

WHALES AND THE CLIMATE: THEY CAN SAVE EACH OTHER

by

SYDNEY BECK

A THESIS

Presented to the Department of General Social Science
and the Robert D. Clark Honors College
in partial fulfillment of the requirements for the degree of
Bachelor of Arts

May 2024

An Abstract of the Thesis of

Sydney Beck for the degree of Bachelor of Arts
in the Department of General Social Science to be taken June 2024

Title: Whales and the Climate: They Can Save Each Other

Approved: Alison Gash J.D., Ph.D. and Sarah Adams-Schoen J.D.
Primary Thesis Advisors

With the rapid acceleration of climate change in the international community, numerous efforts are being made to combat the increase in the global temperature and the declining health of the oceans. Both domestically and internationally lawsuits are being brought to the courts seeking relief for the various impacts of state practices. One state in particular that could be impacting the health of the ocean and the climate is Japan and its commercial and research whaling practices. While Japan is not the sole country still engaging in commercial and research whaling processes, Japan has caught the most international attention.

The World Wildlife Fund recently stated that whales have the ability to sequester thirty-three tonnes of carbon throughout their lives. Upon the death of the whale, the carbon sequestered stays within the whale for up to one thousand years. This makes whales crucial to the fight against climate change. Now, using UNCLOS as the foundation for a suit, which Japan is a party to, a state may allege that Japan has violated numerous rights and obligations of UNCLOS with respect to its duty to protect the marine environment. If the international courts have the legitimacy to effect lasting change in such a suit, there will be international recognition of climate change.

Acknowledgements

I would like to extend my gratitude to everyone involved in this process. My deepest thanks to my committee who have seen this project go through many phases and continue to provide feedback and encouragement. Thank you to my friends and family who have spent countless hours listening to me talk about whales.

Table of Contents

Background	7
Whales and their contribution to protecting the ocean	7
History and purpose of the International Whaling Commission	8
Japanese commercial whaling history and practice	9
History and purpose of the International Court of Justice	10
The passage of the United Nations Convention on the Law of the Sea	12
History and purpose of the International Tribunal on the Law of the Sea	12
Analysis of the Legitimacy of the International Courts	13
The legitimacy of the International Court of Justice and its ability to provide relief	13
The legitimacy of ITLOS and its ability to provide resolution in a climate suit	16
Climate and ocean law in the international courts	18
Analysis of Climate Litigation in International Courts	19
The IWC, the ICJ and international law's ability to regulate Japan's whaling	19
The Convention on International Trade of Endangered Species of Wild Fauna and Flora (CITES) as a method of patrolling Japan's commercial whaling activity	21
UNCLOS as a basis for ending commercial whaling in Japan	22
UNCLOS Article 194(1) as a basis to end Japanese commercial whaling	23
Japan's duty to protect and preserve the marine environment, generally, under Articles 192 and 193 as a basis to end its commercial whaling practices	26
Japan has violated the Principle of Cooperation under Article 197 of UNCLOS	30
Final Considerations of an International Tribunal in a suit against Japan	34
A lawsuit under UNCLOS to end commercial whaling as a form of judicial activism	34
Japan's potential withdrawal from UNCLOS	35
International invasion of state sovereignty and jurisdictional waters	35
Conclusion	37
Bibliography	39

List of Figures

Figure 1: Japan's Whaling Industry for 2024.	10
Figure 2: Initial Allocation of TAC for 2024 in Japan.	25
Figure 3: Japan's TAC for 2022 and 2023.	33
Figure 4: Visualization of whale migration patterns.	36

Whales and the Climate: They Can Save Each Other

Free Willy and he may save the world. In 2017, one whale completed the longest-known movement for his species.¹ Frodo, the male humpback whale, swam nearly 7,000 miles from the Mariana Islands to Mexico.² Frodo was on a seemingly odd journey. Scientists speculate Frodo embarked on this journey likely to find a mate.³ During his journey, Frodo also sequestered large amounts of carbon.⁴ So, as he migrated to find a mate, he helped clean the ocean in the process.

In a world with deteriorating climate health, scholars, lawyers, politicians, and the entire international community are searching for ways to battle climate change and the decline of the ocean's health. Scientists have now found that whales could play a crucial role in protecting the ocean by sequestering the carbon that would otherwise heat the atmosphere.⁵ However, Japan and other countries, such as Norway and Iceland, still engage in commercial whaling at a time when the majority of whale species are classified as endangered.⁶ Commercial whaling has left the international community at a roadblock in an effort to protect the marine environment through the protection of whales.

The story of whaling sheds light on international legal institutions and their capacity to regulate climate risks. Through a legitimate international tribunal, a state can bring a suit against Japan and end its commercial whaling practices alleging various violations of international

¹ Brianna Randall, *A humpback whale swam halfway around the world. His name is Frodo.*, Nat'l Geographic (Sept. 27, 2023). <https://www.nationalgeographic.com/animals/article/humpback-whale-longest-migration-record>.

² *Id.*

³ *Id.*

⁴ Sophia Ly, *3 Ways North Atlantic Right Whales Help Solve Climate Change: The right whale is a champion in the fight against climate change - one that we cannot afford to lose*, CLF.org, Feb. 8, 2021, <https://www.clf.org/blog/3-ways-right-whales-help-solve-climate-change/>.

⁵ Alexander Nicolas, *What makes whales fin-tastic climate champions?: Here's how they can be a nature-based buffer against the climate crisis*, WWF, December 20, 2023. <https://www.worldwildlife.org/stories/what-makes-whales-fin-tastic-climate-champions#:~:text=But%20this%20massive%20stature%20is,heating%20carbon%20from%20the%20atmosphere>.

⁶ Whale & Dolphin Conservation, *Whaling in Japan*, WDC.

climate law under the United Nations Convention on the Law of the Sea (UNCLOS).⁷ However, the international courts struggle to maintain legitimacy. The more established international tribunals, such as the International Court of Justice (ICJ), have more established legitimacy. In contrast, young courts, such as the International Tribunal on the Law of the Sea (ITLOS), are working to achieve legal, moral, and sociological legitimacy.

For the purposes of this paper, the focus will surround the Japanese commercial whaling industry and not the subsistence whaling practices of Japanese coastal communities.⁸ Part I explains the importance of whales to the marine environment, the practice of commercial whaling in Japan, and the legal protections under UNCLOS and international case law to ensure the continued health of whale populations. Part II then explores the legitimacy of various international courts. Part III analyzes past, present, and future legal arguments surrounding the protection of whales, specifically from commercial whaling practices in Japan. Although other countries are engaged in commercial whaling practices, Japan's commercial whaling practices are the focus of this paper because Japan has withdrawn from the International Whaling Commission (IWC) and has been the main subject of litigation in the international courts in the past ten years.⁹

I. Background

A. Whales and their contribution to protecting the ocean

⁷ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S 396. [hereafter UNCLOS]

⁸ Animal Welfare Inst., Japanese Whaling, AWI, <https://awionline.org/content/japanese-whaling> (last visited Nov. 11, 2023)

⁹ Int'l Whaling Comm'n, *Total Catches: Since the Moratorium came into place in 1985*, IWC, 2022. <https://iwc.int/management-and-conservation/whaling/total-catches>.

Whales play a crucial role in managing the amount of carbon dioxide in the ocean.¹⁰ During the course of its life, large species of whales, such as the North Atlantic Right Whale, can sequester almost thirty three tons of carbon dioxide.¹¹ This level of carbon dioxide sequestration is 1500 times higher than the amount of carbon dioxide a tree can absorb during the course of its life.¹² Even following their deaths, whales continue to keep the carbon they sequestered as they sink to the ocean floor.¹³ The International Monetary Fund (IMF) calculates that a single whale is worth at least two million dollars to the environment.¹⁴

Whale populations continue to decline as well as their general life expectancy.¹⁵ For example, Right Whales live for about sixty-five years, when, in the past, these whales lived for about seventy years with the potential to live up to 100 years.¹⁶ Many scientists speculate this decrease in life expectancy is due to human activities including entanglement in fishing gear, vessel strikes, climate change, and commercial hunting.¹⁷

B. History and purpose of the International Whaling Commission

To help ensure the safety and longevity of the whale populations, the International Whaling Commission was founded in 1946.¹⁸ Upon its founding, the IWC drafted the Schedule.

