There has been a presumption that a whaling matter has not been dealt with at the meeting in the Antarctic Treaty System (ATS) from the beginning[36]. This is, to a certain degree, apparent in the historical background of the law-making process of the Treaty where the participant states were principally concerned with the peaceful use of Antarctica and the promotion of international cooperation in the scientific field[37]. Therefore, the peaceful and cooperative use of Antarctica under the ATS has been of foremost 'public interest' in the context of international society. In this sense, a number of writers have made a positive evaluation with respect to the function and effectiveness of the ATS[38].

As time goes by, some of the components of the ATS furnish themselves with relevant provisions that support the above-mentioned general attitude of the member states[39]. Among others, the most cardinal provision in the Antarctic Treaty is, needless to say, Article IV, which is now under consideration.

(2) The Significance of Article IV

It is often argued that Article IV of the Antarctic Treaty has 'frozen' the claim of territorial sovereignty over Antarctica[40]. However, the real meaning of the provision is not necessarily clear, and is widely open to many interpretations. And this may seem to be what the original signatory parties had intended in this clause.

Article IV provides as follows,

1. Nothing contained in the present Treaty shall be interpreted as:
   a. a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;
   b. a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;
   c. prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's rights of or claim or basis of claim to territorial sovereignty in Antarctica.
2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

Largely speaking, there are, among others, two influential doctrines with regard to the interpretation of the provision[41]. Firstly, according to a theory that argues freezing the rights and claims over territorial sovereignty in Antarctica, the claimant states may not exercise their rights. Secondly, according to a theory that supports the

idea that Article IV only has produced the situation where no territorial dispute may arise, there is no regulation with respect to the claimant states' exercise of their own rights over their own Antarctic territory.

However, the essential point regarding this provision is the 'agreement to disagree' for the purpose of the *status quo* with a view to maintain peace and security in Antarctica as a whole[42]. In other words, due to the conditions to which all the claimant, potential claimant and non-claimant states consented in Article IV, paragraph 1, all legal positions with respect to the territorial disputes can be maintained. Rather, what seems to be more problematic is the meaning of 'territorial sovereignty in Antarctica' in paragraph 2 of the same Article, which does not include maritime areas but only covers land territory because 'Antarctica' only denotes the land area of the territory in question[43]. This phrase seems to imply that it is not 'sovereign rights' that are used under the 1958 Geneva Convention on the Continental Shelf, for example[44]. It is often suggested that the second paragraph is purported to have an effect for the future of the state parties to the Treaty. In this sense, a question arises with regard to whether it is allowed for a claimant state, such as Australia, to establish an EEZ around its own claimed territory under the relevant provision[45]. Does this provision also prohibit the establishment of any kind of act like this with respect to the maritime area in Antarctica? This question may also be connected to the scope of application of the Antarctic Treaty, which is considered below.

(3) The Scope of Application of the Treaty[46]

The scope of the Antarctic Treaty is provided in Article VI, which reads as follows:

> The provisions of the present Treaty shall apply to the area south of 60° South Latitude, including all ice shelves, but nothing in the present Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area.

This Article is also pointed out as a very difficult clause to interpret, like Article

IV of the Antarctic Treaty[47]. Some writers interpret this provision to the effect that all the maritime areas around Antarctica shall be deemed as the high seas since there is no coastal state in Antarctica. But a question arises with regard to whether or not the Treaty applies only to the land area of Antarctica and not to its maritime area. In other words, is the sea surrounding the Antarctica the high seas? It is certain that the original signatory parties had in mind the fact that the 1958 Geneva Convention on the High Seas[48] had been adopted a year before the Antarctic Treaty.

However, the fundamental question that must be asked at the outset with regard to the relation between the law of the sea and Antarctica[49] is whether or not the baselines can be drawn in Antarctica, and, if affirmative, then how to do it, as is often addressed by writers but almost in vain. The coast is covered by ice and the legal status of ice (iceberg) has not yet been determined under international law[50].

It is worth noting that Article 1 of the 1972 Convention for the Conservation of Antarctic Seals provides that the Convention shall apply to the 'seas' below 60° South Latitude[51], and that Article 1, paragraph 1, of the 1980 Convention on the Conservation of the Antarctic Marine Living Resources (CCAMLR) provides that the Convention shall apply to 'the marine ecosystem in Antarctica'[52]. In addition, CCAMLR, taking an ecosystem approach[53], is responsible for all waters south of 60° South as well as areas north of 60° South that are within the Antarctic Convergence[54]. Therefore, one may presume that based on the historical development mentioned above, the practice is that the Antarctic Treaty System has been enlarging the scope of application of its components to the maritime area.

