

# NATIONAL LITIGATION AND INTERNATIONAL LAW: REPERCUSSIONS FOR AUSTRALIA'S PROTECTION OF MARINE RESOURCES

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*[Australia's efforts to protect certain marine resources have been challenged in recent litigation before Australian courts, potentially prompting repercussions for Australia's standing within international legal regimes. In this article, the authors consider the extent to which Australian courts should not only be generally cognisant of the international law framework in which their decisions sit, but also take specific account of Australia's international rights and duties in determining matters. This analysis contributes to wider discussions about the role of international law before national courts and, in particular, addresses the use made of non-justiciability doctrines as well as whether national courts should play a role in seeking institutional change in the international legal system.]*

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## I INTRODUCTION

Recent litigation before Australian courts in relation to the protection of certain marine resources (namely, whales, southern bluefin tuna and hydrocarbon resources in the Timor Gap)<sup>1</sup> may have repercussions for Australia's standing and responsibility within international legal regimes. In *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* ('*HSI v Kyodo*'),<sup>2</sup> *Re Humane Society International and Minister for the Environment* ('*Re HSI and Minister for the Environment*')<sup>3</sup> and *Petrotimor Companhia de Petroleos SARL v Commonwealth* ('*Petrotimor*'),<sup>4</sup> the Australian judiciary was required to render decisions on the basis of Australian legislation that implicated international rights and duties. In light of these recent decisions, it is worth questioning to what extent Australian courts should not only be generally cognisant of the international law framework in which their decisions sit but also take specific account of Australia's international rights and duties in determining a matter. This study sits within a broader framework of analysis concerning the interaction of national and international law. The focus on litigation over marine resources protection provides another analytical stream for discerning broader trends in this area, both in Australia and globally.

The involvement of national courts in cases involving international law issues is by no means a new phenomenon and judges, practitioners and commentators have all grappled with the question of how national courts should address these issues.<sup>5</sup> An overriding concern for national courts has traditionally been the need

<sup>1</sup> The Timor Gap refers to an area of the Timor Sea located between Australia and Timor-Leste — it was the 'gap' left in the delimitation of Australia's maritime boundary with Indonesia in 1971 and 1972 (when Timor-Leste was still a Portuguese colony): see *Petrotimor Companhia de Petroleos SARL v Commonwealth* (2003) 126 FCR 354, 380 (Beaumont J).

<sup>2</sup> This comprises more than six decisions, including *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2005) 212 ALR 551 ('*HSI v Kyodo (First Application for Leave to Serve)*'), *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664 (Unreported, Allsop J, 27 May 2005) ('*HSI v Kyodo (Second Application for Leave to Serve)*'), *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425 ('*HSI v Kyodo (Full Court)*') and *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2008) 165 FCR 510 ('*HSI v Kyodo (Injunction)*'). They will be referred to collectively as '*HSI v Kyodo*'.

<sup>3</sup> (2006) 93 ALD 640.

<sup>4</sup> (2003) 126 FCR 354.

<sup>5</sup> In the Australian context, see, eg, *Al-Kateb v Godwin* (2004) 219 CLR 562, in particular the contrasting views of McHugh and Kirby JJ on the role of international law: at 589–95 (McHugh J), 617–30 (Kirby J). See also Sir Anthony Mason, 'The High Court as Gatekeeper' (2000) 24 *Melbourne University Law Review* 784; Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423 (analysing how the branches of federal government have responded to international law); Devika Hovell and George Williams, 'A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa' (2005) 29 *Melbourne University Law Review* 95. This topic has also generated considerable interest in other jurisdictions: see, eg, *Baker v Minister of Citizenship and Immigration* [1999] 2 SCR 817, 841, 860–2 (L'Heureux-Dubé J for L'Heureux-Dubé, Gonthier, McLachlin, Bastarache and Binnie JJ), 865–6 (Iacobucci J for Cory and Iacobucci JJ); *Lawrence v Texas*, 539 US 558, 576–7 (Kennedy J for Stevens, Kennedy, Souter, Ginsburg and Breyer JJ) (2003); *Medellin v Texas*, 128 S Ct 1346 (2008); Benedetto Conforti, *International Law and the Role of Domestic Legal Systems* (1993); Mayo Moran, 'Authority, Influence and Persuasion: Baker, Charter Values and the Puzzle of Method' in David Dyzenhaus (ed), *The Unity of Public Law* (2004) 389; Karen Knop, 'Here and There: International Law in Domestic Courts' (2000) 32 *New York University Journal of International Law and*

for the different branches of government to ‘speak with one voice’,<sup>6</sup> and courts have usually been willing to defer to executive expertise in matters of international affairs through the application of various judicial doctrines.<sup>7</sup> Strict adherence to this approach has been increasingly questioned with the advent of globalisation and with it the growing involvement of non-state actors in international affairs. There has been an ongoing engagement of national courts with international affairs through both comparative constitutional law and international law. In the early 1990s, Professor Harold Koh argued that national courts should be willing to address those politically charged cases which he described as ‘transnational public law litigation’,<sup>8</sup> rather than indiscriminately applying judicial doctrines to avoid them.<sup>9</sup> Professor Koh advocated for a careful examination of whether a court has jurisdiction as the principal means for assessing whether cases with international implications should be heard and resolved.<sup>10</sup>

More recently, Professor Eyal Benvenisti has commented favourably on the use that national courts are now making of foreign and international law as a means of empowering domestic democratic processes, in some ways countering the forces of globalisation.<sup>11</sup> He notes that external pressures (ranging from cartels of powerful states, active non-governmental organisations and inter-governmental organisations) have reduced the ability of some governments to allow for national interests to be protected.<sup>12</sup> Furthermore, he proposes that enhanced coordination of national courts, through recourse to comparative constitutional law and international law, provides a means to restore meaningful domestic democratic deliberation.<sup>13</sup> Professor Benvenisti argues that

for courts in most democratic countries ... referring to foreign and international law has become an effective instrument for *empowering* the domestic democratic processes by shielding them from external economic, political, and even legal pressures.<sup>14</sup>

*Politics* 501; Melissa A Waters, ‘Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties’ (2007) 107 *Columbia Law Review* 628; Robert B Ahdieh, ‘Between Dialogue and Decree: International Review of National Courts’ (2004) 79 *New York University Law Review* 2029.

<sup>6</sup> ‘Our State cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another’: *The Arantzazu Mendi* [1939] AC 256, 264 (Lord Atkin). See also *Thomas v Mowbray* (2007) 233 CLR 307, 354–5 (Gummow and Crennan JJ).

<sup>7</sup> These doctrines are variously described as ‘abstention doctrines’ or ‘avoidance doctrines’ and include the ‘act of state’ doctrine, sovereign immunity, and non-justiciability: see generally Richard Garnett, ‘Foreign States in Australian Courts’ (2005) 29 *Melbourne University Law Review* 704.

<sup>8</sup> Harold Hongju Koh, ‘Transnational Public Law Litigation’ (1991) 100 *Yale Law Journal* 2347, 2347.

<sup>9</sup> *Ibid* 2382–3, 2386–7.

<sup>10</sup> *Ibid* 2382–3.

<sup>11</sup> Eyal Benvenisti, ‘Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts’ (2008) 102 *American Journal of International Law* 241.

<sup>12</sup> *Ibid* 246–7.

<sup>13</sup> *Ibid* 245–52.

<sup>14</sup> *Ibid* 241 (emphasis in original).

In considering national litigation related to Australia's protection of marine resources, it is possible to undertake a preliminary assessment as to the extent to which Australian courts are embracing Professor Benvenisti's notion of empowering domestic democratic processes. *HSI v Kyodo*, *Re HSI and Minister for the Environment* and *Petrotimor* are all cases that gave the applicants an opportunity to have a greater voice in shaping Australia's role or position on particular international law issues. Nonetheless, these cases show that Australian courts have been inconsistent in their willingness to address specifically rights and obligations arising under international law, although concerns regarding international affairs more generally have resonated in judicial decision-making. Consistent with Professor Koh's suggestion of 'doctrinal targeting' to increase the likelihood that courts will engage with cases involving international law, the courts have carefully considered whether they have jurisdiction to determine the cases presented or whether deference should be accorded to the other branches of government.<sup>15</sup> These assessments have predominantly been undertaken with regard to national law, rather than addressing the questions of international law at play.<sup>16</sup> Most notably, Australian courts have not availed themselves of the potential for courts to allow for international institutional reform, whereby rulings sought by plaintiffs on marine resource protection may potentially be taken to both domestic and international fora as a means of influencing their processes and decision-making. Instead, the courts have minimised their role in the international legal system, both in terms of developing the law itself and in relation to Australia's responsibility under international law. We consider this outcome to be appropriate and argue that Professor Benvenisti's support for judicial engagement to enhance democratic processes is unnecessary in the context of marine resource protection.<sup>17</sup>

In examining the judicial role in relation to Australia's rights and duties in the protection of marine resources, we first set forth the relevant international legal framework. The role of national courts vis-à-vis Australia's international rights and duties is then examined from an international law and Australian constitutional law perspective. From this background, we analyse the judgments in *HSI v Kyodo*, *Re HSI and Minister for Environment* and *Petrotimor* as a means of highlighting how decisions on national legislation have implicated Australia's international legal rights and duties (or at least its international standing) in relation to marine resources. The recent cases dealing with marine resources that are examined here merit attention in view of the stakes for Australia, namely, Australia's rights over resource-rich maritime areas and resources of consider-

<sup>15</sup> See below Part V. See also Koh, above n 8, 2382, who proposes that 'courts should target their concerns by applying those doctrines that have been specifically tailored to address them' rather than using overbroad rules that would eliminate all transnational cases.

<sup>16</sup> See, eg. *Thomas v Mowbray* (2007) 233 CLR 307, 354–5 (Gummow and Crennan JJ). Cf *Hicks v Ruddock* (2007) 156 FCR 574, 600 (Tamberlin J).

<sup>17</sup> See Benvenisti, above n 11, 252–67, who notes this phenomenon of inter-judicial cooperation for reclaiming democracy occurring particularly in relation to counter-terrorism laws, refugee law and environmental protection in developing countries. While Australian court decisions on counter-terrorism laws and refugee laws would be in line with his analysis, this article shows the limited application of his theory when considered in relation to other areas of law.

able economic importance.<sup>18</sup> This article concludes that, while greater account could have been taken of Australia's international obligations in these cases, it is generally preferable that the courts avail themselves of non-justiciability doctrines in order to avoid causing international law disputes, despite any broader political goals for institutional reform that may exist.

## II AUSTRALIA'S RIGHTS AND OBLIGATIONS UNDER THE LAW OF THE SEA

Australia's rights and obligations in relation to the international law of the sea may predominantly be drawn from the 1982 *United Nations Convention on the Law of the Sea* ('UNCLOS')<sup>19</sup> and have been enacted into Australian law through a range of legislation, most notably the *Seas and Submerged Lands Act 1973* (Cth) ('*Seas and Submerged Lands Act*'), which was amended to reflect aspects of UNCLOS by *Maritime Legislation Amendment Act 1994* (Cth) part 2. The law of the sea comprises a complex body of law: the oceans are divided into various maritime zones, and the rights and duties of a state and its vessels will depend on the location of the particular activity being undertaken.<sup>20</sup> As a result, Australia's rights to regulate the fishing of southern bluefin tuna will vary depending on where fishing vessels are located. Similarly, Australia's right to grant oil concessions over offshore areas depends on the limits of its continental shelf.<sup>21</sup> Further, the actions Australia may take to prevent Japanese whaling vessels from killing particular species of whales are also affected by the location of the whaling activity. This section briefly describes the different maritime zones as a means of indicating what rights and responsibilities Australia has in different areas of the oceans, including zones off Australia's claimed Australian Antarctic Territory ('AAT'). Any declaration of a maritime zone by a state will have an international aspect,<sup>22</sup> either because it potentially impinges on maritime zones that may be claimed by a neighbouring state or because it usurps areas that would otherwise be open to all states. Virtually all activities undertaken by states at sea are subject to varying degrees of international regulation.<sup>23</sup> As a result, it could reasonably be anticipated that any national court decision addressing ocean resources would involve some reference to the international law of the sea.

<sup>18</sup> The maritime areas in question are Antarctica and the Timor Sea in relation to *HSI v Kyodo and Petrotimor*, and the resources are southern bluefin tuna and petroleum in relation to *Re HSI and Minister for the Environment and Petrotimor*.