¹⁰ Sophia Ly, *3 Ways North Atlantic Right Whales Help Solve Climate Change: The right whale is a champion in the fight against climate change - one that we cannot afford to lose*, CLF.org, Feb. 8, 2021, <https://www.clf.org/blog/3-ways-right-whales-help-solve-climate-change/>.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Ralph Chami et al., *Nature's Solution to Climate Change: A strategy to protect whales can limit greenhouse gasses and global warming*, 2019 IMF Fin. & Dev. Mag. 34, 38.

¹⁵ Ly, *supra* note 6.

¹⁶ *Id.*

¹⁷ N. Am. Right Whale, NOAA Fisheries Species Directory, <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale> (last visited Oct. 22, 2023).; Whale and Dolphin Conservation, *Stop Whaling*, WDS, <https://us.whales.org/our-4-goals/stop-whaling/> (last visited Oct. 22, 2023).

¹⁸ Int'l Whaling Comm'n, *History and Purpose*, IWC, <https://iwc.int/commission/history-and-purpose> (last visited Oct. 22, 2023)

The Schedule lays out the legally binding principles that are necessary to regulate whaling in the international community.¹⁹ Some of these principles include catch limits by species and area, creating whale sanctuaries, protection of calves and their mothers, and restrictions on hunting methods.²⁰ The Schedule can be amended whenever the IWC meets to reflect the current health of whale populations.²¹ Many countries ratified The International Convention for the Regulation of Whaling creating the IWC in 1946, and many countries continue to join the IWC, thereby binding themselves to the Schedule today.²² Some of the parties to the treaty include the United States, Japan, Canada, Brazil, Russia, South Africa, and Australia.²³ However, in 2019, Japan left the IWC following numerous disagreements on the management of commercial whaling.²⁴

C. Japanese commercial whaling history and practice

Japan is not the only country to engage in commercial whaling. However, its history with commercial whaling and the IWC provides unique insight into the power of international whaling law. Japan's coastal communities have engaged in whaling for the past 400 years.²⁵ However, Japan began commercial whaling following World War II when Japan's supply of animal protein was in short supply.²⁶ Japan continued its whaling practices for the next forty years until the IWC issued a moratorium on commercial whaling in 1986.²⁷ Following the moratorium, Japan, Norway, and Russia all objected to the moratorium, which provided them

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Int'l Whaling Comm'n, Membership and Contracting Gov't, IWC, <https://iwc.int/commission/members> (last visited Oct. 22, 2023).

²⁴ Whale and Dolphin Conservation, Whaling in Japan, WDC, <https://us.whales.org/our-4-goals/stop-whaling/whaling-in-japan/> (last visited Oct. 22, 2023).

²⁵ Flynn Holm, *After Withdrawal from the IWC: The Future of Japanese Whaling*, 17 *The Asia-Pacific J.: Japan Focus* 1, 2 n.4 (2019).

²⁶ WDC, *supra* note 1.

²⁷ *Id.*

with an exemption to continue commercial whaling for the first three years that followed.²⁸ During these three years, Japan captured and killed approximately 5,500 whales.²⁹ In 1988, facing a lot of political pressure, Japan rescinded its objection to the moratorium, thereby subjecting it to the ban on commercial whaling.³⁰ In 2019, Japan withdrew from the IWC and began setting its own catch limits.³¹ As of 2024, Japan continues its commercial whaling practices by setting the total allowable catch limits for three species of whales.³²

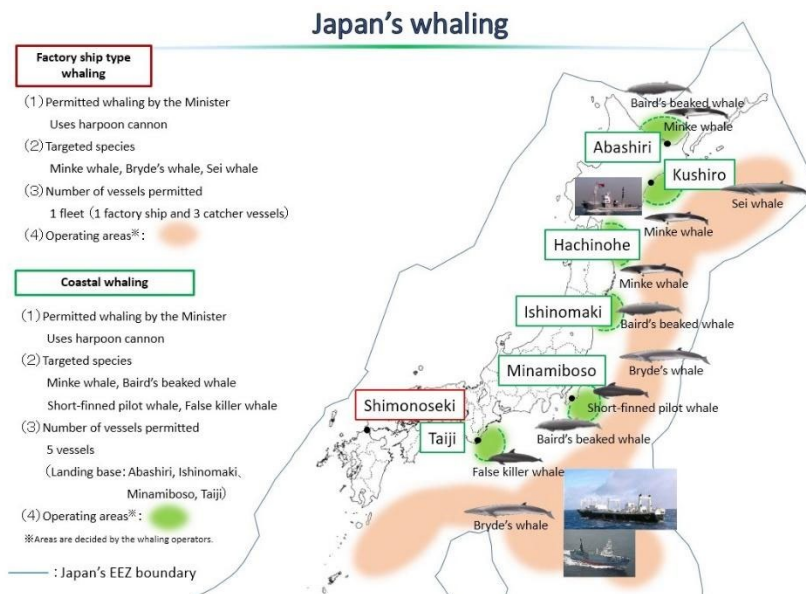


Figure 1. Japan's whaling industry for 2024.

D. History and purpose of the International Court of Justice

While Japan left the IWC in 2019, it is still subject to the authority of the International Court of Justice (ICJ), which was established in 1947 following a long, arduous history to create a forum to resolve international disputes.³³ However, the ICJ was preceded by and modeled after

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Flynn Holm, *supra* note 25, at 2.

³² *Id.*

³³ Int'l Ct. of Just., *History*, ICJ, <https://www.icj-cij.org/history>.

the Permanent Court of International Justice (PCIJ), which was formed under the League of Nations and entered into force in September of 1921.³⁴ The PCIJ was then revised in 1929 with the revisions entering into force in 1936.³⁵ The PCIJ helped create the vast body of international law that the ICJ draws from today.

In 1939, the PCIJ dissolved following the outbreak of war.³⁶ Following the end of World War II and the founding of the United Nations in October 1945, the states recognized the importance of having an international tribunal to resolve disputes. However, the UN decided to create a new international court for numerous reasons including states wanting an international court that represented the new world order following the end of WWII.³⁷ In May 1947, the first case was submitted to the ICJ.³⁸ The case was brought to the ICJ by the United Kingdom alleging that Albania laid mines in the Corfu Channel following an effort to clear the Channel of mines.³⁹

Presently, the ICJ consists of 15 judges, all of whom are elected by the General Assembly and the Security Council of the UN.⁴⁰ Each judge possesses the “qualifications necessary in their respective countries to be appointed to high judicial offices.”⁴¹ These judges have the opportunity to both hear disputes brought by states and issue advisory opinions, even when no state has brought a suit asking for such resolutions.⁴² The judges of the ICJ represent all forms of

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), Summary of the Case, 1947 (July 31).

⁴⁰ Joseph L. Daly, *Is the International Court of Justice Worth the Effort?*, Akron L. Rev., July 2015, at 391, 394.

⁴¹ *Id.*

⁴² *Id.*

states including both developed and developing countries as well as countries with capitalist systems and countries with socialist systems.⁴³ Since its inception in 1947 to the end of 2023, the ICJ has heard 192 cases and issued even more advisory opinions as requested by various states and sectors of the UN.⁴⁴

E. The passage of the United Nations Convention on the Law of the Sea

About thirty-five years after the creation of the ICJ, UNCLOS opened for signatures in Montego Bay, Jamaica on December 10, 1982.⁴⁵ UNCLOS provides an unprecedented “constitution of the oceans” that codified progressive, international law.⁴⁶ UNCLOS contains over 400 articles relating to both historic and new laws of the sea.⁴⁷ UNCLOS addresses numerous international issues regarding the rights and obligations of a state in its jurisdictional waters and rights of the high seas. Further, UNCLOS addresses a state’s rights to mineral resources beyond the jurisdiction of a state to a state’s obligation to prevent the pollution of the marine environment.⁴⁸

As of July 2023, 168 parties have ratified UNCLOS, and 14 states have signed the treaty but not yet ratified it.⁴⁹ Presently, Japan remains a party to UNCLOS even though it withdrew from the IWC, thereby binding itself to the duties and obligations of UNCLOS.

F. History and Purpose of the International Tribunal on the Law of the Sea

⁴³ *Id.*

⁴⁴ Int’l Ct. of J., *Cases*, ICJ, <https://www.icj-cij.org/history>.

⁴⁵ Tullio Treves, *United Nations Convention on the Law of the Sea*, Audiovisual Libr. of Int’l Law: UN. (Dec. 10, 1982), <https://legal.un.org/avl/ha/uncls/uncls.html>.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Int’l Seabed Auth., *The United Nations Convention on the Law of the Sea at 40*, ISA, <https://www.isa.org/jm/unclos-at-40/>.