(4) The Question of Jurisdiction

In the ATS, the scope of application of 'jurisdiction' is based on the principle of nationality[55]. Particularly, observers, scientific personnel and members of staff accompanying any such persons are all under this principle[56]. Moreover, as is indicated in the *amicus curiae* submissions mentioned above, it has been the practice of the ATS that claimant states have consistently refrained from exercising their own rights of jurisdiction with respect to the maritime area in Antarctica[57]. In this respect,

is it allowed under international law for a claimant state to exercise its jurisdiction over a non-national in the adjacent maritime area of its Antarctic territory with a view to restricting whaling?

3 The Positions With Regard to Territorial Sovereignty

(1) Australia as a Claimant State[58]

The official standpoints of Australia with respect to this litigation can be seen in the *amicus curiae* submissions[59]. For Australia, 'the Antarctic Treaty in effect provides for *a balance between potentially competing interests*, by preserving the status quo as it was at the time of the Treaty's completion'[60].

Claimant states normally seem to interpret that the territorial sea is inherent for the territorial sovereignty of a claimant state. Since the establishment of the EEZ is not a claim of sovereignty but an act as a result of 'only sovereign rights for limited purposes'[61], Article IV, paragraph 2, of the Antarctic Treaty does not purport to prohibit the establishment of an EEZ. Thus, for Australia, the establishment of an EEZ in Antarctica is 'consistent with Article IV of the Antarctic Treaty'[62]. Those writers who support the position of Australia tend to develop this kind of arguments, differentiating a claim to territorial sovereignty in Antarctica and the actions of proclaiming an EEZ and delimiting a continental shelf in the Antarctic maritime area[63].

The Australian government used to hold, in practice, the idea that it would refrain from exercising its jurisdiction outside its own territory[64]. This is why, by the time the *amicus curiae* statement was submitted to the court in this litigation, it had 'not enforced its laws in Antarctica against the nationals of other States that are Parties to the Antarctic Treaty'[65]. But this policy was not sustained in the appeal court judgment. This is probably because the exercise of jurisdiction depends on a policy judgment made by the government concerned. In other words, former governments used to be more cautious about the question of Antarctica as well as the Antarctic Treaty provisions, while the current government does not pay so much attention to international relations or harmony.

(2)　Japan as a Non-Claimant State

Japan's stance with respect to this issue has been clearly expressed in the press release posted, after the injunction order was issued, on the official website of the Japanese Embassy in Canberra, as follows:

> 'Japan as well as considerable number of sovereign states have taken the position regarding the issue of sovereignty in Antarctica that any state's territorial sovereignty shall not be recognised. Recalling Article IV of Antarctic Treaty, Japan does not recognise any state's rights of or claims to territorial sovereignty in Antarctica and consequently does not recognise any state's rights over or claims to the water, sea-bed, and sub-soil of the submarine areas adjacent to the continent of Antarctica, including the establishment of EEZ.'(66)

Thus, upon the issuance of the injunction by the Federal Court, Japan also denied the judgment, 'since [it] is not in concordance with the principle of exclusivity of the Flag State'(67). For Japan, who does not recognise any claim of any state to Antarctica, the sea around Antarctica is the high seas, where only the flag state may exercise jurisdiction over its vessels(68). Accordingly, from the viewpoint of Japan, the action of legislation such as the EPBC Act cannot be allowed, let alone the practical exercise of enforcement jurisdiction, which has no legal foundation to be permitted under the Antarctic Treaty System(69).

4　The Transition of Australian Policy on Antarctica(70)

Here, some points are made with respect to the Australian policy towards Antarctica. Firstly, the most significant point is that Australia has not yet clarified its baselines from which it measures the width of the territorial sea around its own Antarctic Territory(71). Australia traditionally seeks an 'entirely orthodox' approach with respect to making maritime claims(72). Even though it established its EEZ in 1994(73), strictly speaking, the real limit of the EEZ has not yet been fixed. Moreover, it has avoided the exercise of its jurisdiction over a foreign national and a foreign vessel in the maritime area adjacent to the Antarctic Territory. Even after it enacted the

Whale Protection Act in 1980, which shall apply to a foreigner, a foreign vessel and a foreign aircraft, Australia, in practice, self-restrained from the exercise of jurisdiction under the Antarctic Treaty and the International Convention for Regulation of Whaling (ICRW).