<sup>19</sup> Opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994).

<sup>20</sup> See UNCLOS arts 2, 55–6, 76–7, 87; *Maritime Legislation Amendment Act 1994* (Cth) pt 2.

<sup>21</sup> See UNCLOS arts 76–7.

<sup>22</sup> *Fisheries Case (United Kingdom v Norway) (Merits)* [1951] ICJ Rep 116, 132.

<sup>23</sup> Again, the level of regulation will depend on the location. For example, even on the high seas, states are required to show due regard for the rights of other users of this area: UNCLOS art 87(2).

*A Maritime Zones Extending from Australia's Mainland*

The waters located most closely to the coast, and often linked with the land-mass of a state (such as bays or estuaries), are 'internal waters' over which the state exercises full sovereignty.<sup>24</sup> The internal waters are those enclosed by baselines, and the breadth of seaward maritime zones is measured from these baselines.<sup>25</sup> Extending outward from the coast, the next maritime area recognised under international law is the 'territorial sea', which may extend up to 12 nautical miles from the coast.<sup>26</sup> The coastal state has sovereignty over the water, subsoil and airspace of the territorial sea,<sup>27</sup> subject to the right of innocent passage of foreign vessels.<sup>28</sup> Under *UNCLOS* arts 27–8, Australia's criminal and civil law apply in limited ways to foreign vessels in the territorial sea.<sup>29</sup> Australia has more authority over a foreign vessel once it arrives in an Australian port and would then have greater opportunity to exercise enforcement jurisdiction over a vessel that had violated Australian law.<sup>30</sup>

Extending beyond the territorial sea is the 'contiguous zone', which reaches up to 24 nautical miles from the baselines of a coastal state.<sup>31</sup> In the contiguous zone, the coastal state may prevent and punish infringements of its customs, fiscal, immigration or sanitary laws and regulations that have been committed within its territory or territorial sea.<sup>32</sup>

<sup>24</sup> *UNCLOS* art 2.

<sup>25</sup> Different baselines are recognised within *UNCLOS*. For example: normal baselines are the low-water line along the coast (art 5); straight baselines are used to encompass areas where the coastline is deeply indented and cut into or where there is a fringe of islands along the coast in its immediate vicinity (art 7); closing lines are drawn across bays meeting specified geographic criteria (art 10). The waters landward of these baselines are internal waters: art 8.

<sup>26</sup> *UNCLOS* art 3. One nautical mile is equivalent to 1.852 km. See also *Commonwealth v Yarmirr* (1999) 101 FCR 171, 280–1 (Merkel J).

<sup>27</sup> *UNCLOS* art 2.

<sup>28</sup> The right of innocent passage entitles foreign vessels to traverse the territorial sea without interference from the coastal state, provided that passage is not prejudicial to the peace, good order or security of the coastal state. That passage must be continuous and expeditious, but may include stopping or anchoring as part of ordinary navigation, as well as rendering assistance to persons, ships or aircraft in danger or distress: *UNCLOS* arts 17–19.

<sup>29</sup> Namely, if the criminal activity has particular effects on the coastal state, if assistance is requested or if the vessel has been in the internal waters of the coastal state: *UNCLOS* arts 27(1)(a), (1)(c), (2). A coastal state may only enforce jurisdiction for civil proceedings if the foreign ship is lying in the territorial sea or has been in the internal waters of the coastal state: art 28(3). See also I A Shearer, 'Problems of Jurisdiction and Law Enforcement against Delinquent Vessels' (1986) 35 *International and Comparative Law Quarterly* 320, 326–9.

<sup>30</sup> See generally Erik Jaap Molenaar, 'Port State Jurisdiction: Towards Mandatory and Comprehensive Use' in David Freestone, Richard Barnes and David M Ong (eds), *The Law of the Sea: Progress and Prospects* (2006) 192. Molenaar argues that port state jurisdiction may be asserted in relation to offences that have occurred in that state's maritime zones or even, potentially, outside those maritime zones: at 196–7, 200–2. It would nonetheless be arguable that in the absence of an international agreement, port state jurisdiction is otherwise limited to offences that occur while the vessel is in port — such as not following proper port procedures.

<sup>31</sup> Australia proclaimed a contiguous zone under *Maritime Legislation Amendment Act 1994* (Cth) s 12, inserting *Seas and Submerged Lands Act* ss 13A–13C, and has further given legislative force to the contiguous zone in s 245B(4) of the *Migration Act 1958* (Cth), inserted by *Border Protection Legislation Amendment Act 1999* (Cth) sch 1. See also *UNCLOS* art 33(2).

<sup>32</sup> *UNCLOS* art 33(1).

The continental shelf comprises the seabed and subsoil of the submarine areas extending beyond the territorial sea up to 200 nautical miles from the coastal state's baselines.<sup>33</sup> The coastal state exercises sovereign rights (as opposed to sovereignty) over the continental shelf for the purposes of exploring and exploiting its natural resources.<sup>34</sup> The waters above the continental shelf may be claimed as an Exclusive Economic Zone ('EEZ') by the coastal state, also up to a span of 200 nautical miles.<sup>35</sup>

In the EEZ, a coastal state has sovereign rights to explore, exploit, conserve and manage natural resources, and jurisdiction with regard to marine scientific research, the protection and preservation of the marine environment, and the establishment and use of artificial islands, installations and structures.<sup>36</sup> The coastal state may not only prescribe laws in relation to fishing in its EEZ, but may also enforce those laws, 'including [by] boarding, inspection, arrest and judicial proceedings'.<sup>37</sup> Foreign vessels within the EEZ enjoy freedoms of navigation and of laying submarine cables and pipelines, as well as other internationally lawful uses of the sea related to these freedoms.<sup>38</sup> Australia first extended its claimed jurisdiction over fisheries within 200 nautical miles of its coast under the *Fisheries Amendment Act 1978* (Cth), establishing the Australian Fishing Zone.<sup>39</sup> It was only in 1994, when *UNCLOS* entered into force, that Australia proclaimed its EEZ under the *Maritime Legislation Amendment Act 1994* (Cth).<sup>40</sup>

Beyond the EEZ and continental shelf of any state lie the 'high seas', and in this area no state has, or may claim, sovereignty or sovereign rights.<sup>41</sup> Instead, the high seas are open to all states wherein they enjoy certain freedoms, including the freedom of navigation, freedom of scientific research and freedom of fishing.<sup>42</sup> The latter two freedoms are subject to an array of obligations included

<sup>33</sup> *UNCLOS* art 76(1). A state may be able to claim a breadth of continental shelf up to 350 nautical miles if conditions set forth in art 76 are met. Australia has made such a claim, which was assessed by the Continental Shelf Commission (created under Annex II of *UNCLOS*), and Australia is now permitted to formally establish its rights over an extended continental shelf area: Commission on the Limits of the Continental Shelf, *Summary of the Recommendations of the Commission on the Limits of the Continental Shelf (CLCS) in regard to the Submission Made by Australia on 15 November 2004* (2008). See also 'Australian Territory Expands with Continental Shelf Ruling', *ABC News* (online), 21 April 2008 <<http://www.abc.net.au/news/stories/2008/04/21/2223353.htm>>.

<sup>34</sup> *UNCLOS* art 77(1). Australia initially claimed these sovereign rights in *Seas and Submerged Lands Act* s 11, which was later amended by *Maritime Legislation Amendment Act 1994* (Cth) s 6: see *Commonwealth v Yarmirr* (1999) 101 FCR 171, 280–1 (Merkel J).

<sup>35</sup> Again, this breadth is measured from the coastal state's baselines: *UNCLOS* art 57.

<sup>36</sup> *UNCLOS* art 56(1).

<sup>37</sup> *UNCLOS* art 73(1). Enforcement powers also exist in relation to marine pollution: see, eg, art 220.

<sup>38</sup> *UNCLOS* art 58(1).

<sup>39</sup> *Fisheries Amendment Act 1978* (Cth) s 3.

<sup>40</sup> *Maritime Legislation Amendment Act 1994* (Cth) s 10, inserting *Seas and Submerged Lands Act* ss 10A–10C and declaring Australia's rights over its EEZ.

<sup>41</sup> *UNCLOS* art 89.

<sup>42</sup> *UNCLOS* art 87(1). Article 87 also lists the freedoms of overflight, of laying submarine cables and pipelines, and of constructing artificial islands and other installations. This list is not exclusive.

in *UNCLOS*, with the freedom of fishing curtailed by obligations related to conservation and management as well as requirements of cooperation for conservation and management of living resources, including marine mammals.<sup>43</sup> These freedoms are to be exercised with due regard to the rights of other users on the high seas.<sup>44</sup>

On the high seas, the rights of states are limited to vessels flying their respective flags and, as a general rule, it is only the flag state that may exercise jurisdiction over its vessels on the high seas.<sup>45</sup> Warships and designated government vessels are only allowed to board, inspect and arrest vessels flagged to another state in a narrow range of instances set forth in *UNCLOS* and other bilateral or multilateral treaties.<sup>46</sup> For example, under international law neither Australia's representatives nor any private citizen may board without consent a Japanese whaling vessel that is located on the high seas.<sup>47</sup> Australia's rights against vessels fishing southern bluefin tuna on the high seas are similarly limited under *UNCLOS*, though its enforcement rights in relation to the fishing of southern bluefin tuna are now primarily regulated under the *Convention for the Conservation of Southern Bluefin Tuna* ('*CCSBT*').<sup>48</sup>

It is commonly the case that states will not be able to claim their full entitlement to an EEZ or over the continental shelf because it would overlap with the claim of another coastal state. In these circumstances, the neighbouring states must agree to delimit the overlapping zones, with *UNCLOS* requiring that they do so 'on the basis of international law ... in order to achieve an equitable solution'.<sup>49</sup> States are thereby accorded a large degree of flexibility in ascertaining between themselves what constitutes an equitable solution. While a median (or equidistant) line may provide a useful starting point, especially for states with opposite coasts, this line is frequently adjusted to account for a variety of circumstances.<sup>50</sup> Although other states are not strictly bound by an agreement of neighbouring states delimiting their maritime boundary, these agreements are

<sup>43</sup> *UNCLOS* arts 116–20.

<sup>44</sup> *UNCLOS* art 87(2).

<sup>45</sup> *UNCLOS* art 92.

<sup>46</sup> See Natalie Klein, 'The Right of Visit and the 2005 Protocol on the Suppression of Unlawful Acts against the Safety of Maritime Navigation' (2007) 35 *Denver Journal of International Law and Policy* 287, discussing the constraints on the right of visit in the law of the sea. The right of hot pursuit may provide another basis for warships or designated government vessels to board and arrest a foreign vessel on the high seas: see *UNCLOS* art 111.

<sup>47</sup> In addition to powers conferred by treaty, this consent may be granted on an ad hoc basis by the flag state or the master of the vessel: see Rosemary Gail Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries* (2004) 61.

<sup>48</sup> Opened for signature 10 May 1993, 1819 UNTS 359 (entered into force 20 May 1994). See below nn 64–70 and accompanying text.

<sup>49</sup> *UNCLOS* arts 74(1), 83(1). The delimitation of overlapping territorial seas is prescribed in art 15.

<sup>50</sup> For a survey of the circumstances that may be taken into account in maritime boundary delimitations, see generally Malcolm D Evans, *Relevant Circumstances and Maritime Delimitation* (1989). State practice on maritime boundary delimitations has been compiled in an impressive series edited (initially) by Jonathan Charney and Lewis Alexander: Jonathan I Charney, Lewis M Alexander and Robert W Smith (eds), *International Maritime Boundaries* (1993–2002). See also Victor Prescott and Clive Schofield, *The Maritime Political Boundaries of the World* (2<sup>nd</sup> ed, 2005).

generally recognised to permit the orderly regulation and exploitation of the resources within the delimited areas.<sup>51</sup>

### B *Maritime Zones and the Australian Antarctic Territory*

States are entitled to claim maritime zones not only off their mainland, but also in relation to any islands or other territories quite separate to the mainland and over which they have sovereignty.<sup>52</sup> In this regard, Australia is entitled to maritime zones off its overseas territories, such as Ashmore and Cartier Islands, Christmas Island, the Cocos (Keeling) Islands, the Coral Sea Islands, Heard and McDonald Islands, and Norfolk Island.