Because Japan is still a party to UNCLOS, it is subject to the jurisdiction of the International Tribunal on the Law of the Sea (ITLOS).⁵⁰ ITLOS first began in 1996 as a tribunal with 21 judges specializing in interpreting disputes falling under UNCLOS and other treaties conferring jurisdiction upon ITLOS.⁵¹ Each judge must have specialized knowledge of the law of the sea in order to be a part of the tribunal.⁵²

ITLOS is then separated into specialized chambers including the Chamber for Marine Environment Disputes.⁵³ This chamber is a subset of nine judges tasked with addressing disputes regarding the protection and preservation of the marine environment.⁵⁴ Moreover, ITLOS and its specialized chambers are able to deliver injunctive relief following the adjudication of a case.⁵⁵ Because Japan is a party to UNCLOS, and is, therefore, subject to the jurisdiction of the tribunal, ITLOS, generally, or the Chamber for Marine Environment Disputes would be able to hear a case in which another state party is alleging a marine environment issue against Japan. The decision would rest with the state party bringing the suit, and its preference in having a nine-member panel of specialized judges or an eleven-member panel of judges with more generalized knowledge of UNCLOS.

II. Analysis of the Legitimacy of the International Courts

A. The legitimacy of the International Court of Justice and its ability to provide relief

Following the formation of the ICJ out of the aftermath of WWII, many questions arose about the legitimacy of this tribunal and its ability to effect lasting change in the international

⁵⁰ UNCLOS art. 287/288, Dec. 10, 1982, 21 U.N.T.S 6.

⁵¹ Anastasia Telesetsky, *The International Tribunal on the Law of the Sea: Seeking the Legitimacy of State Consent* Ch. 7, 174-215 (Nienke Grossman et al eds., rev. ed. 2018).

⁵² *Id.* at 176.

⁵³ *Id.* at 177.

⁵⁴ *Id.*

⁵⁵ *Id.*

community. Because the ICJ has no true policing body, the enforcement of its judgments can be difficult to measure.⁵⁶ However, the ICJ does have the authority to seek the policing power of the UN Security Council to compel states to abide by its decision.⁵⁷ While this method of enforcement may pose political issues, recent studies have shown that, of the cases that have made it to the judgment and post-judgment phases, the majority of states have complied with the determinations of the court without the state bringing suit seeking the intervention of the Security Council.⁵⁸

Presently, scholars recognize three criteria of legitimacy that a tribunal or court must meet in order for the tribunal to be found legitimate.⁵⁹ The court must have legal, moral, and sociological legitimacy to be seen as a respected tribunal capable of effecting lasting change.⁶⁰ Legal legitimacy is found through the legal norms that created the respective institution.⁶¹ In the case of the ICJ, the legal legitimacy is found through the UN's Charter and the statutes of the ICJ, which parties of the UN have agreed to follow. Because the state parties to the UN ratified the treaties and some state parties have consented to the compulsory jurisdiction of the ICJ, legal legitimacy is achieved for the ICJ.⁶² The Vienna Convention specifically vested the ICJ with mandatory jurisdiction to hear disputes regarding *jus cogens*⁶³, which are the norms that govern

⁵⁶ Daly, *supra* note 40, at 396.

⁵⁷ *Id.*

⁵⁸ Aloysius P. Llamzon, 18 *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, *Eur. J. of Int'l L.* 815, 825 n.5 (2017).

⁵⁹ Roger-Claude Liwanga, *Demystifying the Legitimacy of International Tribunals: Case Study of the International Court of Justice and Its Decisions on Armed Activities in the Congo*, 35 *Emory Int'l L. Rev.* 413, 419 n.3 (2021).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See, Int'l Ct. J., *Treaties*, ICJ, <https://www.icj-cij.org/treaties> (last visited April 16, 2024).

⁶³ *Jus cogens*, Legal Info. Inst., https://www.law.cornell.edu/wex/jus_cogens#:~:text=Jus%20cogens%2C%20or%20compelling%20law,English%20term%20%E2%80%9Cperemptory%20norm%E2%80%9D (last visited April 15, 2024).

customary international law.⁶⁴ Presently, there are 166 state parties to the Vienna Convention.⁶⁵ By ratifying the treaty, the state parties consent to the jurisdiction of the ICJ. Moreover, the ICJ has dealt with many prestigious cases in the past, and now have several treaties, conventions, and declarations conferring jurisdiction upon it in numerous types of disputes.⁶⁶

The next basis for establishing a legitimate court is moral legitimacy. Moral legitimacy is established when the actions of the court are found to be morally justifiable or respect-worthy.⁶⁷ In this aspect, the ICJ has historically struggled.⁶⁸ For example, in 2006 the ICJ heard the case of *Armed Activities on the Territory of the Congo*.⁶⁹ While the ICJ correctly applied its jurisdictional statute and dismissed the case due to lack of jurisdiction, scholars and humanitarians criticized the ICJ because it left victims of human rights violations without an avenue for recourse.⁷⁰ For the ICJ to achieve full moral legitimacy, it must show its ability to seek recourse for the victim party in a case. However, some scholars suggest that current trends demonstrate more state compliance with the judgments following the litigation of a suit.⁷¹ With this trend, there is potential for the ICJ to increase its moral legitimacy as more states comply, at least in part, with the judgment of the court.

The final component in the three-part test for establishing the legitimacy of the court is sociological legitimacy. For a court to gain sociological legitimacy, the court must have a

⁶⁴ Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

⁶⁵ *Id.*

⁶⁶ *ICJ, supra* note 44.

⁶⁷ Liwanga, *supra* note 56, at 419.

⁶⁸ *Id.* at 421.

⁶⁹ *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. 128 (Feb. 3).

⁷⁰ Liwanga, *supra* note 60, at 420.

⁷¹ Llamzon, *supra* note 59, at 824.

majority of the litigating states accepting and respecting the court's authority.⁷² Similarly to moral legitimacy, there is a growing respect for the ICJ. More states are seeking relief from the ICJ and complying with the judgment of the court.⁷³

Finally, even if a court does not meet all three of these components, the ICJ could still have legitimacy simply on its merits and necessity in the world order. Judge Taslim O. Elias of the ICJ discussed numerous questions in the international community still needing resolution including human rights, the law of the sea, and aspects of the new world economy.⁷⁴ Each of these questions presents an issue that only seems suitable for an international judicial body because an international judicial body can achieve more independent, unbiased resolutions than the courts of individual states.⁷⁵ An international judicial body provides states with the opportunity to be heard in front of judges from varying states minimizing the potential for state prejudice a single judge may have when adjudicating a case with the judge's home state as a party.

While recognizing the optimism required when determining whether the ICJ is a legitimate forum, Daly states that justice is "as dear to mankind as is the idea of peace among people."⁷⁶ In the era of potential nuclear war and a destabilization of the climate system, optimism must be considered when determining whether the ICJ has the legitimacy to hear a potentially contentious case regarding commercial whaling and its connection to the climate.

B. The legitimacy of ITLOS and its ability to provide resolution in a climate suit

⁷² *Id.* at 823.

⁷³ Hannah Sweeney, *The International Court of Justice: A Year in Review*, Lawfare, November 6, 2023.

⁷⁴ Daly, *supra* note 40, at 406.

⁷⁵ *Id.*

⁷⁶ *Id.*

ITLOS may prove to be the most effective forum for adjudicating allegations that Japan has breached UNCLOS in its commercial and research whaling processes. While ITLOS is much younger than the ICJ, it is proving to be an important forum in the interpretation of UNCLOS and other marine-related treaties that confer jurisdiction upon the court. When applying the three factors of international court legitimacy to ITLOS, the analysis is very similar to the ICJ.

ITLOS has the legal legitimacy required as UNCLOS confers jurisdiction upon the court in matters involving the laws of the sea. ITLOS's moral and sociological legitimacy face similar struggles to the ICJ, but nevertheless could achieve both forms of legitimacy with more cases presented to the court and states complying with the judgments of the court.