Secondly, however, it appears that Australia had changed its policy on Antarctica by the end of the 1980s, when it started thinking more about the protection of the environment than anything else in the relevant area[74]. The 1999 EPBC Act has set a 'whale sanctuary' in the EEZ of the AAT and, by this enactment, has superseded the 1980 Whale Protection Act[75] in order to ascertain that whales shall be more firmly and widely protected under the jurisdiction of the coastal state. What is noteworthy with this new Act is that the margin for the operation of discretion by the government has been remarkably narrowed as a result of the enactment on the basis of the Parliament's intention.

Thirdly, this tendency of Australia towards pro-environmental protection can be understood when one turns eyes to the recent concerns with respect to the illegal, unreported and unregulated (IUU) fisheries in and around this maritime area[76] where Australia and France, in particular, have shown a very strong interest of their own nations[77]. This is why a series of cases on prompt release at the ITLOS must be considered in light of the recent trend that is specific to coastal states, such as the two abovementioned ones.

5 Evaluation

One may wonder whether the Australian action is in accordance with the spirit and practice of the Antarctic Treaty System or not. In particular, regarding the issue of whaling, is it allowed for a claimant state to exercise jurisdiction over a national of a non-claimant state such as Japan, who is an original signatory party of the Antarctic Treaty?

The policy of 'self-restraint' under the ATS has been in place for nearly half a century since its establishment[78]. This is why Australia herself has not exercised its jurisdiction up until the initiation of the present cases concerning the *Kyodo Senpaku*.

This is the most traditional and fundamental approach that has been taken by the Australian government, as is indicated in the *amicus curiae* statement(79). And it is well known that Australia has intentionally avoided exercising jurisdiction in the relevant area(80). This policy may be understood in light of the idea that Australia thought the policy of 'self-restraint' would be not only in its own interest but also in 'public interest', which should be achieved under the ATS.

However, soon after the Labour Party took over power as a result of victory in the 2007 general election, Australia overturned the traditional policy with regard to the Antarctic diplomacy and implemented what it had advocated particularly in relation to the environmental (or anti-whaling) movement. It is apparent that the new domestic political environment has been reflected directly in its domestic judicial courts' rulings. But this is very dangerous to international relations and, in particular, to the practice of the Antarctic Treaty System, which has been successfully operating with considerably wide public support(81).

In the ATS, it has been expected that any conflict between state parties will be settled through diplomatic consultation within and outside the regime so that it will not endanger the existence of the regime as well as the maintenance of international peace and security, which are traditionally among 'public interests' in its own regime. Against the reasoning and the background mentioned above, the present paper also shares the common view of some writers(82) who are rather critical regarding the injunction order and the views that are in favour of the order. In the *Kyodo Senpaku* litigation, 'public interest' in the context of the EPBC Act does not necessarily have a proper place in the milieu of international law, which, within the current framework of law, is designated by the ATS and the ICRW. For the benefit of the maintenance of peace and security in the Antarctica, both in its maritime and land areas, the Australian unilateral measures taken domestically do not seem to be consistent with international law.

Ⅳ Concluding Remarks

Will it be expected that a case in an Australian domestic court like the *Kyodo Senpaku* case will take place between the two countries when Japan resumes whaling? Or will Australia file a case against Japan at any international court or tribunal such as the ICJ and the ITLOS, contending that Japanese research whaling is contrary to international law?

As a claimant state, Australia has some peculiar features such as its geological propinquity or closeness, historical attachment and industrialised society of pro-ecosystem related to a large portion of the Antarctic Territory, comparatively speaking. Nowadays, environment protection and the conservation of biodiversity are, under the EPBC Act, recognised as Australia's 'public interests'. So far as the current administration is in power, it does not seem easy that the government will soon dramatically change its own position towards whaling and, anyhow, amend the EPBC Act in line with the former policy of less conflicting contents.