Australia has also claimed maritime zones off the AAT. This claim is controversial under international law as Australia does not have recognised sovereignty over this area.<sup>53</sup> Instead, an international cooperative regime has been created through the adoption of the *Antarctic Treaty*<sup>54</sup> and related instruments,<sup>55</sup> which are collectively known as the Antarctic Treaty System ('ATS'). An important aspect of the *Antarctic Treaty* is the 'freezing' of all sovereignty claims by art 4. As a result of this provision, claims to sovereignty over parts of Antarctica are essentially held in abeyance and it is this agreement not to resolve sovereignty disputes that has allowed the ATS to function effectively in regulating an array of issues concerning Antarctica, including, importantly, non-militarisation and the primacy of scientific research.<sup>56</sup>

As sovereignty claims to Antarctica are now subject to the terms of *Antarctic Treaty* art 4, there has been considerable debate as to whether maritime zones may be claimed in the waters surrounding Antarctica. Commentators have different views on whether maritime zones may be claimed in light of art 4, particularly when there is no certainty as to sovereignty over the adjacent

<sup>51</sup> See generally Lea Brilmayer and Natalie Klein, 'Land and Sea: Two Sovereignty Regimes in Search of a Common Denominator' (2001) 33 *New York University Journal of International Law and Politics* 703, 746–7, which argues that states have an interest in 'quieting' legal title to ensure marketability of the marine resources in the delimited zones.

<sup>52</sup> UNCLOS art 121(2).

<sup>53</sup> Only France, New Zealand, Norway and the United Kingdom recognise Australia's claim to the AAT: see House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Australian Law in Antarctica* (1992) 9.

<sup>54</sup> Opened for signature 1 December 1959, 402 UNTS 71 (entered into force 23 June 1961).

<sup>55</sup> These include: *Convention for the Conservation of Antarctic Seals*, opened for signature 1 June 1972, 1080 UNTS 175 (entered into force 11 March 1978); *Convention on the Conservation of Antarctic Marine Living Resources*, opened for signature 20 May 1980, 1329 UNTS 47 (entered into force 7 April 1982); *Protocol on Environmental Protection to the Antarctic Treaty of 1 December 1959*, opened for signature 4 October 1991, [1998] ATS 6 (entered into force 14 January 1998). In addition, at meetings of the parties to the *Antarctic Treaty*, a number of recommendations and measures governing aspects of the regime have been adopted and provide guidance for the regulation of activity in the area covered by the Antarctic Treaty System.

<sup>56</sup> For a general discussion on the ATS and Australia's role therein, see Donald R Rothwell, *The Polar Regions and the Development of International Law* (1996) ch 4; Gillian D Triggs, *International Law and Australian Sovereignty in Antarctica* (1986) chs 4–7. For a more recent perspective, see Marcus Haward et al, 'Australia's Antarctic Agenda' (2006) 60 *Australian Journal of International Affairs* 439; Lorne K Kriwoken, Julia Jabour and Alan D Hemmings (eds), *Looking South: Australia's Antarctic Agenda* (2007).

landmass.<sup>57</sup> This debate does not need to be settled (even if it could be) in the present article, as it is sufficient to note that the matter is controversial and involves considerable diplomatic sensitivities.

In taking the position that it is entitled to claim maritime zones off the AAT, Australia has claimed rights in relation to a territorial sea, an EEZ and a continental shelf under the *Seas and Submerged Lands Act*.<sup>58</sup> In addition, Australia has established the Australian Whale Sanctuary under s 225(1) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ('*EPBC Act*'),<sup>59</sup> which is applicable to the waters claimed off the AAT because the location of the sanctuary is primarily defined by reference to the Australian EEZ.<sup>60</sup> In the Australian Whale Sanctuary, it is an offence to kill, injure, take, possess or treat (process) a cetacean.<sup>61</sup> Under the *EPBC Act* s 5(4), this law applies to Australians and to other nationals in Australia's EEZ. In view of the controversy surrounding claims to maritime zones off Antarctica, Australia has established a practice of not seeking to enforce its domestic law against foreign nationals in the claimed EEZ off the AAT.<sup>62</sup> This practice has been sufficient for Australia in its international relationships with regard to the ATS, but creates difficulties (as will be discussed below) when attempts are undertaken by private litigants acting in the public interest to have Australian authority exercised under the *EPBC Act*.

### C Australia's Rights and Duties in Relation to Marine Resources under International Law

As noted at the outset of this Part, the regulation of any specific activity at sea greatly depends on where that activity is taking place. In national litigation implicating Australia's international rights and duties under the law of the sea,

<sup>57</sup> These debates are canvassed in Joanna Mossop, 'When Is a Whale Sanctuary Not a Whale Sanctuary? Japanese Whaling in Australian Antarctic Maritime Zones' (2005) 36 *Victoria University of Wellington Law Review* 757. See also Anna Homan, 'Maritime Zones in Antarctica' (2006) 20 *Australia and New Zealand Maritime Law Journal* 69; Chris McGrath, 'Australia Can Lawfully Stop Whaling within Its Antarctic EEZ' (Paper presented at the Environmental Defender's Office New South Wales Seminar, Sydney, 21 February 2008) 4-7 <[http://www.edo.org.au/edonsw/site/pdf/workshop/whales\\_chris\\_mcgrath\\_paper\\_080225.pdf](http://www.edo.org.au/edonsw/site/pdf/workshop/whales_chris_mcgrath_paper_080225.pdf)>.

<sup>58</sup> *Seas and Submerged Lands Act* ss 6, 10A, 11. Australia has also made a claim to an outer continental shelf off the AAT pursuant to *UNCLOS* art 76, but requested the Commission on the Limits of the Continental Shelf not to act on this aspect of Australia's outer continental shelf submission for the present time: Australia, *Continental Shelf Submission of Australia: Executive Summary* (2004) <[http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/aus04/Documents/aus\\_doc\\_es\\_web\\_delivery.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/aus04/Documents/aus_doc_es_web_delivery.pdf)>; Australia, *Note from the Permanent Mission of Australia to the Secretary General of the United Nations Accompanying the Lodgement of Australia's Submission*, Note No 89/2004 (November 2004) <[http://www.un.org/Depts/los/clcs\\_new/submissions\\_files/aus04/Documents/aus\\_doc\\_es\\_attachment.pdf](http://www.un.org/Depts/los/clcs_new/submissions_files/aus04/Documents/aus_doc_es_attachment.pdf)>.

<sup>59</sup> For an overview of earlier regulation of whaling and whaling conservation under Australian law, see Ruth Davis, 'Enforcing Australian Law in Antarctica: The *HSI Litigation*' (2007) 8 *Melbourne Journal of International Law* 142.

<sup>60</sup> *EPBC Act* s 225(2)(a).

<sup>61</sup> *EPBC Act* ss 229-30.

<sup>62</sup> See Attorney-General (Cth), 'Outline of Submissions of the Attorney-General of the Commonwealth as Amicus Curiae', Submission in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd*, NSD 1519/2004, 25 January 2005, [10], [20]-[22], [28].

the three key activities that have come under scrutiny are the fishing of southern bluefin tuna, whaling and offshore hydrocarbon exploration and exploitation.

### 1 *Southern Bluefin Tuna*

Under *UNCLOS*, Australia is entitled to regulate the fishing of southern bluefin tuna within its EEZ and to enforce the laws doing so.<sup>63</sup> However, southern bluefin tuna are a highly migratory species,<sup>64</sup> and as such Australia and other states that fish this species must

co-operate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond [the EEZ].<sup>65</sup>

After almost a decade of informal cooperation in the conservation and utilisation of southern bluefin tuna,<sup>66</sup> Australia, New Zealand and Japan decided to formalise their cooperation in 1993 with the adoption of the *CCSBT*. The *CCSBT* is intended 'to ensure, through appropriate management, the conservation and optimal utilisation of southern bluefin tuna.'<sup>67</sup> The main features of the *CCSBT* include the creation of the Commission for the Conservation of Southern Bluefin Tuna ('SBT Commission')<sup>68</sup> and, through it, a mechanism for the establishment of a total allowable catch and its allocation among the parties.<sup>69</sup> South Korea and Indonesia joined the SBT Commission in 2001 and 2008 respectively, and the 'Fishing Entity of Taiwan' is now a member of an Extended Commission.<sup>70</sup>

### 2 *Whales*

For the regulation of whales within Australia's EEZ, *UNCLOS* art 65 entitles Australia to prohibit, limit or regulate the exploitation of marine mammals (such as whales) and also requires Australia to cooperate with a view to the conservation of marine mammals and 'work through the appropriate international organizations for their conservation, management and study.' This provision also applies with regards to the conservation and management of marine mammals in the high seas.<sup>71</sup> The 'appropriate international organization' is widely recognised

<sup>63</sup> *UNCLOS* arts 56, 73.

<sup>64</sup> *UNCLOS* Annex 1.

<sup>65</sup> *UNCLOS* art 64(1).

<sup>66</sup> See Moritaka Hayashi, 'The Southern Bluefin Tuna Cases: Prescription of Provisional Measures by the International Tribunal for the Law of the Sea' (2000) 13 *Tulane Environmental Law Journal* 361, 365–6.

<sup>67</sup> *CCSBT* art 3.

<sup>68</sup> *CCSBT* art 6.

<sup>69</sup> *CCSBT* art 8(3)(a).

<sup>70</sup> Commission for the Conservation of Southern Bluefin Tuna, *About the Commission* <<http://www.ccsbt.org/docs/about.html>>. For discussion of Taiwan's status as a 'Fishing Entity', see Nien-Tsu Alfred Hu, 'Fishing Entities: Their Emergence, Evolution, and Practice from Taiwan's Perspective' (2006) 37 *Ocean Development and International Law* 149; Andrew Serdy, 'Bringing Taiwan into the International Fisheries Fold — The Legal Personality of a Fishing Entity' (2004) 75 *British Year Book of International Law* 183. The Philippines, South Africa and the European Communities have been formally accepted as Cooperating Non-Members, whereby they agree to adhere to the management and conservation objectives of the *CCSBT*, including the agreed catch limits.

<sup>71</sup> *UNCLOS* arts 65, 120.

to be the International Whaling Commission ('IWC'), which is established under art 3 of the 1946 *International Convention for the Regulation of Whaling* ('ICRW')<sup>72</sup> and is composed of one commissioner from each contracting party.<sup>73</sup> A prominent feature of the IWC at present is the division between its members as to whether they are in favour of commercial whaling, like Japan, or in favour of conservation, like Australia.<sup>74</sup> The IWC is assisted by three committees, including a Scientific Committee that has responsibility for reviewing scientific and statistical information with respect to whales and whaling, scientific research programs and special permits for scientific programs, as well as considering any additional matters referred to it.<sup>75</sup> The Scientific Committee does not have any power to prohibit a state from issuing a special permit for scientific research.<sup>76</sup>

### 3 Mineral Resources

In accordance with *UNCLOS*,<sup>77</sup> Australia exercises sovereign rights for the purpose of exploring and exploiting the natural resources of the continental shelf. Australia's rights to these resources are exclusive, in that if Australia elects not to explore and exploit its continental shelf, then no other state may do so in the absence of Australia's consent.<sup>78</sup> Australia's exclusive rights are affected only in situations where another state has a claim to the continental shelf that overlaps with Australia's claim. It is in this context that Australia entered into an agreement with Indonesia for the joint exploitation of the Timor Gap in 1989<sup>79</sup> and has subsequently engaged in negotiations with Timor-Leste regarding the exploitation of these resources following Timor-Leste's independence.<sup>80</sup>

## III NATIONAL COURTS IN THE INTERNATIONAL LEGAL SYSTEM

When national courts make judgments on questions involving matters of international law, there are two key consequences in the international legal

<sup>72</sup> Opened for signature 2 December 1946, 161 UNTS 72 (entered into force 10 November 1948).

<sup>73</sup> *ICRW* art 3(1). Any state may accede to the *ICRW*: art 10(2). See also Gregory Rose and Sandra Crane, 'The Evolution of International Whaling Law' in Philippe Sands (ed), *Greening International Law* (1993) 159, 165. Membership currently stands at 88 contracting parties: International Whaling Commission, *IWC Information* (11 August 2009) <<http://www.iwcoffice.org/commission/iwcmmain.htm#nations>>.

<sup>74</sup> See Rose and Crane, above n 73, 165.

<sup>75</sup> International Whaling Commission, *Rules of Procedure and Financial Regulations* (2008) 5–6.