ITLOS is a relatively new international tribunal. The judges tend to look to the extensive case law created by other international tribunals including the ICJ when writing advisory opinions and judgments for cases presented before the court.⁷⁷ Presently, thirty-two cases have been submitted to ITLOS since its inception.⁷⁸ Seven of these cases have been submitted to the ICJ in the past five years.⁷⁹ ITLOS also has special expertise with UNCLOS as it is the judicial body created by UNCLOS for the purpose of explaining and interpreting the language of the treaty.⁸⁰ Thus, because ITLOS has jurisdiction conferred upon it by UNCLOS to be the preferred tribunal for disputes regarding the laws of the sea and the growing number of disputes being submitted to ITLOS, it has the legitimacy and power to effect change in a potential lawsuit regarding commercial whaling if it is the chosen forum for such suits.

⁷⁷ Telesetsky, *supra* note 52, at 180

⁷⁸ *ICJ*, *supra* note 40.

⁷⁹ *Id.*

⁸⁰ *Id.*

However, some parties to UNCLOS have refused to comply with the orders of the tribunal. For example, China continues to refuse to comply with the orders of the tribunal regarding its practices in the South China Sea.⁸¹ Enforcement of the orders has also proven difficult because China is a member of the U.N. Security Council, which is the enforcement mechanism for compliance with the orders of ITLOS.⁸² Presently, Japan is also a member of the UN Security Council, so it may be less likely to comply with an ITLOS order. But, if the state bringing the suit waits until 2026, Japan will no longer be on the security council because it only holds an elected seat on the council for two years.⁸³

C. Climate and ocean law in the international courts

With the international courts already struggling to maintain legitimacy, the introduction of contentious climate law into these spaces may only continue to decrease the perceived legitimacy of the international court. This suggests that these tribunals may not be the space to bring a contentious suit against Japan for violations of its duty to protect the marine environment.

However, the international courts may be the only places in which such a global issue can garner the necessary international attention. Moreover, climate change is a global issue and having one uniform body interpreting climate and ocean law could prove beneficial in clarifying how states should follow international climate agreements and treaties relating to their duties to the ocean.

Further, climate and ocean-related treaties are numerous. Having two bodies to interpret each of these treaties creates a more uniform body of law without giving too much power to any

⁸¹ The South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China), Order, 2016 P.C.A. Rep. 16 (July 12) at 1.

⁸² Llamzon, *supra* note 59, at 823.

⁸³ UN Security Council, *Current Members*, UNSC, (last visited April 15, 2024). [https://www.un.org/securitycouncil/content/current-members#:~:text=The%20Council%20is%20composed%20of,Ecuador%20\(2024\).](https://www.un.org/securitycouncil/content/current-members#:~:text=The%20Council%20is%20composed%20of,Ecuador%20(2024).)

one state. For example, UNCLOS, the Paris Agreement, the Kyoto Protocol, and the UN Framework Convention on Climate Change all lay out the ways in which states are to manage themselves regarding their relationships with the climate and the oceans. However, the language arising from these treaties is vast and vague, so having international tribunals dedicated to interpreting such language will likely prove beneficial in enforcing and interpreting each of these agreements.⁸⁴

The judges composing ITLOS and the Chamber on Marine and Environmental Disputes also hold unique knowledge regarding UNCLOS and the customary international law of the sea, as opposed to the judges of individual states. Moreover, the judges composing these panels are from varying states, so no one state will have the power to dictate the interpretation of an UNCLOS or the outcome of a case. Thus, while the international courts may not be the obvious place to flex a contentious climate lawsuit, both the ICJ and ITLOS currently have enough legitimacy to hear such cases and take steps to ensure lasting judgments in such a case against Japan and potential cases arising against other whaling states such as Norway and Iceland.

III. Analysis of Climate Litigation in the International Courts

With climate change presenting a global issue, having one specialized body interpreting international climate and ocean laws and treaties could prove the most successful in affecting global change to better protect the oceans and climate. States, in the past, have tried to bring various suits against Japan both to the ICJ and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) Standing Commission regarding both its commercial and research whaling and have been met with general success.

A. The IWC, the ICJ, and international law's ability to regulate Japan's whaling

⁸⁴ Lorenzo Cotula & Camilla More, *How the International Court of Justice can advance climate action*, Int'l Inst. for Env't and Dev't Resch. Rep., October 2023, at 1.

Generally, the IWC is able to adequately regulate whaling activity in the international community. However, in the case of Japan, the IWC has been unable to regulate its commercial activity both during Japan's time as a party to the IWC and presently not as a party to the IWC. During its time as a party to the IWC, Japan continued to whale commercially under the guise of scientific research.

In the case of *Whaling in the Antarctic*, the ICJ, in a 12-4 decision, was able to show the power of the IWC in international court by finding that Japan had violated the rules of the IWC and ordering Japan to cease its whaling activity. The ICJ was able to take jurisdiction of the case pursuant to Article 36(2) of the Statutes of the International Court of Justice.⁸⁵ In this suit, Australia made three main allegations against Japan. First, Australia alleged Japan had misinterpreted the purpose of the IWC.⁸⁶ Second, Australia alleged Japan had overstepped the power given to them in Article VIII of the Schedule when it granted the commercial whaling permits.⁸⁷ Finally, Australia alleged that, even if Japan had complied with its permit powers to permit commercial whaling for scientific and research purposes, the execution of the permits was not in compliance with the requirement that the whales captured and killed be for scientific and research purposes.⁸⁸

When determining the outcome of the case, the ICJ chose to place the most focus on whether Japan took the whales for research and scientific purposes when it authorized the permits to engage in commercial whaling in the Antarctic.⁸⁹ Ultimately, the court determined that Japan's use of lethal force to catch the whales and the sale of the whale meat resulting from

⁸⁵ Stat. Int'l Ct. Just. § 36(2) (1945).

⁸⁶ *Sonia E. Rolland*, *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, 108 Am. J. Int'l L. 496, 497 (2014).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

the catch violated the scientific purpose provision laid out in the International Convention on the Regulation of Whaling.⁹⁰

However, following this case, the IWC and ICJ were unable to stop Japan's commercial whaling as it has since withdrawn from the IWC and made a declaration stating that it will no longer recognize the ICJ's compulsory jurisdiction regarding disputes relating to the research, conservation, management, or exploitation of living resources of the sea.⁹¹ Even though Japan's withdrawal from the ICJ was met with international backlash, a majority of the Japanese people appear to have been in favor of the withdrawal with fifty-three percent of Japanese people saying the withdrawal was good or very good.⁹² Thus, one could conclude that neither the IWC nor the ICJ could convince or pressure Japan to comply with the International Convention on the Regulation of Whaling or rejoin the IWC. This suggests that other avenues of climate and ocean law must be pursued in order to end Japan's commercial and research whaling practices.

B. The Convention on International Trade of Endangered Species of Wild Fauna and Flora (CITES) as a method of patrolling Japan's commercial whaling activity.

With Japan officially out of the IWC, whale preservation groups and the international community continue to search for other means to compel Japan to stop its commercial whaling. One method is CITES. The goal of CITES is to ensure that the international trade of fauna and flora does not threaten the survival of any of these species.⁹³

However, the Standing Commission of CITES heard arguments to end Japan's commercial whaling. In 2018, the commission found that Japan had violated the CITES

⁹⁰ *Id.*

⁹¹ Japanese Ministry of Foreign Affairs, ICJ and Japan, Japan MOFA, <https://www.mofa.go.jp/files/100028922.pdf> (last visited October 23, 2023).

⁹² Michael Kolmas, *When Shaming Fails: Japanese Withdrawal from the International Whaling Commission*, Austr. Inst. of Int'l Aff. (Nov. 18, 2020).

⁹³ *Id.*

prohibition of the trade of endangered species.⁹⁴ While Japan argued the capture of the whales was only for scientific purposes, the commission concluded that the quantity of whale meat was more than was necessary for scientific purposes.⁹⁵ The commission also noted that Japan had not tested any of the 12 metric tons they had caught for scientific purposes.⁹⁶ As a result of this dispute, Japan agreed, and has since complied, with the order to only capture whales in its jurisdictional waters and avoid selling the whale meat in international markets.⁹⁷ Thus, if CITES were to be used again in the future as a basis to stop or limit Japan's commercial whaling, the Standing Commission would have to see evidence that Japan has whaled outside of its jurisdictional waters or sold their whale in the international meat market.