As for Japan, whaling is still regarded as its own cultural activity with long-standing tradition and national interest (i.e., Japan's 'public interest') in spite of the worldwide criticism towards its whaling practice[(83)]. The Japanese government assumes that the issue should be addressed either by bilateral diplomatic consultations or through an interstate mechanism concerning this matter, including the IWC and the ATS. Japan, as a non-claimant state, cannot follow the view of Australia, a claimant state, since the former must maintain its own legal standpoint with regard to Antarctica. Moreover, the two states have been facing some uncertain aspects of the science concerning whaling, the environment and biodiversity. This scientific uncertainty also seems to have a risk of endangering the bilateral relationship between the two countries, which, unfortunately at this time, may not be properly addressed and settled only by legal science[(84)].

Under these circumstances, what is expected is the wisdom of the two governments who are solely responsible for the maintenance of peace and security of Antarctica, including its adjacent maritime area. Against the background of the

development and function of the Antarctic Treaty System, it may well be said that, in international society, preserving such 'public interests' as the maintenance of peace and security of Antarctica should, for the benefit of mankind as a whole, prevail over ascertaining each country's 'public interests'. Thus, there should be more room for these two countries to reconsider and discuss the real 'public interests' concerning this case through diplomatic consultation(85) without taking recourse to unilateral measures for the enforcement of its own 'public interest'.

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(1) See *Humane Society International Inc. v. Kyodo Senpaku Kaisha Ltd.*, [2005] FCA 664 (27 May 2005) for the original case, and the final judgment issuing declaration and injunction can be found in [2008] FCA 3 (15 January 2008). All the relevant documents including the judgments of the courts have been conveniently collected at the following site; <http://www.envlaw.com.au/whale.html>.

(2) For case reviews, see Joanna Mossop, 'When is a Whale Sanctuary Not a Whale Sanctuary? Japanese Whaling in Australian Antarctic Maritime Zones', at <http://www.austlii.edu.au/nz/journals/VUWLRev/2005/34.html>; Ruth Davis, 'Commentaries Enforcing Australian Law in Antarctica: The HIS Litigation', at <http://www.austlii.edu.au/au/journals/MelbJIL/2007/6.html>; Donald K. Anton, 'False Sanctuary: The Australian Antarctic Whale Sanctuary and Long-Term Stability in Antarctica', at <http://ssrn.com/AbstractID=1117022>; Donald K. Anton, 'Australian Jurisdiction and Whales in Antarctica: Why the Australian Whale Sanctuary in Antarctic Waters Does Not Pass International Legal Muster and is also a Bad Idea as Applied to Non-Nationals', at <http://ssrn.com/AbstractID=1127852>.

(3) In this declaration, the court ruled that the Kyodo Senpaku had killed, injured, taken and interfered with Antarctic whales in the Australian Whale Sanctuary, breaking relevant sections of the EPBC Act. See *Humane Society International Inc. v. Kyodo Senpaku Kaisha Ltd.*, [2008] FCA 3 (15 January 2008).

(4) See *Humane Society International Inc. v. Kyodo Senpaku Kaisha Ltd.*, (2004) 292 ALR 551. Justice Allsop took an unusual step to invite the Attorney-General to make submissions on

this matter.

(5) See *Humane Society International Inc. v. Kyodo Senpaku Kaisha Ltd.*, [2005] FCA 664.

(6) See *Humane Society International Inc. v. Kyodo Senpaku Kaisha Ltd.*, (2006) 154 FCR 425.

(7) Justice Allsop was again in charge of the case at the Federal Court.

(8) The Antarctic Treaty System consists of the following major international instruments: the Antarctic Treaty of 1959; the 1972 Convention for the Conservation of Antarctic Seals; the 1980 Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR); the 1991 Protocol on Environmental Protection to the Antarctic Treaty; and various recommendations and measures that have been adopted in the meeting held under the above-mentioned agreements.

(9) This institution functions under the Convention for the Regulation of Whaling of 1946.

(10) In this respect, see also Rosalie Balkin, 'International Law and Domestic Law', in Sam Blay, Ryszard Piotrowicz, & Martin Tsamenyi, (Eds.), *Public International Law: An Australian Perspective*, Second Edition, Oxford University Press, 2005, pp. 115-140.

(11) This statement is titled 'Outline of submissions of the Attorney-General of the Commonwealth as Amicus Curiae' (hereinafter 'Outline') (in the Federal Court of Australia, New South Wales District registry, No. NSD 1519 of 2004).

(12) See [2008] FCA 3, at [16], p. 8.