<sup>76</sup> *ICRW* art 8(1). The powers of the Scientific Committee in this regard are set out in IWC, *International Convention for the Regulation of Whaling, 1946: Schedule* (2008) 14, whereby states issuing special permits for scientific whaling are to provide them to the IWC before they are issued and in sufficient time to allow the Scientific Committee to review and comment on them.

<sup>77</sup> *UNCLOS* art 77(1). These rights were initially codified in the *Convention on the Continental Shelf*, opened for signature 29 April 1958, 499 UNTS 311, art 2(1) (entered into force 10 June 1964) ('*Continental Shelf Convention*').

<sup>78</sup> *UNCLOS* art 77(2). See also *Continental Shelf Convention* art 2(2).

<sup>79</sup> *Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia*, signed 11 December 1989, [1991] ATS 9 (entered into force 9 February 1991).

<sup>80</sup> The history of these agreements is traced in *Petrotimor* (2003) 126 FCR 354, 388–99 (Beaumont J).

system. First, as an organ of the state, any decision of a national court that constitutes an internationally wrongful act (such as a violation of a treaty or a breach of customary international law) will be attributed to the state and may trigger its international responsibility.<sup>81</sup> For example, if a national court denies an individual the right to contact their consulate upon arrest or detention, then that denial is a violation of individual rights recognised in the *Vienna Convention on Consular Relations*.<sup>82</sup> Even if the domestic law of the state does not require a national court to respect the right of the individual to consular assistance,<sup>83</sup> that fact is not accepted as an excuse for the violation of international law.<sup>84</sup> It may therefore be the case that a national court will act consistently with its own national legislation, but that legislation runs counter to the international obligations of the state. If another state is injured by the action of the court, then the injured state could claim reparations under international law against the state of the court.<sup>85</sup> In the example just given, the state would be injured by the violation of the individual's right to consular assistance, because every state has an interest in protecting the rights of its nationals and an injury to a national is viewed as an injury to the state of nationality under international law.<sup>86</sup>

In the context of a national court making a decision that is in violation of international legal principles concerning the marine environment, an injured state may have rights in particular maritime zones negatively affected by the decision.<sup>87</sup> The injured state also has rights when their particular interests are

<sup>81</sup> See *Resolution on Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN GAOR, 56<sup>th</sup> sess, 85<sup>th</sup> plen mtg, Annex, UN Doc A/RES/56/83 (2001) ('*Articles on State Responsibility*'). Article 4(1) states:

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

<sup>82</sup> Opened for signature 24 April 1963, 596 UNTS 261, art 36(1)(b) (entered into force 19 March 1967). By virtue of art 36(2), states are required to give full effect to the purposes of the obligations set forth in art 36(1). The possibility of national courts and local law enforcement agencies violating these obligations has been explored by the International Court of Justice in *LaGrand* (*Germany v United States of America*) [2001] ICJ Rep 466, 497 ('*LaGrand*') and *Avena and Other Mexican Nationals (Mexico v United States of America)* [2004] ICJ Rep 12, 43–4, 63 ('*Avena*').

<sup>83</sup> This is the situation in the United States criminal justice system, as seen in *LaGrand* [2001] ICJ Rep 466 and *Avena* [2004] ICJ Rep 12.

<sup>84</sup> *Articles on State Responsibility* art 32: 'The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations'.

<sup>85</sup> *Articles on State Responsibility* art 31(1): 'The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.'

<sup>86</sup> This is the principle of diplomatic protection, articulated in *Mavrommatis Palestine Concessions (Greece v United Kingdom) (Jurisdiction)* [1924] PCIJ (ser A) No 2, 12:

By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights — its right to ensure, in the person of its subjects, respect for the rules of international law.

<sup>87</sup> For example, a national court's failure to require an environmental impact assessment for a development project that may cause pollution in a neighbouring state's territorial sea or EEZ could violate the rights of that neighbouring state. The failure to undertake such an assessment may be in violation of *UNCLOS* arts 204–6. This was one of Ireland's allegations against the United Kingdom in *MOX Plant Case (Ireland v United Kingdom) (Ireland Memorial)* (Permanent Court of Arbitration, 26 July 2002) 111–37.

affected on the high seas. In the latter situation, the judgment of a national court permitting the wrongful exercise of enforcement powers against a fishing vessel on the high seas would potentially harm the interests of another state in securing the rights of that vessel.<sup>88</sup> In such instances, there would need to be an assessment of what international legal principles applied and how they were violated by the decision of the national court in order to ascertain if there has been an internationally wrongful act committed.

The second key consequence for decisions of national courts involving questions of international law is the potential for those judgments to constitute sources of international law. The sources of international law are generally recognised as those set forth as the applicable law for the International Court of Justice in art 38 of the *Statute of the International Court of Justice* ('*ICJ Statute*').<sup>89</sup> Judicial decisions are identified as a subsidiary source of international law,<sup>90</sup> but are also relevant to the formation of two primary sources: customary international law and general principles of law. The most common formulation for the creation of customary international law involves the two elements of state practice and *opinio juris*.<sup>91</sup> National court decisions may be indicative of state practice.<sup>92</sup>

National court decisions may further influence the content of international law when they are a reflection of 'general principles of law', as identified in *ICJ Statute* art 38(1)(c). General principles of law are those that are recognised in the vast majority of legal systems throughout the world and may thus be seen as having a level of international acceptance. General principles of law may be drawn from legislation and codes in addition to national court decisions, but obviously for common law countries, where courts play an important role in the development and interpretation of the law, national court decisions may well influence the content of international law.

#### IV NATIONAL COURT TREATMENT OF INTERNATIONAL AFFAIRS

National courts play an important role in determining how international law is applied within the state. In Australia, international treaties are applicable within Australian law only when there is legislation giving effect to those treaties.<sup>93</sup>

<sup>88</sup> See *UNCLOS* arts 92, 116.

<sup>89</sup> See, eg, Ian Brownlie, *Principles of Public International Law* (6<sup>th</sup> ed, 2003) 5.

<sup>90</sup> *ICJ Statute* art 38(1)(d).

<sup>91</sup> *Opinio juris* is a belief by states that an action is required by law. These elements are reflected in the formulation of 'international custom, as evidence of a general practice accepted as law', as set forth in *ICJ Statute* art 38(1)(b). Some commentators have argued that there are alternative ways of viewing the formation of customary international law: see, eg, W Michael Reisman, 'International Lawmaking: A Process of Communication' (1981) 75 *American Society of International Law Proceedings* 101; Anthea Elizabeth Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 *American Journal of International Law* 757.

<sup>92</sup> See, eg, Brownlie, above n 89, 6.

<sup>93</sup> *Chow Hung Ching v The King* (1948) 77 CLR 449, 478 (Dixon J); *Bradley v Commonwealth* (1973) 128 CLR 557, 582 (Barwick CJ and Gibbs J); *Simsek v Macphee* (1982) 148 CLR 636, 641–2 (Stephen J); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 211–12 (Stephen J),

However, in the context of administrative law, the ratification of a treaty may give rise to legitimate expectations that the executive will act in accordance with Australia's treaty obligations.<sup>94</sup> Similarly, while customary international law has not been considered as directly applicable within Australia, the position is not free from controversy.<sup>95</sup> Brennan J has also taken the position that international law may inform the development of the common law.<sup>96</sup> In each of these instances, judges are required to give consideration as to how international law will be applied within Australia. A further aspect of this judicial role, and one of greater interest for present purposes, is where judges are called upon to decide cases concerning questions of international law and where there are circumstances suggesting that those international law questions may not, or should not, be subject to judicial consideration at the national level.

Of particular relevance is when actions that Australia's executive or legislature has taken — or has failed to take — regarding international affairs are challenged before national courts. One recent example is Australia's decisions regarding the treatment of David Hicks, an Australian detained in the United States prison in Guantánamo Bay.<sup>97</sup> The decisions in *HSI v Kyodo* and *Re HSI and Minister for the Environment* also relate to Australia's decisions on international affairs in terms of, respectively, Japan's so-called scientific whaling program and southern bluefin tuna fishing quotas under the *CCSBT. Petrotimor*

224–5 (Mason J); *Kioa v West* (1985) 159 CLR 550, 570 (Gibbs CJ); *Dietrich v The Queen* (1992) 177 CLR 292, 305 (Mason CJ and McHugh J).

<sup>94</sup> See *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 291 (Mason CJ and Deane J):

ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the *Convention*. That positive statement is an adequate foundation for a legitimate expectation ...

This decision has not been without controversy in commentary and cases before federal and state courts: see *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 10–11 (Gleeson CJ), 33–4 (McHugh and Gummow JJ), 47–8 (Callinan J); Kristen Walker and Penelope Mathew, 'Minister for Immigration v Ah Hin Teoh' (1995) 20 *Melbourne University Law Review* 236, 246–9; *Royal Women's Hospital v Medical Practitioners Board of Victoria* (2006) 15 VR 22, 39–40 (Maxwell P); Simon French, 'How "Legitimate" Are Legitimate Expectations?' (2006) 80(3) *Law Institute Journal* 54; Matthew Groves, 'Is *Teoh's* Case Still Good Law?' (2007) 14 *Australian Journal of Administrative Law* 126; Michael Kirby, 'The Impact of International Human Rights Norms: "A Law Undergoing Evolution"' (1995) 25 *University of Western Australia Law Review* 30, 45–8.

<sup>95</sup> *Nulyarimma v Thompson* (1999) 96 FCR 153, 162 (Wilcox J). See also *Sumner v United Kingdom* [2000] SASC 91 (Unreported, Nyland J, 13 April 2000) [32]; *Thorpe v Kennett* [1999] VSC 442 (Unreported, Warren J, 15 November 1999) [12]–[46]; Henry Burmester and Susan Reye, 'The Place of Customary International Law in Australian Law: Unfinished Business' (2000) 21 *Australian Year Book of International Law* 39, 44–5; Charlesworth et al, above n 5, 451–7. But see *Nulyarimma v Thompson* (1999) 96 FCR 153, 189–91 (Merkel J), where his Honour, in dissent, set out six criteria that a court should consider in a determination as to whether customary international law should be adopted as part of the common law.

<sup>96</sup> *Dietrich v The Queen* (1992) 177 CLR 292, 321 (Brennan J); see also at 360 (Toohey J); *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42 (Brennan J). See also *Cachia v Hanes* (1991) 23 NSWLR 304, 313 (Kirby P); *Young v Registrar, Court of Appeal [No 3]* (1993) 32 NSWLR 262, 275–6 (Kirby P).

<sup>97</sup> These decisions were challenged before the Federal Court of Australia: see *Hicks v Ruddock* (2007) 156 FCR 574. See also Marley Zelinka, 'Hicks v Ruddock versus *The United States v Hicks*' (2007) 29 *Sydney Law Review* 527.

raised questions concerning Australia's rights to explore and exploit the continental shelf in an area overlapping with the claims of another coastal state. In these sorts of cases, the Australian courts may, through judicial abstention, refrain from reaching a decision because the matter is viewed as non-justiciable.<sup>98</sup> Although courts cannot be prevented by Parliament from undertaking their constitutional function of determining contested questions of the meaning and validity of federal laws,<sup>99</sup> it has consistently been held that '[i]t is not for an issuing court to enter upon any dispute as to the assessment made by the executive and legislative branches of government',<sup>100</sup> as these issues are considered non-justiciable. Indeed, the High Court in *Horta v Commonwealth*<sup>101</sup> and the Federal Court in *Petrotimor*<sup>102</sup> correctly determined that there is no basis either in s 51(xxix) itself or in any other provision of the *Constitution* for concluding that the legislative power conferred by s 51 must be confined within the limits of international law.<sup>103</sup> Nor is it the role of the judiciary to add to or vary the content of the powers exercisable by the executive under s 61 of the *Constitution*, or to take a particular view of the conduct of external affairs. Rather, the judiciary's role is to declare and enforce the limits of the executive's power.<sup>104</sup>

'Non-justiciable' has been coined a 'slippery term of indeterminate reference.'<sup>105</sup> It has been used to identify the lack of competence of the court under Chapter III of the *Constitution* to adjudicate on powers entrusted to the Parliament and to the executive under Chapters I and II of the *Constitution*, respectively.<sup>106</sup> Therefore, non-justiciability may refer to a situation in which:

- 1 there is no 'matter' capable of determination by reference to principles of law under Chapter III of the *Constitution*;<sup>107</sup>
- 2 a 'matter' is not capable of judicial determination because Parliament has not conferred jurisdiction upon the court;
- 3 there is a lack of judicially manageable standards,<sup>108</sup> and judgments are non-enforceable;<sup>109</sup> and

<sup>98</sup> See, eg, *Thomas v Mowbray* (2007) 233 CLR 307, 354 (Gummow and Crennan JJ). See also *Buttes Gas & Oil Co v Hammer* [1982] AC 888, 931 (Lord Wilberforce) ('*Buttes*').