C. UNCLOS as a basis for ending commercial whaling in Japan

With the IWC and CITES no longer being viable options to use as a basis to end Japan's commercial whaling practices, new, creative avenues must be pursued in an effort to stop or limit Japan's commercial whaling industry. UNCLOS and climate law can be used as a basis to end commercial whaling for the health of the marine environment and the climate in general.⁹⁸

Moreover, the ocean absorbs large amounts of heat and anthropogenic CO₂, which slows the warming of the global temperature.⁹⁹ Much of this anthropogenic CO₂ is a result of human pollution of the air and water.¹⁰⁰ For example, the melt of the Arctic Ocean ice in the summer

⁹⁴ Chris Wold, *Japan's Resumption of Commercial Whaling and Its Duty to Cooperate with the International Whaling Commission*, 35 J. Env'tl L. & Lit. 87, 96 (2020).

⁹⁵ *Id.*

⁹⁶ *Id.* at 97.

⁹⁷ *Id.*

⁹⁸ *The Law of the Sea and Climate Change: Solutions and Constraints* ch. 3 (Elise Johansen et al., 2021).

⁹⁹ United Nations: Climate Action, *The ocean - the world's greatest ally against climate change*, UN. (last visited April 14, 2024). <https://www.un.org/en/climatechange/ocean-%E2%80%93-world%E2%80%99s-greatest-ally-against-climate-change>.

¹⁰⁰ US Env'l Prot. Agency, *Sources of Greenhouse Gas Emissions*, EPA. (last visited April 14, 2024).

subjects the east coast of Canada and the US to exceptionally severe winters.¹⁰¹ A whale's role in this pollution is the sequestration of the CO₂; therefore, when removing whales from the ocean, Japan is contributing to the increasing amount of non-sequestered CO₂ in the ocean, which has deleterious effects to both the climate and the ocean.

i. UNCLOS Article 194(1) as a basis to end Japanese commercial whaling

Article 194 (1) of UNCLOS states:

States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.

Further expanded upon in *The Matter of the Chagos Marine Protected Area Arbitration* presented to the Permanent Court of Arbitration (PCA), which involved a dispute over the designation of a marine protected area by the United Kingdom around the Chagos archipelago, Article 194(1) is not limited to measures strictly aimed at controlling pollution, but it also extends to measures focusing primarily on conservation and the preservation of ecosystems.¹⁰²

First, a state bringing suit against Japan for its commercial and research whaling practices could demonstrate that Japan has violated Article 194(1) by showing that the removal of whales from the ocean violates its duty to reduce and control pollution of the marine environment. As previously discussed, whales sequester large quantities of CO₂ during their lives and then continue to keep this CO₂ sequestered even after their

¹⁰¹ *Id.*

¹⁰² In the Matter of the Chagos Marine Protected Area Arbitration (Mauritius v. U.K and Northern Ireland), Award, 2015 P.C.A. Rep. 15 (March 18) at 580.

deaths.¹⁰³ By removing these whales, the amount of non-sequestered CO₂ in the ocean will continue to increase, leading to heavier pollution of the ocean.

Further, with the expansion of Article 194(1) to include the conservation and preservation of ecosystems, a strong claim could be made regarding the deleterious effects of Japan’s commercial whaling industry on the marine ecosystems. For the year of 2024, Japan’s Ministry of Foreign Affairs set the total allowable catch for three species of whales.¹⁰⁴ The Ministry stated that the total allowable catch is 142 Minke Whales, 187 Bryde’s Whales, and 25 Sei Whales.¹⁰⁵

Initial Allocation of TAC for 2024

	Catch limit (Note 1)	TAC (Total Allowable Catch) (Note 2)	Initial Allocation of TAC (Note 3)		Government reserves (Note 4)	Number of bycatch (Note 5)	[For reference] Fisheries Agency of Japan					
			Factor y ship type whaling	Coastal base type whaling			Initial Catch Quota	Government reserves	Number of bycatch	Catch total		
Minke whale	167	142	Factor y ship type whaling	0	0	25	Factor y ship type whaling	0	27	31	Factor y ship type whaling	0
			Coastal base type whaling	142			Coastal base type whaling	109			Coastal base type whaling	88
Bryde's whale	187	187	Factor y ship type whaling	150	37	0	Factor y ship type whaling	150	37	0	Factor y ship type whaling	187
			Coastal base type whaling	0								
Sei whale	25	25	Factor y ship type whaling	24	0	0	Factor y ship type whaling	24	0	1	Factor y ship type whaling	24

¹⁰³ Ralph Chami et al., *supra* note 14, at 35.

¹⁰⁴ Ministry of Foreign Aff. of Japan, *Japan and the Management of Whales*, MOFA Japan.

¹⁰⁵ *Id.*

Figure 2. Initial Allocation of TAC for 2024 in Japan

While Japan has acknowledged its commitment to the sustainable practice of commercial and research whaling, the Ministry of Foreign Affairs has not yet acknowledged the crucial role whales play in conserving and protecting the marine environment. With Japan allowing the catch of 354 whales in total, Japan is removing the ability of these whales to sequester about 11,682 tons of carbon in the ocean.

Moreover, because whales sequester CO₂, which reduces the amount of non-sequestered CO₂ in the ocean, other marine species benefit from this sequestration. For example, many coral species have been impacted by the increase in CO₂ in the ocean.¹⁰⁶ Coral reefs are being bleached and are dying due to over-acidification. Similarly, crustaceans in the ocean are facing a similar fate because CO₂ dissolves their shells and skeletons, thus reducing hatching success.¹⁰⁷

Finally, to the extent Japan is economically reliant on whaling, Japan may be less likely to comply with an order stopping or limiting its practice of commercial whaling—especially to the extent the judgment comes from a body that lacks clear enforcement powers—the International Fund for Animal Welfare suggests that the economic success of Japan may not be deeply intertwined with its commercial whaling industry.¹⁰⁸

¹⁰⁶ Nat'l Marine Sanctuaries and National Oceanic and Atmospheric Admin., *Coral bleaching and ocean acidification are two climate-related impacts to coral reefs*, NOAA.

¹⁰⁷ EcoWatch, *What are the harmful effects of ocean acidification on marine life, and why is climate change to blame?*, World Econ. F.

¹⁰⁸ Int'l F. of Animal Welfare, *The Econ. of Japanese Whaling*, IFAW (last visited April 15, 2024). <https://www.ifaw.org/resources/the-economics-of-japanese-whaling>.

- ii. Japan's duty to protect and preserve the marine environment, generally, under Articles 192 and 193 as a basis to end its commercial whaling practices

In addition to alleging a violation of Article 194(1) of UNCLOS in attempting to end Japan's commercial and research whaling practices, a state could allege a violation of Japan's duty to protect and preserve the marine environment under Articles 192 and 193 of UNCLOS. Article 192 states:

States have the obligation to protect and preserve the marine environment.

Further, Article 193 states:

States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.

ITLOS has further expanded upon these obligations to include that the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment.¹⁰⁹ In *The Bluefin Tuna Cases*, ITLOS determined that Japan had violated its duty to protect and preserve the marine environment by over-exploiting Bluefin Tuna without the cooperation of Australia and New Zealand in determining how to successfully remove the Bluefin Tuna without exhausting its population.¹¹⁰

In the present case, while Japan has committed to the sustainable practice of commercial whaling, Japan can no longer engage in these practices without violating their obligation to protect and preserve the marine environment because of the now crucial role whales play in preserving and protecting the marine environment. As

¹⁰⁹ Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Case Nos. 3&4, Order of 27 August 1999, 280 at 295.

¹¹⁰ Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Case Nos. 3&4, Request for the Prescription of Provisional Measures Submitted by New Zealand, 3 at 6.

discussed above, whales are now even more crucial to the health of the marine environment in light of the human activities that are emitting high levels of carbon dioxide into the atmosphere and that are subsequently sequestered in the ocean. New scientific data must emerge, determining just how crucial whales are to the rest of the marine ecosystem.

If a claim of this nature against Japan does not succeed, a state could, however, seek an advisory opinion from either the ICJ or ITLOS asking the court to determine whether or not the removal of whales from the ocean now violates their obligation to protect and preserve the environment in light of emerging scientific evidence of a whale's role in the marine ecosystem.

Further, while Article 193 provides a state the sovereign right to exploit its natural resources, it does not operate independently of Article 192. Japan and other whaling nations may therefore claim whales are a natural resource they have the right to exploit.