(13) 'Outline', at [20], p. 4.

(14) *Id.*, at [21], p. 4.

(15) [2005] FCA 664, at [44], p. 13.

(16) *Id.*, at [38], p. 11.

(17) See [2008] FCA 3, at [45], p. 17 (emphasis added).

(18) Section 475 of the EPBC Act reads as follows,

> (1) If a person has engaged, engages or proposes to engage in conduct consisting of an act or omission that constitutes an offence or other contravention of this Act of the regulations:
>
> (a) the Minister; or
>
> (b) an interested person (other than an unincorporated organisation); or
>
> (c) a person acting on behalf of an unincorporated organisation that is an interested person;
>
> may apply to the Federal Court for an injunction.

Section 475 (7) also prescribes the meaning of interested person – organisations.

(19) See [2006] FCAFC 116, at [2], p. 1.

(20) *Id.*, at [18], p. 6.

(21) But see the dissenting opinion of Moore J on the question of futility of enforcement at [2006] FCAFC 116, at [48], p. 8.

(22) See [2006] FCAFC 116, at [21]-[23], pp. 7-8.

(23) See [2008] FCA 3, at [52]. Moreover, the court paid a full attention to the Parliament's 'complete recognition … of [public interest nature] type of claim'. *Ibid.*

(24) *Id.*, at [52].

(25) In this sense, this kind of inaction of the Court may appear 'unfortunate' to many international legal scholars. See Anton, 'Australian Jurisdiction', *supra* note 2, p. 7.

(26) As is pointed out by Anton (*Id.*, p. 7, note 36), one may particularly refer to *Horta v. Commonwealth* (1994) (181 CLR 183), where the Australian legislation retains its validity if the enactment of the action in question is based on the constitution.

(27) 'Outline', *supra* note 11, at [32], p. 6, and at [35]-[42], at pp. 6-7.

(28) For the primary judge, the submissions of the Attorney-General appear to 'have great force' and to be 'the most careful and helpful' ones. See [2005] FCA 664, at [42] and [44].

(29) See [2008] FCA 3, at [28]-[43].

(30) See [2006] FCAFC 116, at [13].

(31) *Id.*, at [14]-[24].

(32) Section 225 (1) of the EPBC Act reads as follows,

> (1) The Australian Whale Sanctuary is established in order to give formal recognition of the high level of protection and management afforded to cetaceans in Commonwealth marine areas and prescribed waters.

(33) See 'Australian Whale Sanctuary' at <http://www.environment.gov.au/coasts/species/cetaceans/sanctuary.html>.

(34) With respect to the penalty, section 229 of the EPBC Act deals with criminal responsibility in general.

(35) For the Antarctic Treaty System, see, for example, Gillian Triggs, (Ed.), *The Antarctic Treaty Regime: Law, Environment and Resources*, Cambridge University Press, 1987; Sir Arthur Watts, *International Law and the Antarctic Treaty System*, Grotius, 1992; Christopher C. Joyner, *Antarctica and the Law of the Sea*, Martinus Nijhoff Publishers, 1992; Francisco Francioni & Tullio Scovazzi, (Eds.), *International Law for Antarctica*, 2nd Edition, Kluwer Law International,

1996; Christopher C. Joyner, *Governing the Frozen Commons: The Antarctic Regime and Environmental Protection*, University of South Carolina Press, 1998; Taisaku Ikeshima, *Nankyoku Joyaku Taisei to Kokusaiho: Ryodo, Shigen, Kankyo wo Meguru Rigai no Chousei* (The Antarctic Treaty System and International Law: Accommodation of Interests Concerning the Territory, Resources and the Environment), Keio University Press, 2000 (in Japanese); Alex G. Oude Elferink & Donald R. Rothwell, *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction*, Martinus Nijhoff Publishers, 2001.

(36) See Watts, *International Law, supra* note 35, pp. 210-211. The lack of any particular provision concerning whaling in the Antarctic Treaty is also mentioned in 'Outline', *supra* note 11, at [11], p. 2.

(37) See Joyner, *Governing the Frozen Commons, supra* note 35, pp. 54-57.

(38) Almost all the writers cited in the present paper share the same view. Rather it is not easy to find a negative view on the evaluation of the ATS in the writings of publicists, in particular.