<sup>99</sup> *XYZ v Commonwealth* (2006) 227 CLR 532, 578 (Kirby J).

<sup>100</sup> *Thomas v Mowbray* (2007) 233 CLR 307, 354 (Gummow and Crennan JJ).

<sup>101</sup> (1994) 181 CLR 183, 195 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

<sup>102</sup> (2003) 126 FCR 354, 417 (Beaumont J).

<sup>103</sup> See also *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 385 (Gummow and Hayne JJ), 418 (Kirby J) ('*Hindmarsh Island Bridge Case*'); *Polites v Commonwealth* (1945) 70 CLR 60, 68–9 (Latham CJ).

<sup>104</sup> *Horta v Commonwealth* (1994) 181 CLR 183, 195–6 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ). See also *Petrotimor* (2003) 126 FCR 354, 373 (Black CJ and Hill J).

<sup>105</sup> *Thomas v Mowbray* (2007) 233 CLR 307, 354 (Gummow and Crennan JJ).

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup> *Buttes* [1982] AC 888, 938 (Lord Wilberforce), stating that:

- 4 the resolution of disputes concerning acts of state, and the validity of competing international law claims, must take place on the international plane, and not before domestic courts.<sup>110</sup>

In some cases, the non-justiciability of an applicant's claim will go directly to a court's jurisdiction to hear a matter.<sup>111</sup> In other cases, non-justiciability will be a reason for the court to decline to exercise jurisdiction, even though that jurisdiction does exist.<sup>112</sup> These latter cases may be viewed as inadmissible.<sup>113</sup> Although either approach results in the same outcome — the court refraining from resolving the dispute — greater clarity and certainty may be afforded by considering the issue as one of jurisdiction. Consequently, even if a case is politically charged, it is not the politicisation as such that determines whether a court may address it, but rather whether the court has jurisdiction.<sup>114</sup> In our view, if a national court's decision could place Australia in violation of international law then it should abstain from deciding the case even if jurisdiction exists.

One doctrine frequently discussed in relation to non-justiciability is the 'act of state' doctrine,<sup>115</sup> which was characterised in *Underhill v Hernandez* as follows:

Every sovereign state is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of griev-

there are ... no judicial or manageable standards by which to judge these issues, or to adopt another phrase ..., the court would be in a judicial no-man's land: the court would be asked to review transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were 'unlawful' under international law.

<sup>109</sup> The non-enforceable standard was applied by Beaumont J in *Petrotimor* (2003) 126 FCR 354, 379, 411, 414–15. See also *Minogue v Human Rights and Equal Opportunity Commission* (1999) 84 FCR 438, 447 (Sackville, North and Kenny JJ).

<sup>110</sup> *Petrotimor* (2003) 126 FCR 354, 410 (Beaumont J).

<sup>111</sup> This was the approach taken in *Petrotimor*: *ibid* 372–4 (Black CJ and Hill J), 414–15 (Beaumont J).

<sup>112</sup> One example of this is Allsop J's decision not to exercise his discretion to allow for service of proceedings outside Australia in *HSI v Kyodo (Second Application for Leave to Serve)* [2005] FCA 664 (Unreported, Allsop J, 27 May 2005) [38]. See also below nn 147–59 and accompanying text.

<sup>113</sup> Sir Gerald Fitzmaurice has explained that an objection to the jurisdiction of the court is 'a plea that the tribunal itself is incompetent to give any ruling at all whether as to the merits or as to the admissibility of the claim', whereas an objection to the admissibility of a claim is 'a plea that the tribunal should rule the claim to be inadmissible on some ground other than its ultimate merits': Sir Gerald Fitzmaurice, 'The Law and Procedure of the International Court of Justice, 1951–4: Questions of Jurisdiction, Competence and Procedure' (1958) 34 *British Year Book of International Law* 1, 12–13 (citations omitted).

<sup>114</sup> See Koh, above n 8, 2387.

<sup>115</sup> *Coe v Commonwealth* (1979) 24 ALR 118, 128 (Gibbs J); *Re Diftfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 371–2 (Gummow J); *Horta v Commonwealth* (1994) 181 CLR 183, 195–6 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Western Australia v Commonwealth* (1995) 183 CLR 373, 422 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) ('*Native Title Act Case*'). See also *Thorpe v Commonwealth [No 3]* (1997) 144 ALR 677, 690–1, where Kirby J noted that the separation of powers generally requires that the conduct of foreign affairs be non-justiciable.

ances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.<sup>116</sup>

Examples of acts of state that cannot ‘be challenged, controlled or interfered with by the courts’<sup>117</sup> are a state’s entry into, performance of and termination of treaties,<sup>118</sup> and the initial annexation or acquisition of foreign territory.<sup>119</sup> A court will also not entertain a suit by a private citizen against the Crown in right of the Commonwealth for a breach of Australia’s international obligations.<sup>120</sup> However, an act of state cannot be pleaded by the Crown against an Australian citizen as a defence to an action arising out of acts done within Australian territory.<sup>121</sup> Reliance on the act of state doctrine is a well-recognised tool for a national court to avoid making a decision that could have serious implications under international law.<sup>122</sup>

Most relevant for present purposes are decisions that relate to Australia’s claims to maritime territory. In this regard, an extension of territory does not require parliamentary authorisation,<sup>123</sup> and the act of state doctrine ‘precludes any contest between the executive and the judicial branches of government as to whether a territory is or is not within the Crown’s Dominions.’<sup>124</sup> As such, the judiciary should ordinarily follow, and not second-guess, executive decision-making in relation to matters concerning sovereignty over disputed territory. Further, Australian courts will not ‘enforc[e] the interests of a foreign sovereign which arise from the exercise of certain powers peculiar to government’,<sup>125</sup> nor will they ‘adjudicate upon the validity of acts and transactions of a foreign sovereign State within that sovereign’s own territory.’<sup>126</sup> Instead, ‘[r]edress of

<sup>116</sup> 168 US 250, 252 (Fuller CJ for the Court) (1897).

<sup>117</sup> *New South Wales v Commonwealth* (1975) 135 CLR 337, 388 (Gibbs J) (*‘Seas and Submerged Lands Case’*).

<sup>118</sup> *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 229 (Mason J).

<sup>119</sup> *Seas and Submerged Lands Case* (1975) 135 CLR 337, 388 (Gibbs J), citing *Post Office v Estuary Radio Ltd* [1968] 2 QB 740, 753 (Diplock LJ); *Wacando v Commonwealth* (1981) 148 CLR 1, 11 (Gibbs CJ), 21–2 (Mason J); *Cook v Sprigg* [1899] AC 572, 579 (Earl of Halsbury LC for Earl of Halsbury LC, Lords Watson, Hobhouse, Macnaghten and Morris).

<sup>120</sup> *Tasmanian Wilderness Society Inc v Fraser* (1982) 153 CLR 270, 274 (Mason J); *Victoria v Commonwealth* (1996) 187 CLR 416, 480–2 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) (*‘Industrial Relations Act Case’*).

<sup>121</sup> See *Walker v Baird* [1892] AC 491, 496–7 (Lord Herschell for Lords Watson, Hobhouse, Herschell, Macnaghten, Morris, Hannen, Sir Richard Couch and Lord Shand); *Johnstone v Pedlar* [1921] 2 AC 262, 272–3 (Viscount Finlay), 276–7 (Viscount Cave), 281, 284 (Lord Atkinson), 295–6 (Lord Phillimore). Both cases were approved by the High Court in *Bradley v Commonwealth* (1973) 128 CLR 557, 582 (Barwick CJ and Gibbs J).

<sup>122</sup> See Garnett, above n 7, 715.

<sup>123</sup> *Baker v Carr*, 369 US 186, 212 (Brennan J) (1962). See also *Seas and Submerged Lands Case* (1975) 135 CLR 337, 388 (Gibbs J); *Post Office v Estuary Radio Ltd* [1968] 2 QB 740, 753 (Diplock LJ); *Petrotimor* (2003) 126 FCR 354, 362 (Black CJ and Hill J).

<sup>124</sup> *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 31 (Brennan J).

<sup>125</sup> *A-G (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 42 (Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ) (*‘Spycatcher’*).

<sup>126</sup> *Ibid* 40. See also *Underhill v Hernandez*, 168 US 250, 252 (Fuller CJ for the Court) (1897); *Banco Nacional de Cuba v Sabbatino*, 376 US 398, 416 (Harlan J) (1964); *Buttes* [1982] AC 888, 933 (Lord Wilberforce).

grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.<sup>127</sup>

A public policy exception to the act of state doctrine developed in English law is that the judiciary need not shut its eyes to a breach of an established principle of international law.<sup>128</sup> In *Kuwait Airways Corporation v Iraqi Airways Co [Nos 4 and 5]* ('*Kuwait Airways*'), the action in question was Iraq's invasion of Kuwait and seizure of its assets, which had been determined by the United Nations Security Council to be a fundamental breach of international law.<sup>129</sup> In these particular circumstances, the Court concluded that 'a law depriving those whose property has been plundered of the ownership of their property in favour of the aggressor's own citizens will not be enforced or recognised in proceedings in this country.'<sup>130</sup> In *Hicks v Ruddock*, Tamberlin J suggested that deprivation of liberty for over five years without valid charge would similarly fall into this category and allow for an exception to the act of state doctrine.<sup>131</sup> These cases suggest that national courts will be prepared to assess what are considered clear violations of international law in the context of domestic litigation.

The perspective of Australian courts on international issues may also be influenced or determined by the issuance of executive certificates. Australian courts will accept formal certificates or statements certified by the executive that the Australian government recognises a particular state of affairs in proceedings concerning foreign relations.<sup>132</sup> An executive certificate may be admissible if the circumstances of the external affairs are uncertain,<sup>133</sup> and it is admitted to address a question which falls within the special knowledge of the executive.<sup>134</sup> Examples here include the extent of territorial waters<sup>135</sup> or 'the extent of the realm or other territory claimed by the Crown'.<sup>136</sup> However, executive certifi-

<sup>127</sup> *Underhill v Hernandez*, 168 US 250, 252 (Fuller CJ for the Court) (1897).

<sup>128</sup> *Kuwait Airways Corporation v Iraqi Airways Co [Nos 4 and 5]* [2002] 2 AC 883, 1080–1 (Lord Nicholls); see also at 1108–11 (Lord Hope).

<sup>129</sup> *Ibid* 1081 (Lord Nicholls).

<sup>130</sup> *Ibid*. Lord Nicholls noted that 'a provision of foreign law will be disregarded when it would lead to a result wholly alien to fundamental requirements of justice as administered by an English court': at 1078.

<sup>131</sup> (2007) 156 FCR 574, 600. Tamberlin J further considered the fact that the case had implications for foreign policy would not be enough to render the dispute non-justiciable: at 586–7. See also Zelinka, above n 97, 538–9.

<sup>132</sup> *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391, 407 (Hutley JA). A statutory basis for the conclusiveness of facts stated within executive certification has been provided in *Consular Privileges and Immunities Act 1972* (Cth) s 12, *Diplomatic Privileges and Immunities Act 1967* (Cth) s 14, and *International Organisations (Privileges and Immunities) Act 1963* (Cth) s 11.

<sup>133</sup> *Duff Development Co Ltd v Government of Kelantan* [1924] AC 797, 805–6 (Viscount Cave), 813 (Viscount Finlay), 826–7 (Lord Sumner).

<sup>134</sup> *Spycatcher* (1988) 165 CLR 30, 50–1 (Brennan J); *Shaw Savill & Albion Co Ltd v Commonwealth* (1940) 66 CLR 344, 363 (Dixon J) ('*Shaw Savill*'); *Engelke v Musmann* [1928] AC 433, 443 (Lord Buckmaster).

<sup>135</sup> James Crawford and W R Edeson, 'International Law and Australian Law' in K W Ryan (ed), *International Law in Australia* (2<sup>nd</sup> ed, 1984) 71, 130.