This claim is subject to at least some limitations. Under Articles 192 and 193, ITLOS observed that while general treaty terms may be broad, they carry a “presumption that they were meant to follow the evolution of the law and the corresponding meaning attached to the expression by the law at any given time.”¹¹¹ Thus, because of this interpretive rule, the phrase “to protect and preserve the marine environment” should accordingly be construed to follow current international law frameworks as laid out in the Paris Agreement and other relevant climate law.¹¹² Under the Paris Agreement, there is a

¹¹¹ Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, 2009 I.C.J. Rep. 9 (July 13).

¹¹² Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, (Commission of Small Island States), Case No. 31, Written Statement of the Commission of Small Island States on Climate Change and International Law of June 2023 1, 2.

general acknowledgement that the global temperature rising two degrees Celsius or more would be catastrophic to the climate and the Earth.¹¹³

Further, the proceedings brought by the Commission of Small Island States on Climate Change also support this interpretation. In its brief submitted to ITLOS, COSIS alleged that Article 192 provides a general obligation of states to protect and preserve the marine environment. Further, there is a customary obligation under Article 192 interpreted by ITLOS case *Nuclear Weapons* that determines states have a general obligation to ensure that “activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.”¹¹⁴ Under this interpretation, Japan must reevaluate its whaling programs to ensure it only has activities that respect the environment. Most likely, this reevaluation will result in the end of the commercial whaling industry.

Japan’s commercial whaling industry must be created under a framework that respects the rights of surrounding states to have healthy marine environments. Concludingly, the interpretation of Articles 192 and 193 must therefore recognize the evolving understanding that the global climate will become irreparable after a 2-degree Celsius increase in temperature, so states must take every step practicable to protect the health of the marine environment, and, subsequently, the climate.

Because Japan probably would be successful in arguing that whales are natural resources, enforcement of the requirement that exploitation of natural resources align

¹¹³ Paris Agreement, Dec 12, 2015, 1 U.N. Doc. FCCC/CP/2015/L.9/Rev.1.

¹¹⁴ *Id.* at 108.

with the duty to protect and preserve the marine environment is the next step in claiming Japan has violated its duty to protect and preserve the marine environment. While the total allotted catch requirements are likely in compliance with Japan's environmental policies, the taking of whales may violate its duty to protect and preserve the marine environment. As discussed in relation to Article 194(1) of UNCLOS, whales are crucial to the marine environment in the present era due to the rising global temperature and its effects on the ocean. Thus, similarly to the argument made regarding Article 194(1), the opposing state has the ability to argue that whales should not be removed from the ocean on a commercial or research level because that process is in direct opposition with their duty to protect, preserve, and conserve the marine environment.

Even though the international courts tend to show deference to a state's sovereign waters and the waters within its Exclusive Economic Zone (EEZ), the opposing state can overcome this deference by demonstrating the global impacts of climate change and the importance of whales sequestering carbon in the ocean.

With this knowledge, a determination of whether Japan's actions violate UNCLOS should consider the importance of whales in maintaining the health (including the temperature, acidity, and salinity) of the ocean and the correlation between the health of the ocean and the climate. If a state or interested parties in an advisory opinion proceeding could successfully show this correlation, ITLOS, the ICJ, or another international tribunal may have a basis to order Japan to cease or rollback its commercial whaling practices.

- iii. Japan has violated the Principle of Cooperation under Article 197 of UNCLOS

The next argument a state could make to end the commercial practices of Japan is alleging a violation of the Principle of Cooperation under Article 197 of UNCLOS.

Article 197 of UNCLOS states:

States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.

While this duty is expressed in UNCLOS, which Japan is a party to, it is also a recognized obligation of customary international law, specifically the customary international law of cooperation. ITLOS also determined a case on point regarding the extent of a state's duty of Cooperation. In the *MOX Plant* case, Ireland alleged that the United Kingdom violated Article 197, among other Articles, in relation to its treatment of radioactive materials and their discharge into the marine environment, specifically the discharge of plutonium into the Irish Sea.¹¹⁵

In its order, ITLOS determined that the United Kingdom had breached its obligation under Article 197 of UNCLOS and had failed to cooperate with Ireland in the protection of the marine environment by refusing to share information with Ireland and refusing to carry out environmental assessments of the impacts on the marine environment by the MOX Plant.¹¹⁶ Moreover, ITLOS determined that the duty of cooperation is fundamental in the prevention of pollution of the marine environment under Part XII of UNCLOS and under customary international law.

¹¹⁵ The *MOX Plant Case* (Ireland v. United Kingdom), Judgment of 2006, 4657 at 4683.

¹¹⁶ *Id.* at 4687.

While a state may have a more difficult time successfully arguing that Japan violated this Article, potential still exists for an international tribunal to find that Japan has violated the Principle of Cooperation. The state alleging the violation would have to show that Japan has failed to cooperate with other states by continuing to engage in commercial and research whaling. While the IWC is still a dominant force in the regulation of whaling in the international community, Japan is not bound by the IWC, and it is unlikely that a state would be successful in arguing that the IWC's regulation of whaling has become customary international law. Customary international law "results from a general and consistent practice of states that they follow from a sense of legal obligation."¹¹⁷ In this case, the regulation of commercial and research whaling has likely not met this criterion because there are 88 parties to the Commission of the 195 countries in the world.¹¹⁸

Thus, the alleging state would need to move to the next argument under the Principle of Cooperation alleging that Japan has not formulated and elaborated their procedures for commercial and research whaling on a scale that is consistent with UNCLOS for the protection and preservation of the marine environment.

¹¹⁷ *Customary International Law*, Legal Information Institute, https://www.law.cornell.edu/wex/customary_international_law#:~:text=Customary%20international%20law%20results%20from,for%20visiting%20heads%20of%20state. (last visited April 14, 2024).

¹¹⁸ Int'l Whaling Comm'n, *Membership and Contracting Governments*, IWC.

Initial allocations of TAC for 2023

	Catch limit (Same as those of 2022)	TAC* (Total Allowable Catch)	Initial allocation of TAC		Government reserves	Number of bycatch**
			Factory ship type whaling	Coastal base type whaling		
Minke whale	167	136	0	109	27	31
			0	109		
Bryde's whale	187	187	150	0	37	0
			0	0		
Sei whale	25	24	24	0	0	1

* TAC has been set for Whaling since 2022 due to the amendment of the Fishery Act.

** Average over the past 5 years(2017-2021)(minke whale) or actual number for 2021(Bryde's and sei whales)

Initial allocation of TAC and Catch total for 2022 (For reference)

	Catch limit*	Initial allocation of TAC		Government reserves	Number of bycatch**	Catch total in 2022
		Factory ship type whaling	Coastal base type whaling			
Minke whale	167	0	107	26	34	0
		0	107			58
Bryde's whale	187	150	0	37	0	187
Sei whale	25	25	0	0	0	25

* Revised in 2022(minke whale) and same as those of 2021(Bryde's and sei whales)

** Average over the past 5 years(2016-2020)(minke whale) or actual number for 2020(Bryde's and sei whales)

Figure 3. Japan's TAC for 2022 and 2023

Moreover, the complaining state would need to show that Japan's commercial and research whaling practices are not compatible with the current health of the ocean and the climate and that the whales being taken from the ocean are affecting the protection and preservation of the marine environment. This argument is possible if the complaining state can show that the removal of whales in the ocean has an impact on the health of the marine environment. While the beginning of this discussion exists in this argument, the alleging state would need to inquire with scientists as to the effects that Minke, Bryde's, and Sei whales have on the marine environment and gather specific data to present to the court. While this may appear as a long, arduous process, it is necessary to consider in an effort to slow down climate change on an international level.

IV. Final considerations of an international tribunal in a suit against Japan

After discussing the potential legitimacy issues with the international tribunals and potential legal claims a state could bring against Japan, some counterarguments still exist regarding the ability of a state to bring such claims to an international tribunal against Japan.

A. A lawsuit under UNCLOS to end commercial whaling as a form of judicial activism

First, the international community may see this lawsuit as a form of judicial activism. Judicial activism refers to the “practice of making rulings based on their policy views rather than their honest interpretation of the current law.”¹¹⁹ While judicial activism is generally understood in the context of an individual state’s courts, the principle carries into the international sphere and could affect the outcome and compliance with potential lawsuits against Japan and similar litigation following the outcome of this case.