(39) See, for example, Article II (a) of the Agreed Measures of 1964 and Article 6 of the 1980 Convention on the conservation on the Marine Living Resources.

(40) See, for example, Ikeshima, *supra* note 35, pp. 54-57.

(41) See René-Jean Dupuy, 'Le Traité sur l'Antarctique', (1960) 6 *AFDI* 111, 123-125; Ikeshima, *supra* note 35, pp. 54-57.

(42) 'Outline' also stresses this point. See 'Outline', *supra* note 11, at [17], p. 3.

(43) Watts, *International Law*, *supra* note 35, pp. 132-133.

(44) *Id.*, p. 133.

(45) Churchill and Lowe maintain that 'the effect of article IV of the 1959 Antarctic Treaty (which prohibits new territorial claims in the Antarctic and the assertion or enlargement of existing territorial claims) would seem to be that EEZs cannot be claimed off territory lying within the area to which that Treaty applies, namely the area south of 60° South.' Robin R. Churchill & A. Vaughan Lowe, *The Law of the Sea*, Third Edition, Manchester University Press, 1999, p. 165.

(46) See, for example, Patricia Birnie, 'Effect of Article I of the Antarctic Treaty on Scientific Research', in R. Wolfrum, (Ed.), *Antarctic Challenge III*, Duncker & Humblot, 1988, pp. 105-120; Alfred van der Essen, 'The Arctic and Antarctic Regions', in R.-J. Dupuy & Daniel Vignes, (Eds.), *A Handbook on the New Law of the Sea*, Vol. I, Martinus Nijhoff Publishers, 1991, pp. 525-560, at p. 550.

(47) See Ikeshima, *supra* note 35, pp. 109-111.

(48) In particular, Article 2 of this Convention, which provides for freedom of the high seas, is relevant here.

(49) See, for example, Lucius Caflisch, 'L'Antarctique, nouvelle frontière san frontières?', in *Le droit international au service de la paix, de la justice et du développement, Mélanges Michel Virally*, A. Pedone, 1991, pp. 157-173 ; Joyner, *Antarctica and the Law of the Sea*, *supra* note 35, pp. 79-87; Watts, *International Law*, *supra* note 35, pp. 141-163 ; Stuart B. Kaye & Donald R. Rothwell, 'Southern Ocean Boundaries and Maritime Claims: Another Antarctic Challenge for the Law of the Sea?', (2002) 33 *ODIL* 359.

(50) With respect to this point, Joyner maintains that '[w]hat is needed is new international law that addresses more adequately the geophysical nature of ice and its legal relationship with the rest of the earth's environment'. Christopher C. Joyner, 'The Status of Ice in International Law', in Alex G. Oude Elferink & Donald R. Rothwell, *The Law of the Sea and Polar maritime Delimitation and Jurisdiction*, Martinus Nijhoff Publishers, 2001, p. 47.

(51) With respect to the flag state jurisdiction in this area, see Ikeshima, *supra* note 35, pp. 169-170.

(52) In this Convention, the new notion of the 'Antarctic Convergence' was introduced. And a new approach to include an environmental point of view within this conventional framework has been the trend for many years. In relation to this idea, see S.K.N. Blay, 'New Trends in the Protection of the Antarctic Environment: The 1991 Madrid Protocol', (1992) 86 *AJIL* 377.

(53) However, this approach also involves some scientific limitations. This is why 'CCAMLR has been hampered by a lack of scientific knowledge of the Antarctic ecosystem'. Churchill & Lowe, *The Law of the Sea, supra* note 45, p. 299.

(54) See Article I (1) and (4) of the CCAMLR.

(55) Article VIII, paragraph 1, of the Antarctic Treaty reads as follows,

> In order to facilitate the exercise of their functions under the present Treaty, and without prejudice to the respective positions of the Contracting Parties relating to jurisdiction over all other persons in Antarctica, observers designated under paragraph 1 of article VII and scientific personnel exchanged under subparagraph 1 (b) of Article III of the Treaty, and members of the staffs accompanying any such persons, shall be subject only to the jurisdiction of the Contracting Party of which they are nationals in respect of all acts or omissions occurring while they are in Antarctica for the purpose of exercising their functions.

'Nationality is also in practice the only accepted basis for regulating persons and activities in

Antarctica'. See Patricia Birnie & Alan Boyle, *International Law and the Environment*, Second Edition, Oxford University Press, 2003, p. 283.