<sup>136</sup> *Shaw Savill* (1940) 66 CLR 344, 364 (Dixon J). See also *Frost v Stevenson* (1937) 58 CLR 528, 549 (Latham CJ); *A-G (Cth) v Tse* (1998) 193 CLR 128, 148–9 (Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ).

cates cannot assert territorial boundaries inconsistent with domestic legislation<sup>137</sup> nor have any effect on the construction of legislation enacted by Parliament under domestic law; '[i]t is the province and duty of courts exercising jurisdiction with respect to matters arising under ... a statute to construe and apply it.'<sup>138</sup> When an executive certificate is admissible, it is admitted on the basis that 'in matters involving foreign relations the Court may rely upon a certificate from the executive and that certificate would be conclusive',<sup>139</sup> but it remains for the court to construe and apply the terms of the law.<sup>140</sup> At common law, the terminology of the certificates is subject to a court's interpretation,<sup>141</sup> but evidence is not admissible to contradict the certificate.<sup>142</sup>

These aspects were at play in *HSI v Kyodo, Re HSI and Minister for the Environment and Petrotimor*, as the challenges brought to the courts under domestic legislation were all set against a background of issues arising in the international legal system. It was therefore for the courts in each case to decide to what extent these international law issues would be taken into account in rendering judgment and whether the issues were such as to warrant judicial abstention due to the non-justiciable nature of the matters concerned.

## V NATIONAL LITIGATION ON MARINE RESOURCES: THE APPROACH OF AUSTRALIAN COURTS TOWARDS INTERNATIONAL LAW

### A *HSI v Kyodo*

*HSI v Kyodo* concerned a challenge to Japan's scientific whaling program in Antarctic waters by Humane Society International ('HSI') on the basis that Kyodo Senpaku Kaisha Ltd ('Kyodo'), the company responsible for conducting the whaling program, was in violation of provisions of the *EPBC Act*. The objectives of the *EPBC Act* include establishing the Australian Whale Sanctuary for the protection of cetaceans in Australian marine areas and prescribed waters, and creating offences with regard to killing, injuring or otherwise interfering with cetaceans within the Australian Whale Sanctuary or within waters beyond the outer limits of the Australian Whale Sanctuary.<sup>143</sup> The *EPBC Act* applies to

<sup>137</sup> *Petrotimor* (2003) 126 FCR 354, 365 (Black CJ and Hill J).

<sup>138</sup> *A-G (Cth) v Tse* (1998) 193 CLR 128, 149 (Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ).

<sup>139</sup> *Petrotimor* (2003) 126 FCR 354, 366 (Black CJ and Hill J).

<sup>140</sup> *A-G (Cth) v Tse* (1998) 193 CLR 128, 149 (Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ).

<sup>141</sup> *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391, 401 (Hutley JA).

<sup>142</sup> *Carl Zeiss Stiftung v Rayner & Keeler Ltd [No 2]* [1967] 1 AC 853, 901 (Lord Reid).

<sup>143</sup> *EPBC Act* ss 3(2)(e)(ii), 24, 225–32. But see *EPBC Act* s 224(2), which limits the application of div 3 ('Whales and other cetaceans'):

A provision of [div 3] that has effect in relation to a place outside the outer limits of the Australian Whale Sanctuary applies only in relation to:

- (a) Australian citizens; and
- (b) persons who:
  - (i) are not Australian citizens; and
  - (ii) hold permanent visas under the Migration Act 1958; and

acts, omissions, matters and things under Commonwealth jurisdiction<sup>144</sup> and to each external territory.<sup>145</sup> Notably, waters within 200 nautical miles of the AAT are within the Australian Whale Sanctuary.<sup>146</sup> HSI, as an ‘interested person’,<sup>147</sup> sought a declaration and injunction against Kyodo for contravening ss 229–30 of the *EPBC Act*,<sup>148</sup> because it ‘[a]t no time ... held a permit or authority as required under ss 231, 232 or 238’.<sup>149</sup>

As the respondent was a foreign company in this case, the applicants initially sought leave from the Federal Court to serve outside jurisdiction. Allsop J was aware that a range of international law questions were at issue regarding the rights Australia claimed off the AAT<sup>150</sup> and therefore thought it would be appropriate that the Commonwealth Attorney-General be given an opportunity to provide submissions on these issues.<sup>151</sup>

In its *amicus curiae* brief, the Attorney-General highlighted both the international law issues and the consequent political controversy in seeking to enforce the *EPBC Act* under international law.<sup>152</sup> With regard to the former, the Attorney-General canvassed the questions relating to the exercise of jurisdiction by Australia in its claimed EEZ off the AAT under international law, taking into account the legal framework established by the *Antarctic Treaty*. In particular, it was observed that ‘Japan would consider any attempt to enforce Australian law against Japanese vessels and its nationals, in the waters adjacent to the AAT, to be a breach of international law on Australia’s part.’<sup>153</sup> With respect to the consequent political controversy that could arise if Australia sought to take law enforcement action against the Japanese whalers, the Attorney-General noted that any purported exercise of jurisdiction against Japanese nationals in Austra-

- (iii) are domiciled in Australia or an external Territory; and
- (c) corporations incorporated in Australia or an external Territory; and
- (d) the Commonwealth; and
- (e) Commonwealth agencies; and
- (f) Australian aircraft; and
- (g) Australian vessels; and
- (h) members of crews of Australian aircraft and Australian vessels (including persons in charge of aircraft or vessels).

<sup>144</sup> *EPBC Act* s 5(2).

<sup>145</sup> *EPBC Act* s 5(1).

<sup>146</sup> *EPBC Act* s 225(2). See also above nn 59–60 and accompanying text.

<sup>147</sup> *HSI v Kyodo (First Application for Leave to Serve)* (2004) 212 ALR 551, 553 (Allsop J). See *EPBC Act* s 475.

<sup>148</sup> *HSI v Kyodo (First Application for Leave to Serve)* (2004) 212 ALR 551, 553 (Allsop J).

<sup>149</sup> *Ibid* 556.

<sup>150</sup> Allsop J noted that in accordance with international comity, courts will generally not adjudicate upon the validity of acts and transactions of a foreign sovereign state: *ibid* 562.

<sup>151</sup> *Ibid* 563.

<sup>152</sup> Attorney-General (Cth), ‘Outline of Submissions of the Attorney-General of the Commonwealth as *Amicus Curiae*’, Submission in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd*, NSD 1519/2004, 25 January 2005. See also *HSI v Kyodo (Second Application for Leave to Serve)* [2005] FCA 664 (Unreported, Allsop J, 27 May 2005) [2], [13].

<sup>153</sup> Attorney-General (Cth), ‘Outline of Submissions of the Attorney-General of the Commonwealth as *Amicus Curiae*’, Submission in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd*, NSD 1519/2004, 25 January 2005, [14].

lia's claimed EEZ adjacent to the AAT was 'reasonably ... expected to prompt a significant adverse reaction from other Antarctic Treaty Parties.'<sup>154</sup> As such, enforcement of the *EPBC Act* in relation to the AAT 'would be contrary to Australia's long term national interests.'<sup>155</sup> The Commonwealth government therefore considered that it was more appropriate to pursue diplomatic solutions in relation to this matter, and believed this should be a 'key consideration' in the proceedings determining whether to grant leave for enforcement outside of the jurisdiction.<sup>156</sup>

While Allsop J acknowledged that the executive's concerns were non-justiciable matters, as issues entirely dependent on political sanctions and understandings,<sup>157</sup> he regarded them as relevant considerations to be weighed when exercising judicial discretion.<sup>158</sup> His Honour accepted that Japan would consider service or the exercise of federal jurisdiction under the *EPBC Act* as contrary to international law and the claim by the Court to the exercise of jurisdiction to be impermissible under the *Antarctic Treaty*.<sup>159</sup> Allsop J did not, however, reach any conclusion of his own as to whether he considered that the legislation was in violation of international law.

In seeking an injunction under the *EPBC Act*, the applicants were plainly motivated in part by wanting to send a message disapproving of Japan's whaling practices in Antarctica as part of a broader anti-whaling campaign. Allsop J did not seek to support these efforts of institutional reform. He considered issuing an injunction to be tantamount to an empty assertion of Australian law by the Court, devoid of utility because, 'as the issue is one for public law, it cannot be expected that Japanese courts would give effect to an injunction.'<sup>160</sup> Having considered the submissions put by the Attorney-General, Allsop J declined to exercise his discretion to grant leave to serve originating process in Japan.<sup>161</sup>

The applicants appealed against this decision, arguing that Allsop J's discretion miscarried because he erred in considering political and diplomatic issues incidentally associated with proceedings between private litigants.<sup>162</sup> Furthermore, it was claimed that international comity was not infringed because the issues in the proceedings (as defined by the Statement of Claim) challenged

<sup>154</sup> Ibid [16].

<sup>155</sup> Ibid [17].

<sup>156</sup> Ibid [20]–[21]. See also *HSI v Kyodo (Second Application for Leave to Serve)* [2005] FCA 664 (Unreported, Allsop J, 27 May 2005) [16].

<sup>157</sup> See also *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 370 (Gummow J).

<sup>158</sup> *HSI v Kyodo (Second Application for Leave to Serve)* [2005] FCA 664 (Unreported, Allsop J, 27 May 2005) [19].

<sup>159</sup> Ibid [27]. His Honour also believed the matters raised in the Attorney-General's submissions 'would be compounded by the difficulty, if not impossibility' of enforcing such a court order: at [28].

<sup>160</sup> Ibid [33].

<sup>161</sup> Ibid [37], [43].

<sup>162</sup> HSI, 'Appellant's Outline of Argument', Submission in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd*, NSD 995/2005, 15 November 2005, [12].

neither the conduct of Japan in its own territory<sup>163</sup> nor the validity of the Japanese Whale Research Program.<sup>164</sup>

The Full Court held that diplomatic and political considerations were irrelevant where Parliament has provided that the action is justiciable in an Australian court.<sup>165</sup> The action was justiciable since the applicants had standing under *EPBC Act* s 475,<sup>166</sup> and the Court was explicitly empowered to ‘grant an injunction restraining a person from engaging in conduct ... whether or not it appears ... that the person intends to engage again ... in conduct of that kind’ and even ‘whether or not there is a significant risk of injury or damage to ... the environment’.<sup>167</sup> As a result, in the opinion of the Court, Allsop J erred in refusing leave, ‘even if the pursuit of the claim was contrary to Australia’s foreign relations.’<sup>168</sup> Moore J also agreed with Black CJ and Finkelstein J that the ‘political repercussions of service of the process’, and the potential ‘litigation of this application in an Australian court, [were] irrelevant in deciding whether to grant leave.’<sup>169</sup> The jurisdiction of the Federal Court having been engaged, the Court could not refuse to adjudicate the dispute.<sup>170</sup> It was held that:

Courts must be prepared to hear and determine matters whatever their political sensitivity either domestically or internationally. To approach the matter otherwise ... is to compromise the role of the courts as the forum in which rights can be vindicated whatever the subject matter of the proceedings.<sup>171</sup>

This conclusion is understandable, as Australian law had prescribed the offences and penalties for undertaking activities within the Australian Whale Sanctuary under the *EPBC Act*,<sup>172</sup> and that legislation was lawfully enacted pursuant to the external affairs power under the *Constitution*.<sup>173</sup> The establishment of the Australian Whale Sanctuary under the *EPBC Act* fell within the modern doctrine as to the scope of the power conferred by s 51(xxix) espoused by Dawson J in *Polyukhovich v Commonwealth*.<sup>174</sup> That is, the conduct pro-

<sup>163</sup> Ibid [15].

<sup>164</sup> Ibid [16]. See also *HSI v Kyodo (First Application for Leave to Serve)* (2004) 212 ALR 551, 561–3 (Allsop J).

<sup>165</sup> *HSI v Kyodo (Full Court)* (2006) 154 FCR 425, 430 (Black CJ and Finkelstein J), citing *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* [2000] 1 AC 61, 107 (Lord Nicholls).

<sup>166</sup> *HSI v Kyodo (Full Court)* (2006) 154 FCR 425, 429–30 (Black CJ and Finkelstein J).

<sup>167</sup> Ibid 431. See *EPBC Act* ss 479(1)(a), (1)(c).

<sup>168</sup> *HSI v Kyodo (Full Court)* (2006) 154 FCR 425, 430 (Black CJ and Finkelstein J).