In a potential suit, Japan and other states such as Norway and Iceland could see this type of lawsuit as a form of judicial activism because of the lack of relief elsewhere in the international community in relation to climate law and the advancement of improving the health of the climate and marine environment by using the judicial process. However, the analysis to determine whether a claim will be seen as judicial activism partly hinges on the analysis of whether the alleging state has a meritorious claim and actual relief could be sought. In this case, there are numerous meritorious claims as outlined above regarding Japan’s violation of UNCLOS, and there are many forms of relief that the international courts could pursue, including a judgment ordering the reduction or ending of commercial and research whaling, environmental impact assessments on the removal of whales from the ocean, or an international, cooperative negotiation regarding the effects of commercial and research whaling on a

¹¹⁹ *Judicial Activism*, Legal Info. Inst., https://www.law.cornell.edu/wex/judicial_activism (last visited April 14, 2024).

commercial level on other neighboring states to Japan. Thus, potential claims alleging a violation of UNCLOS by Japan could likely overcome complaints of judicial activism based on the merits of the claim and the possible relief the international courts could deliver.

B. Japan's potential withdrawal from UNCLOS

Another issue that may arise out of a potential suit against Japan is Japan's withdrawal from UNCLOS. However, Japan's withdrawal from UNCLOS is unlikely given the rights and abilities offered by UNCLOS. UNCLOS provides parties with "stable maritime zones, including a maximum outer limit for territorial seas [and] codifies innocent passage [and] transit passage."¹²⁰ Because Japan is an island state with all ocean boundaries, UNCLOS provides it with protections for its territorial seas and its rights on the high seas, which is crucial to much of Japan's travel and commerce. But as demonstrated by the United States, it is possible for a state to benefit from most of the provisions of UNCLOS that the state values even if the state is not a party to the treaty. The US does this by asserting the provisions that it likes are customary international law.

C. International invasion of state sovereignty and jurisdictional waters

The final critique of a potential lawsuit against Japan is the argument that an allegation such as the arguments presented overreaches the international tribunal's power and creates a state sovereignty issue. International tribunals are very hesitant to render judgments that affect a state's sovereignty as is evident by the extensive jurisdictional sections of ITLOS' and ICJ's opinions discussing why the international tribunal has jurisdiction over the issue. In such a case as the one presented, ITLOS and ICJ will likely undergo a very scrutinizing analysis to ensure that it has jurisdiction over the issues presented before it.

¹²⁰ Navy Jag Corp., *The Convention on the Law of the Sea*, Judge Advocate General's Corps.

Moreover, the capture of whales is not an issue that solely affects Japan. Whales are migratory beings that travel thousands of kilometers throughout the course of their lives.

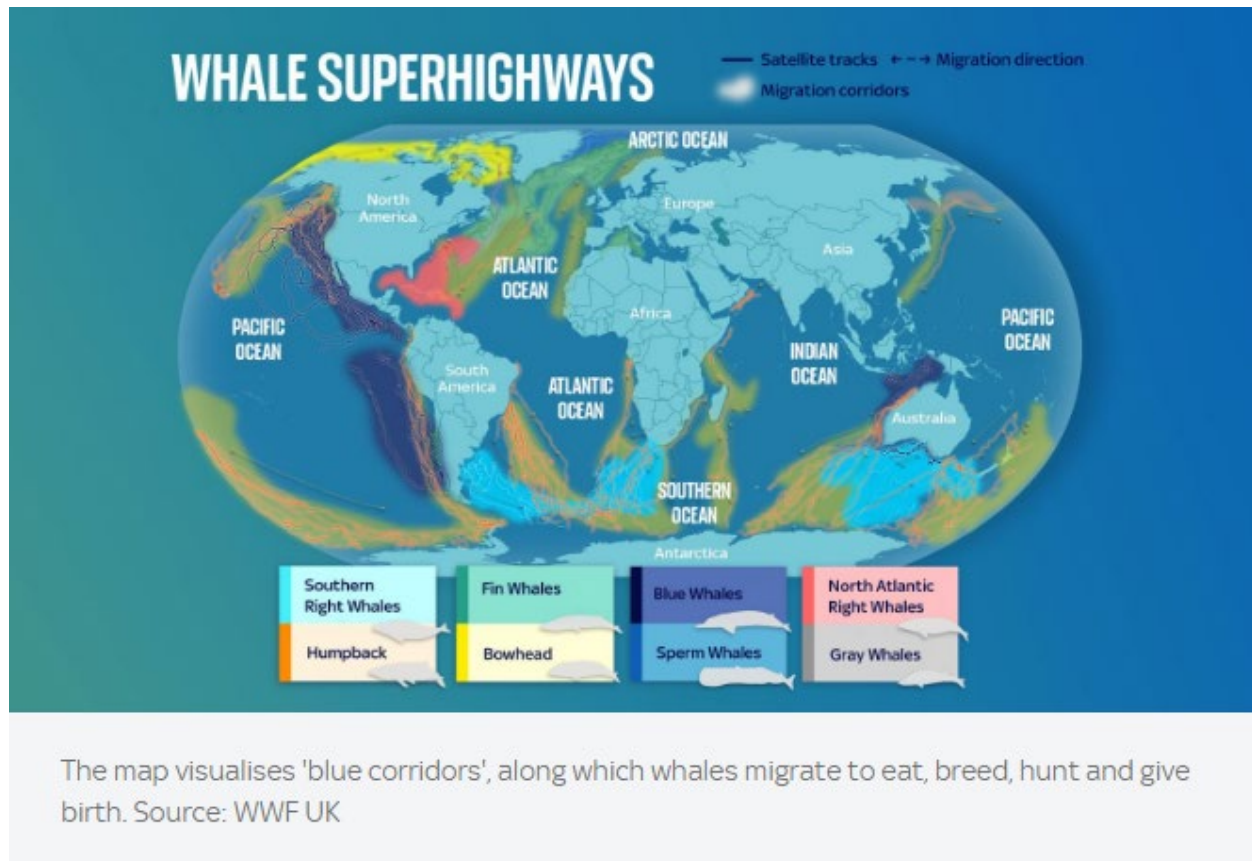


Figure 4. Visualization of whale migration patterns.

Japan's removal of whales from its jurisdictional waters does not only affect the health of the marine environment in its jurisdictional waters, but potentially affects the health and wellbeing of the marine environments of Australia and New Zealand, both of which are states that have brought suit against Japan in the past for its whaling practices.¹²¹ Therefore, the allegation that a suit such as the ones presented violates a state's sovereignty in its exploitation of its resources could potentially be overcome with a demonstration of whales' migratory patterns and their

¹²¹ Sonia E. Rolland, *supra* note 87, at 502.

ability to move among jurisdictional waters and territorial waters of multiple states and the high seas.

V. Conclusion

Over the past ten years, the global surface temperature has risen 1.1 degrees Celsius.¹²² Scientists from the Intergovernmental Panel on Climate Change (IPCC) warn that when the global surface temperature rises past two degrees Celsius, the Earth will face irreparable harm. With this consideration in mind, states must take drastic measures to slow down the warming of the Earth in an attempt to reach net-zero carbon dioxide emissions. However, until the world can reach net-zero emissions, scientists are considering all avenues of carbon sequestration and carbon dioxide reduction in the atmosphere.

With the recent increase in knowledge surrounding whales' ability to sequester carbon, scientists and the international community are looking to the species to help slow down the effects of climate change and improve the health of the marine environment. The importance of whales in the battle against climate change cannot be understated. The international community must continue to take steps to protect the species.

Japan's commercial whaling practices provide the perfect case study to determine whether the international tribunals will flex their strength. The international tribunal must determine that Japan has violated UNCLOS and customary international law by continuing to capture and kill whales for commercial use after learning of their importance to the health of the marine environment. The effort to slow down climate change is a global effort that will require collaboration across scholars, states, and even whales. To get everybody united with a common goal, the courts must provide clear interpretation of the law to provide everyone with a baseline

¹²² Intergovernmental Panel on Climate Change, CLimate Change 2023: Synthesis Report, Summary for Policymakers, IPCC, Geneva, Switzerland, eds. Hoesung Lee et al. 1, 4

understanding of the legal protections and ramifications of marine practices. The court only has as much power as the people and the states are willing to give it, so a case against Japan will grab the attention of the international community as the international courts decide whether to flex their power in the effort to slow down climate change, or if the international courts will choose to disregard the growing threat of climate change.

But, if the international courts choose to move a case against Japan forward and determine its whaling practices violate UNCLOS, the international courts will show to the international community that it recognizes climate change as a legitimate global issue. It may open the potential for more litigation regarding the rights and obligations of states under UNCLOS to protect the environment.