(56) However, it is rightly suggested that 'general principles [concerning jurisdiction] will have to be resorted to when a national of one party commits and offence or civil wrong against a national of another party or of a non-party'. Ian Brownlie, *Principles of Public International Law*, Sixth Edition, Oxford University Press, 2003, p. 255.

(57) It is observed that '[a]lthough in principle there is nothing to stop states regulating their nationals when operating in other states, *in practice most states* will confine such cases of concurrent jurisdiction to serious criminal offences' . See Birnie & Boyle, *supra* note 55, p. 283 (emphasis added).

(58) See, for example, Gillian Triggs, *International Law and Australian Sovereignty in Antarctica*, Legal Books PTY Limited, 1986; House of representatives Standing Committee on Legal and Constitutional Affairs, 'Australian Law in Antarctica: The Report of the Second Phase of an inquiry into the Legal Regimes of Australia's External Territories and the Jervis Bay Territory', 1992, at <http://www.aph.gov.au/house/committee/laca/antarctica.pdf> ; Donald Rothwell, 'Antarctica and International Law', in Sam Blay, Ryszard Piotrowicz, & Martin Tsamenyi, (Eds.), *Public International Law: An Australian Perspective*, Second Edition, Oxford University Press, 2005, pp. 379-401.

(59) 'Outline of submissions of the Attorney-General of the Commonwealth as *Amicus curiae*' in No. NSD 1519 of 2004, *supra* note 11.

(60) *Id.*, at [8], p. 2 (emphasis added).

(61) 'Outline', *supra* note 11, at [4], p. 1.

(62) *Id.*, at [12], p. 3.

(63) See, for example, Julian Green, 'Australian maritime boundaries: the Australian Antarctic Territory', (2001) 25 *Mar. Pol.* 1, 4.

(64) It is noteworthy that the Australian government attached to its submissions to the Commission on the Limits of the Continental Shelf a note to request the Commission 'not to take any action for the time being', considering 'the special legal and political status of Antarctica under the provisions of the Antarctic Treaty, including its article IV'. See the following site: <http://www.un.org/Depts/los/clcs_new/submissions_files/aus04/Documents/aus_doc_es_attachment.pdf>.

(65) 'Outline', *supra* note 11, at [16], p. 3.

(66) See 'Press Release' of the Japanese government at the following site; <http://www.au.emb-

japan.go.jp/e_web/press_release/press_release_whaling_16-01-08.html>.

(67) *Ibid.*

(68) This explanation can also be found even in the amicus curiae submissions in this litigation. See 'Outline', *supra* note 11, at [13], p.3.

(69) Japan also expressed its position as a non-claimant state with respect to the Australian submissions to the Commission on the Limits of the Continental Shelf and at the same time requested the Commission not to make any action on the matter. See the following site: <http://www.un.org/Depts/los/clcs_new/submissions_files/aus04/clcs_03_2004_los_jap.pdf>.

(70) Besides those cited above, see, for example, James Crawford & Donald Rothwell, 'Legal Issues Confronting Australia's Antarctica', (1992) 13 *Australian YBIL* 53.

(71) A number of writers have referred to this point. See, for example, Stuart Kaye & Donald Rothwell, 'Australia's Antarctic Maritime Claims and Boundaries', (1995) 26 *ODIL* 195, 202-205; V. Prescott, 'Australia's Proclamation of an Exclusive Economic Zone (EEZ)', (1995) 10 *IJMCL* 95, 96-7; Green, *supra* note 63, 25 *Mar. Pol.* 1, 7; Donald Rothwell, 'Antarctic Baselines: Flexing the Law for Ice-Covered Coastlines', in Alex G. Oude Elferink & Donald R. Rothwell, *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction*, Martinus Nijhoff Publishers, 2001, pp. 49-68, at pp. 59-60.

(72) See Henry Burmester, 'Australia and the Law of the Sea' in James Crawford & Donald Rothwell, (Eds.), *The Law of the Sea in the Asian Pacific Region*, Kluwer Academic Publishers, 1995, pp. 51-64, at p. 52.

(73) See 'Seas and Submerged Lands Act 1973, as amended by the Maritime Legislation Amendment Act 1994' and 'Proclamation of 26 July 1994, under section 10B Seas and Submerged Lands Act 1973 and section 4 of the Acts Interpretation act 1901'.