<sup>169</sup> Ibid 434–5.

<sup>170</sup> See *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 238–9 (Brennan J).

<sup>171</sup> *HSI v Kyodo (Full Court)* (2006) 154 FCR 425, 435 (Moore J).

<sup>172</sup> Ibid 428 (Black CJ and Finkelstein J).

<sup>173</sup> Section 51(xxix) extends to matters or things geographically situated outside Australia: *Seas and Submerged Lands Case* (1975) 135 CLR 337, 471 (Mason J). The Australian Whale Sanctuary would constitute an area ‘external to the continent of Australia and the island of Tasmania’: at 360 (Barwick CJ); see also at 470–1 (Mason J), 497–8 (Jacobs J). In addition, ‘laws which regulate conduct within Australia by Australians may be laws with respect to external affairs [if they are] with respect to a subject-matter which involved a relationship with other countries’: *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168, 191 (Gibbs CJ).

<sup>174</sup> (1991) 172 CLR 501, 632.

scribed by the *EPBC Act*, being with regard to ‘a place, person, matter or thing [that] lies outside the geographical limits of the country,’<sup>175</sup> fell within the meaning of the phrase ‘external affairs’,<sup>176</sup> and therefore constituted a sufficient ‘constitutional fact’ to sustain the validity of those sections,<sup>177</sup> irrespective of any possible violation of both international law and international comity.<sup>178</sup>

Although there is a presumption that Parliament intends to legislate in conformity with international law,<sup>179</sup> this presumption is subject to two qualifications: first, it applies only when the legislation is intended to give effect to an international instrument — that is, when ‘the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant instrument’<sup>180</sup> — and, secondly, the court may use the convention only in a case of ambiguity so as to favour a construction that accords with the obligations of Australia under international law.<sup>181</sup> This enables a court to favour a construction that accords with the obligations of Australia under a treaty. However, if the constitutional provision is clear and if the law is clearly within power, no rule of international law and no treaty (including one to which Australia is a party) may override the *Constitution* or any law validly made under it.<sup>182</sup>

The courts have also taken a narrow view of s 15AB of the *Acts Interpretation Act 1901* (Cth), confirming that where there is no ambiguity in the text of the legislation a doubt cannot be created by reference to the treaty itself.<sup>183</sup> Moreover, although Commonwealth laws may contain an implication that they should

<sup>175</sup> *Ibid* 632 (Dawson J):

the power extends to places, persons, matters or things physically external to Australia. The word ‘affairs’ is imprecise, but is wide enough to cover places, persons, matters or things. The word ‘external’ is precise and is unqualified. If a place, person, matter or thing lies outside the geographical limits of the country, then it is external to it and falls within the meaning of the phrase ‘external affairs.’

See also the discussion of the other members of the Court: at 528–31 (Mason CJ), 599–603 (Deane J), 695–6 (Gaudron J), 712–14 (McHugh J). The modern doctrine as to the scope of the external affairs power has been subsequently applied in *Industrial Relations Act Case* (1996) 187 CLR 416, 485 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *XYZ v Commonwealth* (2006) 227 CLR 532, 552 (Gummow, Hayne and Crennan JJ).

<sup>176</sup> See also *Commonwealth v Tasmania* (1983) 158 CLR 1, 300–1 (Dawson J) (*‘Tasmanian Dam Case’*).

<sup>177</sup> *XYZ v Commonwealth* (2006) 227 CLR 532, 547 (Gummow, Hayne and Crennan JJ).

<sup>178</sup> *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 669 (Dixon J).

<sup>179</sup> *Zachariassen v Commonwealth* (1917) 24 CLR 166, 181 (Barton, Isaacs and Rich JJ);

*Polites v Commonwealth* (1945) 70 CLR 60, 68–9 (Latham CJ), 77 (Dixon J), 80–1 (Williams J).

<sup>180</sup> *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J). See also *Yager v The Queen* (1977) 139 CLR 28, 43–4 (Mason J).

<sup>181</sup> *Re Woolley; Ex parte Applicant M276/2003* (2004) 225 CLR 1, 71 (Kirby J); *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ); *Yager v The Queen* (1977) 139 CLR 28, 43–4 (Mason J). Cf *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J).

<sup>182</sup> *Hindmarsh Island Bridge Case* (1998) 195 CLR 337, 417–18 (Kirby J). See also *Polites v Commonwealth* (1945) 70 CLR 60, 69 (Latham CJ), 79 (McTiernan J).

<sup>183</sup> See *Hindmarsh Island Bridge Case* (1998) 195 CLR 337, 417–18 (Kirby J) (*‘[i]t does not authorise the creation of ambiguities by reference to international law where none exist’*); *ICI Australia Operations Pty Ltd v Fraser* (1992) 34 FCR 564, 569–70 (Black CJ, Neaves and von Doussa JJ); *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298, 304 (Gummow J).

be construed to conform to international law, the legislature is not bound by the implication and may legislate in disregard of it.<sup>184</sup>

Relevant to *HSI v Kyodo*, the *EPBC Act* does not express an intention to give effect to *UNCLOS* or the *Antarctic Treaty*, nor does it make these treaties an operative part of the Act.<sup>185</sup> Further, the *EPBC Act* makes no reference to the relevant provisions of these treaties in its schedule nor includes reference to the treaties in its various sections, which would have been sufficient to attract the operation of s 15AB of the *Acts Interpretation Act*<sup>186</sup> to determine a meaning that is otherwise ambiguous or obscure,<sup>187</sup> or to avoid a result which is perceived to be manifestly absurd or unreasonable.<sup>188</sup> Finally, neither *UNCLOS* nor the *Antarctic Treaty* were mentioned in the second reading speech,<sup>189</sup> which also would have been sufficient to attract s 15AB of the *Acts Interpretation Act*.<sup>190</sup>

The offences and penalties<sup>191</sup> prescribed by the *EPBC Act* do not affect acts or omissions that have been authorised by a permit or recognised foreign authority under s 7(1) of the *Antarctic Treaty (Environment Protection) Act 1980* (Cth) ('*ATEP Act*').<sup>192</sup> However, the *EPBC Act* prevails to the extent of any other inconsistency and, whereas s 4(2) of the *ATEP Act* provides that it is subject to the obligations of Australia under international law (including obligations under any international agreement binding on Australia), no such limitation is prescribed in the *EPBC Act*.

As a result, the *EPBC Act* effectively puts Australian courts in a position of violating international law and triggering Australia's international responsibility unless the courts are willing to recognise as much and seek to rely on non-justiciability doctrines. This approach is admittedly difficult given the clear grant of jurisdiction to the courts under the *EPBC Act* and the inapplicability of the various tools of construction that would have otherwise permitted direct consideration of the relevant treaties. The courts would have been required to find that, even though jurisdiction existed, the consequences under international law were such that the court should have abstained from acting. The principle,

<sup>184</sup> *Polites v Commonwealth* (1945) 70 CLR 60, 69 (Latham CJ), 78 (Dixon J), 81 (Williams J); *Horta v Commonwealth* (1994) 181 CLR 183, 195 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Al-Kateb v Godwin* (2004) 219 CLR 562, 591 (McHugh J).

<sup>185</sup> Cf *Shipping Corporation of India Ltd v Lamlen Chemical Co (A/Asia) Pty Ltd* (1980) 147 CLR 142, 158–60 (Mason and Wilson JJ).

<sup>186</sup> *Acts Interpretation Act 1901* (Cth) s 15AB(2)(d).

<sup>187</sup> *Acts Interpretation Act 1901* (Cth) s 15AB(1)(b)(i).

<sup>188</sup> *Acts Interpretation Act 1901* (Cth) s 15AB(1)(b)(ii).

<sup>189</sup> Commonwealth, *Parliamentary Debates*, Senate, 2 July 1998, 4795–8 (Robert Hill, Minister for the Environment).

<sup>190</sup> *Acts Interpretation Act 1901* (Cth) s 15AB(2)(f). See, eg, *ICI Australia Operations Pty Ltd v Fraser* (1992) 34 FCR 564, 568–70 (Black CJ, Neaves and von Doussa JJ).

<sup>191</sup> *EPBC Act* ss 196–196E, 207B.

<sup>192</sup> *EPBC Act* s 9(2). *ATEP Act* s 3 defines a permit as 'a permit in force under Part 2 ['Conservation of Antarctic fauna and flora'] of this Act' and a 'recognised foreign authority' as including:

a permit, authority or arrangement that ... authorises the carrying on of an activity in the Antarctic and ... has been issued, given or made by a Party (other than Australia) to the *Madrid Protocol* that has accepted under that *Protocol* the same obligations as Australia in relation to the carrying on of that activity in the Antarctic.

alluded to in *Buttes Gas & Oil Co v Hammer* ('*Buttes*'),<sup>193</sup> that a case should not be decided if it would cause embarrassment to the state, could have applied but, unfortunately, was not addressed by the Full Court.<sup>194</sup>

On the question of the futility of the injunction being enforced, the Full Court disagreed with Allsop J's approach, and considered that

even if there is a problem with the enforcement of an injunction (if any be granted) that does not lead to the conclusion that there is no justiciable controversy or 'matter' before the court. ... [T]he requirement that there must be an available remedy is to say nothing about the effectiveness of that remedy in a particular case.<sup>195</sup>

Moreover, the *EPBC Act* had provided the necessary judicially manageable standards,<sup>196</sup> as the Australian Parliament had created offences and penalties under the *EPBC Act*.<sup>197</sup> It was also clear under the legislation that the relevant provisions of the *EPBC Act* were to apply to all Australian and foreign persons and vessels in the EEZ of the AAT; no provision was made for foreign entities to be excluded from the Act's general enforcement provisions.<sup>198</sup>

*HSI v Kyodo* therefore dealt with a 'matter' that had arisen under a law that, despite having already been preceded by a political assessment, was not a matter 'making or challenging that assessment',<sup>199</sup> because the international obligations entered into by the executive had become binding on individuals through justiciable rights.<sup>200</sup> That is, by providing 'standing'<sup>201</sup> Parliament had conferred jurisdiction because there was an 'immediate right, duty or liability'<sup>202</sup> to be determined by the Federal Court.<sup>203</sup> As the Full Court did not consider it

<sup>193</sup> [1982] AC 888, 938 (Lord Wilberforce). The 'embarrassment' principle was articulated in *Moore v Mitchell*, 30 F 2d 600, 604 (Learned Hand J) (2<sup>nd</sup> Cir, 1929) and was accepted by King-smill Moore J in *Peter Buchanan Ltd v McVey* [1955] AC 516, 528–9 (High Court of Eire). See also *Spycatcher* (1988) 165 CLR 30, 43–4 (Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ); Garnett, above n 7, 724.

<sup>194</sup> Cf below Part V(C).

<sup>195</sup> *HSI v Kyodo (Full Court)* (2006) 154 FCR 425, 428–9 (Black CJ and Finkelstein J). In dissent, Moore J stated that but for one consideration, he would have granted leave. Even though the applicant had demonstrated an arguable case involving issues of great public importance, the 'almost certain futility of the litigation the applicant [sought] to pursue' did not satisfy Moore J that leave should be granted: at 436.

<sup>196</sup> Namely, intentionally treating and possessing whales in contravention of the *EPBC Act* ss 229–30: *HSI v Kyodo (First Application for Leave to Serve)* (2004) 212 ALR 551, 553 (Allsop J).

<sup>197</sup> See *HSI v Kyodo (Full Court)* (2006) 154 FCR 425, 429 (Black CJ and Finkelstein J). See also *EPBC Act* ss 229–30.

<sup>198</sup> *HSI v Kyodo (Full Court)* (2006) 154 FCR 425, 429 (Black CJ and Finkelstein J). See also *EPBC Act* s 224(2).

<sup>199</sup> *Thomas v Mowbray* (2007) 233 CLR 307, 354 (Gummow and Crennan JJ).

<sup>200</sup> *HSI v Kyodo (First Application for Leave to Serve)* (2004) 212 ALR 551, 553 (Allsop J). Cf *Bradley v Commonwealth* (1973) 128 CLR 557, 582–3 (Barwick CJ and Gibbs J); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 224 (Mason J); *Dietrich v The Queen* (1992) 177 CLR 292, 305 (Mason CJ and McHugh J).

<sup>201</sup> *EPBC Act* ss 475(6)–(7).

<sup>202</sup> *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).