As the international courts continue to interpret the rules and obligations of UNCLOS, they, like Frodo, will embark on a long and extensive journey to protect the marine environment. In the process, they might just save the world.

Bibliography

Treaties

Paris Agreement, Dec 12, 2015, 1 U.N. Doc. FCCC/CP/2015/L.9/Rev.1.

United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 U.N.T.S 6.

Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S 95.

Statutes

Stat. Int'l Ct. Just. § 36(2) (1945).

Cases

Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), Summary of the Case, 1947 (July 31).

Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua), Judgment, 2009 I.C.J. Rep. 9 (July 13).

In the Matter of the Chagos Marine Protected Area Arbitration (Mauritius v. U.K and Northern Ireland), Award, 2015 P.C.A. Rep. 15 (March 18).

The MOX Plant Case (Ireland v. United Kingdom), Judgment of 2006, 4657.

Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, (Commission of Small Island States), Case No. 31, Written Statement of the Commission of Small Island States on Climate Change and International Law of June 2023 1.

The South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China), Order, 2016 P.C.A. Rep. 16 (July 12) at 1.

Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Case Nos. 3&4, Order of 27 August 1999, 280.

Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Case Nos. 3&4, Request for the Prescription of Provisional Measures Submitted by New Zealand, 3.

Secondary Sources

Alexander Nicolas, *What makes whales fin-tastic climate champions?: Here's how they can be a nature-based buffer against the climate crisis*, WWF, December 20, 2023.

<https://www.worldwildlife.org/stories/what-makes-whales-fin-tastic-climate-champions#:~:text=But%20this%20massive%20stature%20is,heating%20carbon%20fro m%20the%20atmosphere.>

Aloysius P. Llamzon, 18 *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, Eur. J.1 of Int'l L. 815, n.5 (2017).

Anastasia Telesetsky, *The International Tribunal on the Law of the Sea: Seeking the Legitimacy of State Consent* Ch. 7, 174-215 (Nienke Grossman et al eds., rev. ed. 2018).

Animal Welfare Inst., *Japanese Whaling*, AWI, <https://awionline.org/content/japanese-whaling> (last visited Nov. 11, 2023).

Brianna Randall, *A humpback whale swam halfway around the world. His name is Frodo.*, Nat'l Geographic (Sept. 27, 2023).

<https://www.nationalgeographic.com/animals/article/humpback-whale-longest-migration-record.>

Chris Wold, *Japan's Resumption of Commercial Whaling and Its Duty to Cooperate with the International Whaling Commission*, 35 J. Ecn'tl L. & Lit. 87, 96 (2020).

Convention on the International Trade of Endangered Species of Wild Flora and Fauna, *What is CITES?*, CITES, <https://cites.org/eng/disc/what.php> (last visited Oct. 23, 2023).

Customary International Law, Legal Information Institute,

https://www.law.cornell.edu/wex/customary_international_law#:~:text=Customary%20in ternational%20law%20results%20from,for%20visiting%20heads%20of%20state. (last visited April 14, 2024).

EcoWatch, *What are the harmful effects of ocean acidification on marine life, and why is climate change to blame?*, World Econ. F.

Flynn Holm, *After Withdrawal from the IWC: The Future of Japanese Whaling*, 17 *The Asia-Pacific J.: Japan Focus* 1, 2 n.4 (2019).

Hannah Sweeney, *The International Court of Justice: A Year in Review*, Lawfare, November 6, 2023. <https://www.lawfaremedia.org/article/the-international-court-of-justice-a-year-in-review.>

Int'l Ct. of J., *Cases*, ICJ, <https://www.icj-cij.org/history>.

Int'l Ct. of Just., *History*, ICJ, <https://www.icj-cij.org/history>.

Int'l F. of Animal Welfare, *The Econ. of Japanes Whaling*, IFAW (last visited April 15, 2024).
<https://www.ifaw.org/resources/the-economics-of-japanese-whaling>.

Int'l Seabed Auth., *The United Nations Convention on the Law of the Sea at 40*, ISA,
<https://www.isa.org.jm/unclos-at-40/>.

Int'l Whaling Comm'n, *History and Purpose*, IWC, <https://iwc.int/commission/history-and-purpose> (last visited Oct. 22, 2023).

Int'l Whaling Comm'n, *Membership and Contracting Government*, IWC,
<https://iwc.int/commission/members> (last visited Oct. 22, 2023).

Int'l Ct. J., *Treaties*, ICJ, <https://www.icj-cij.org/treaties> (last visited April 16, 2024).

Int'l Whaling Comm'n, *Total Catches: Since the Moratorium came into place in 1985*, IWC, 2022. <https://iwc.int/management-and-conservation/whaling/total-catches>.

Intergovernmental Panel on Climate Change, *CLimate Change 2023: Synthesis Report, Summary for Policymakers*, IPCC, Geneva, Switzerland, eds. Hoesung Lee et al. 1.

Japanese Ministry of Foreign Affairs, ICJ and Japan, Japan MOFA,
<https://www.mofa.go.jp/files/100028922.pdf> (last visited October 23, 2023).

Jennifer Mishler, *Whale Hunting Still Exists in 3 Countries, but it is Declining*, Sentient Media, Sept. 1, 2023. <https://sentientmedia.org/whale-hunting/>.

Joseph L. Daly, *Is the International Court of Justice Worth the Effort?*, Akron L. Rev., July 2015, at 391.

Judicial Activism, Legal Info. Inst., https://www.law.cornell.edu/wex/judicial_activism (last visited April 14, 2024).

The Law of the Sea and Climate Change: Solutions and Constraints ch. 3 (Elise Johansen et al., 2021).

Lorenzo Cotula & Camilla More, *How the International Court of Justice can advance climate action*, Int'l Inst.for Env't and Dev't Resch. Rep., October 2023, at 1.

Michael Kolmas, *When Shaming Fails: Japanese Withdrawal from the International Whaling Commission*, Austr. Inst. of Int'l Aff. (Nov. 18, 2020).

Ministry of Foreign Aff. of Japan, *Japan and the Management of Whales*, MOFA Japan.

Nat'l Marine Sanctuaries and National Oceanic and Atmospheric Admin., *Coral bleaching and ocean acidification are two climate-related impacts to coral reefs*, NOAA.

Navy Jag Corp., *The Convention on the Law of the Sea*, Judge Advocate General's Corps.

N. Am. Right Whale, NOAA Fisheries Species Directory, <https://www.fisheries.noaa.gov/species/north-atlantic-right-whale> (last visited Oct. 22, 2023).; Whale and Dolphin Conservation, Stop Whaling, WDS, <https://us.whales.org/our-4-goals/stop-whaling/> (last visited Oct. 22, 2023).

Ralph Chami et al., Nature's Solution to Climate Change: A strategy to protect whales can limit greenhouse gasses and global warming, 2019 IMF Fin. & Dev. Mag. 34.

Roger-Claude Liwanga, *Demystifying the Legitimacy of International Tribunals: Case Study of the International Court of Justice and Its Decisions on Armed Activities in the Congo*, 35 Emory Int'l L. Rev. 413, 419 n.3 (2021).

Tullio Treves, *United Nations Convention on the Law of the Sea*, Audiovisual Libr. of Int'l Law: UN. (Dec. 10, 1982), <https://legal.un.org/avl/ha/uncls/uncls.html>.

Sonia E. Rolland, *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, 108 Am. J. Int'l. L. 496 (2014).

Sophia Ly, 3 Ways North Atlantic Right Whales Help Solve Climate Change: The right whale is a champion in the fight against climate change - one that we cannot afford to lose, CLF.org, Feb. 8, 2021, <https://www.clf.org/blog/3-ways-right-whales-help-solve-climate-change/>.

Whale & Dolphin Conservation, Whaling in Japan, WDC.

United Nations: Climate Action, *The ocean - the world's greatest ally against climate change*, UN (last visited April 14, 2024). <https://www.un.org/en/climatechange/ocean-%E2%80%93-world%E2%80%99s-greatest-ally-against-climate-change>

UN Security Council, *Current Members*, UNSC (last visited April 15, 2024).

[https://www.un.org/securitycouncil/content/current-members#:~:text=The%20Council%20is%20composed%20of,Ecuador%20\(2024\).](https://www.un.org/securitycouncil/content/current-members#:~:text=The%20Council%20is%20composed%20of,Ecuador%20(2024).)

US Env'l Prot. Agency, *Sources of Greenhouse Gas Emissions*, EPA. (last visited April 14, 2024).