(74) See 'Chapter 14 Australia and New Zealand', in Ben Boer, Ross Ramsay & Donald R. Rothwell, (Eds.), *International Environmental Law in the Asia Pacific*, Kluwer Law International, 1998, pp. 265-283.

(75) The following Acts were repealed by the EPBC Act: *National Parks and Wildlife Conservation Act 1975*, the *Whale Protection Act 1980*, the *World Heritage (Properties Conservation) Act 1983*, the *Endangered Species Protection Act 1992*, and the *Environment Protection (Impact of Proposals) Act 1974*. See also Rosemary Rayfuse, 'International Environmental Law', in Sam Blay, Ryszard Piotrowicz, & Martin Tsamenyi, (Eds.), *Public International Law: An Australian Perspective*, 2nd Edition, Oxford University Press, 2005, p. 373.

(76) As to the recent tendency, see, for example, Liza D. Fallon, & Lorne K. Kriwoken, 'International Influence of an Australian Nongovernment Organization in the Protection of Patagonian Toothfish', (2004) 35 *ODIL* 221; Erik J. Molenaar, 'Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the *Viarsa 1* and the *South Tomi*', (2004) 19 *IJMCL* 19; Donald Rothwell, 'Illegal Southern Ocean Fishing and Prompt Release: Balancing Coastal and Flag State Rights and Interests', (2004) 53 *ICLQ* 171. This aspect should not be neglected even within the framework of the Antarctic Treaty System. See also Taisaku Ikehsima, '*Shin-Kaiyoho Chitsujo no Seisei to Nankyoku no Kaiiki Kanri no Hatten* (Developing Antarctic Marine Management under the Evolving Law of the Sea: the Effect of "Creeping Jurisdiction" and Japan's Response)', *Waseda Global Forum*, No. 3, 2006, pp. 17-30 (in Japanese).

(77) See 'Treaty between the Government of Australia and the Government of the French Republic on cooperation in the maritime areas adjacent to the French Southern and Antarctic Territories (TAAF), Heard Island and the McDonald Islands (Canberra, 24 November 2003)', (2003) 19 *IJMCL* 545-553.

(78) See Arthur Watts, 'The Antarctic Treaty as a Conflict Resolution Mechanism', in *Antarctic Treaty System, An Assessment, Proceedings of a Workshop Held at Beardmore South Field Camp, Antarctica, January 7-13, 1985*, National Academy Press, 1986, p.72; Francisco Orrego Vicuña, *Antarctic Mineral Exploitation: The Emerging Legal Framework*, Cambridge University Press, 1988, p. 112.

(79) In the statement, due regard has been taken to the exercise of its own enforcement toward a foreign national and foreign vessel of a non-claimant, intending to a diplomatic settlement in accordance with international practice. See 'Outline', *supra* note 11, at [20]-[22].

(80) *Id.*, at [28].

(81) See Anton, 'Australian Jurisdiction', *supra* note 2, pp. 24-35; *Id.*, 'False Sanctuary', *supra* note 2, pp. 16-22.

(82) See, for example, Anton, Davis, and Mossop, *supra* note 2.

(83) As regards the Japanese viewpoints on whaling, see, for example, 'The Position of the Japanese Government on Research Whaling' at <http://www.mofa.go.jp/policy/q_a/faq6.html>; 'Center of the Sustainable Use of Marine Resources: Japan Whaling Section' at <http://www.jfa.maff.go.jp/whale/index.htm>; 'Japan Whaling Association' at <http://www.whaling.jp/qa.html>.

(84) With respect to the question of limits of law concerning the settlement of international disputes of this kind, see Taisaku Ikeshima, 'How Effective Will the Precautionary Principle Be

in the Future?: Its Role and Limits in the Settlement of Disputes', *Waseda Global Forum*, No. 4, 2007, pp. 7-16, at pp. 10-11.

(85)　It is noteworthy that, on 12 Jun 2008, Japan and Australia had a bilateral meeting in Tokyo, and that the following point was included in the abstract of the meeting; 'Recognising that Japan and Australia have different views on whaling, the two Prime Ministers decided to continue discussions *both bilaterally and at the IWC* so that the issue would not undermine the bilateral relationship'. See 'Japan-Australia Prime Ministers' Meeting', at <http://www.mofa.go.jp/region/asia-paci/australia/meet0806.html> (emphasis added).