<sup>203</sup> *HSI v Kyodo (Full Court)* (2006) 154 FCR 425, 432–3 (Black CJ and Finkelstein J).

necessary or appropriate to address the international law issues (as distinct from political or diplomatic considerations), it allowed the appeal and set aside the order that dismissed the application for leave to serve the originating process in Japan.<sup>204</sup>

Following this judgment, the applicants were able to serve process outside jurisdiction, and the matter proceeded to trial. Given the views of the Full Court, Allsop J determined that under the *EPBC Act* there was evidence to show that the respondent had violated the terms of that legislation and was likely to do so again.<sup>205</sup> His Honour decided that Japan's refusal to recognise Australia's claim to Antarctica was to be put to one side, even though 'the lack of wide international recognition of Australia's claim to the relevant part of Antarctica' could not be ignored.<sup>206</sup> Despite these misgivings, Allsop J issued an injunction, noting '[i]t is not for this Court to question Australia's claim or Parliament's mandate in the *EPBC Act*, which is based on Australia's claim.'<sup>207</sup> The case was thereby resolved purely in terms of Australian law without further consideration of the international legal rights and duties involved. As discussed below in Part IV, the injunctions have not yet been enforced.

#### B Re HSI and Minister for the Environment

*Re HSI and Minister for the Environment*, which was decided before the Administrative Appeals Tribunal (the 'Tribunal'), also raised issues under the *EPBC Act* and related to Australia's decisions pursuant to its role and obligations under the *CCSBT*. With respect to the former, it is an offence under the *EPBC Act* to export a 'regulated native specimen' that is not otherwise exempt under the provisions of the *EPBC Act*.<sup>208</sup> In light of this, the Minister made an amendment to the list of exempt native specimens to include fish taken from the southern bluefin tuna fishery, subject to the requirement that they are covered by the declaration of an 'approved Wildlife Trade Operation',<sup>209</sup> as required by *EPBC Act* s 303FN.

HSI sought merits review of the Minister's decision to declare fishing operations in the southern bluefin tuna fishery an 'approved wildlife trade operation'.<sup>210</sup> It asked the Tribunal to overturn the Minister's decision that certain matters in ss 303FN(3)–(4) had been satisfied, including that the operation of the fishery would 'not be detrimental to the survival or conservation status of the [southern bluefin tuna]'.<sup>211</sup> It was further argued that the Minister had not as a

<sup>204</sup> *Ibid* 433.

<sup>205</sup> *HSI v Kyodo (Injunction)* (2008) 165 FCR 510, 522.

<sup>206</sup> *Ibid* 525.

<sup>207</sup> *Ibid*.

<sup>208</sup> *EPBC Act* ss 303DB, 303DD.

<sup>209</sup> Commonwealth, *Gazette: Special*, No S 489, 1 December 2004.

<sup>210</sup> *Re HSI and Minister for the Environment* (2006) 93 ALD 640, 641 (Olney DP, Senior Member J Kelly and Member I R Way). See also Commonwealth, *Gazette: Government Notices*, No 48, 1 December 2004, 4033; *EPBC Act* ss 303FN, 303GJ(1)(h).

<sup>211</sup> *Re HSI and Minister for the Environment* (2006) 93 ALD 640, 644 (Olney DP, Senior Member J Kelly and Member I R Way); *EPBC Act* s 303FN(3)(b).

condition of approval provided for quota reductions<sup>212</sup> despite receiving advice from the SBT Commission that the overall total allowable catch for southern bluefin tuna should immediately be reduced by 30 per cent in 2006 or by 50 per cent in 2007.<sup>213</sup> The challenge under the *EPBC Act* therefore raised questions regarding Australia's decision-making in relation to an international treaty and its role in the SBT Commission (the institution created under that treaty).

The decision of the Minister had been based on the plan of management devised by the Australian Fisheries Management Authority ('AFMA'), which is responsible for determining national seasonal catch allocations and dividing that allocation into individual transferable quotas (statutory fishing rights).<sup>214</sup> Before a plan of management is established, AFMA must make an agreement for the assessment of the potential impact of the plan on each of the matters protected under part 3 of the *EPBC Act*<sup>215</sup> and consider any matters in the Minister's recommendations under the agreement.<sup>216</sup>

To this end, a Strategic Assessment was made pursuant to an agreement between the Minister and AFMA, which was entered into in December 2001.<sup>217</sup> One of the guiding principles of the Assessment was that '[f]ishing operations should be managed to minimise their impact on the structure, productivity, function and biological diversity of the ecosystem.'<sup>218</sup> AFMA further verified that the framework set in place (which included proposed amendments to the *SBT Fishery Management Plan 1995* (Cth)) was robust and that Australia would meet its national and international obligations in relation to fishing southern bluefin tuna.<sup>219</sup> The proposed amendments to the *SBT Fishery Management Plan 1995* (Cth) included:<sup>220</sup>

- 'an appropriate data collection and verification system, through [the] use of logbooks and an observer program';
- a limitation on commercial quotas, with enhanced accountability;

<sup>212</sup> See *EPBC Act* s 303FT(4)(c).

<sup>213</sup> HSI, 'HSI Calls for Specialist Environment Court after Tribunal Abandons Endangered Southern Bluefin Tuna to Extinction' (Press Release, 3 April 2006). However, as the Tribunal noted, Australia has a 'power to veto any proposed decision by the [SBT Commission] on total allowable catch or quota allocation': *Re HSI and Minister for the Environment* (2006) 93 ALD 640, 645 (Olney DP, Senior Member J Kelly and Member I R Way).

<sup>214</sup> *Ibid* 648.

<sup>215</sup> *Fisheries Management Act 1991* (Cth) s 17; *EPBC Act* ss 146, 148(1)(a).

<sup>216</sup> *EPBC Act* s 148(1)(b). Section 153 also provides for the endorsement and accreditation of a plan of management under the *Fisheries Management Act 1991* (Cth), which has been made pursuant to an agreement within the meaning of *EPBC Act* s 146.

<sup>217</sup> Australian Fisheries Management Authority (Cth), *Assessment Report — Southern Bluefin Tuna* (2002) ('*AFMA Assessment Report*'). See also Department of Environment and Heritage (Cth), *Strategic Assessment of the Southern Bluefin Tuna Fishery* (2004) ('*Strategic Assessment Report*').

<sup>218</sup> *AFMA Assessment Report*, above n 217, iv. See also *Strategic Assessment Report*, above n 217, 32; *Re HSI and Minister for the Environment* (2006) 93 ALD 640, 649 (Olney DP, Senior Member J Kelly and Member I R Way).

<sup>219</sup> *AFMA Assessment Report*, above n 217, iii. See also *Re HSI and Minister for the Environment* (2006) 93 ALD 640, 650 (Olney DP, Senior Member J Kelly and Member I R Way).

<sup>220</sup> *Strategic Assessment Report*, above n 217, 8. See also *Re HSI and Minister for the Environment* (2006) 93 ALD 640, 650 (Olney DP, Senior Member J Kelly and Member I R Way).

- ‘management of by-catch’;
- ‘an effective monitoring and compliance program’;
- a ‘definition of the methods by which SBT can be taken’; and
- an ‘annual risk assessment and risk analysis projects’.

The Department of the Environment and Heritage was of the opinion that the proposed amendments would ‘significantly improve overall management’ of the southern bluefin tuna and ‘set the framework for achieving sustainability’ in the interim by working to reverse the overfished status of the stocks in the international fishery.<sup>221</sup> In August 2004, the Minister accredited the *SBT Fishery Management Plan 1995* (Cth), incorporating the amendments recommended by AFMA in its Strategic Assessment.<sup>222</sup>

To assist the Tribunal in determining whether the Minister’s decision to declare the southern bluefin tuna fishery an approved wildlife trade operation was in accordance with the *EPBC Act*,<sup>223</sup> evidence in the form of affidavits from experts in the field was presented to the Tribunal.<sup>224</sup> The information therein took account of the decisions of the SBT Commission (which, as stated previously, determines the total allowable catch of southern bluefin tuna), as well as each nation’s allocation and Australia’s role in the Commission.<sup>225</sup>

Mr Hurry, from the Commonwealth Department of Agriculture, Fisheries and Fauna, gave evidence of the current status of southern bluefin tuna stocks and the risks associated with the operation of the global fishery.<sup>226</sup> Mr Hurry was of the opinion ‘that the most pragmatic and effective approach [would] be for Australia to continue to take [southern bluefin tuna] in a responsible manner’,<sup>227</sup> and stated:

The reasons for this are as follows. Australia currently has a strong reputation as the most balanced voice on the [SBT] Commission. However, if we were to cease taking SBT in the current circumstances (that is, when other countries are likely to continue taking SBT), the likely political consequences would include a significant weakening of our position as a lead player in the Commission and, as a result, a diminishing of the Commissions’ [sic] effectiveness overall. If Australia was no longer in a position to take a leadership role in the Commission, particularly in arguing for responsible management of SBT, in my view none of the other members would presently be able to step into that role.<sup>228</sup>

<sup>221</sup> *Strategic Assessment Report*, above n 217, 8.

<sup>222</sup> *Re HSI and Minister for the Environment* (2006) 93 ALD 640, 648 (Olney DP, Senior Member J Kelly and Member I R Way).

<sup>223</sup> *EPBC Act* s 303FN.

<sup>224</sup> *Re HSI and Minister for the Environment* (2006) 93 ALD 640, 651–6 (Olney DP, Senior Member J Kelly and Member I R Way).

<sup>225</sup> *Ibid* 647. See also *CCSBT* arts 8(3)(a), (5).

<sup>226</sup> *Re HSI and Minister for the Environment* (2006) 93 ALD 640, 655 (Olney DP, Senior Member J Kelly and Member I R Way).

<sup>227</sup> *Ibid*, paraphrasing Mr Hurry.

<sup>228</sup> *Ibid*, quoting Mr Hurry.

This statement highlights Australia's role in the SBT Commission, and as such demonstrates how the applicants, through a national court process, could have engaged in the processes of an international institution.

Mr McNee, an employee of the Commonwealth Department of Environment and Heritage, discussed in his affidavit the role of AFMA and its responsibilities under the *SBT Fishery Management Plan 1995* (Cth), as well as examining the likelihood of AFMA setting a lower national catch allocation than that determined by the SBT Commission.<sup>229</sup> In his affidavit, Mr McNee stated in relation to the latter point:

AFMA does have the power to set a lower national catch allocation than that determined by the [SBT Commission]. However, the [*Fisheries Management Act 1991* (Cth)] and the [*SBT Fishery Management Plan 1995* (Cth)] articulate the central role of the [SBT Commission] and the importance of giving effect to Australia's obligations under international agreements (including implementing [SBT Commission] decisions). Australia is a member of the [SBT Commission] so that it can participate in effective global management of a global stock. Therefore, AFMA perceives part of its role as implementing the decisions of the [SBT Commission] as rapidly and efficiently as possible, and it has done so to date. ...

Taking an alternative approach, if AFMA considered that it should set a lower national catch allocation than that taken by the [SBT Commission] (or voluntarily agreed to by the Australian government), I consider that this would lower the pressure and momentum on other members of the [SBT Commission] in implementing a cohesive recovery strategy ...<sup>230</sup>

A suggestion here seems to be that interference with AFMA and the Minister's decisions would infringe on Australia's fulfilment of its international obligations. This view would be inaccurate as it is an unlikely argument that Australia is required to harvest a certain amount of southern bluefin tuna within its allocation. However, the implications for Australia's stance before the SBT Commission remain relevant.

Upon reviewing the evidence, the Tribunal considered the policy behind the Minister's decision well justified, because the decision-making process that the Minister at first instance and the Tribunal on review were required to embark upon was in a highly technical, specialised and uncertain field of endeavour.<sup>231</sup> The Tribunal therefore affirmed the decision by the Minister to declare the southern bluefin tuna fishery an approved 'wildlife trade operation' under *EPBC Act* s 303FN.<sup>232</sup>

In doing so, the Tribunal appears to have appreciated the dynamics of the SBT Commission, within which Australia needs to operate, and opted not to intrude on those matters in reviewing the Minister's decision. It may nonetheless be observed that a contrary decision could not have placed Australia in violation of international law, as is arguably the case with the decision in *HSI v Kyodo*. So

<sup>229</sup> Ibid 655–6.

<sup>230</sup> Ibid 656.

<sup>231</sup> Ibid.

<sup>232</sup> Ibid 657.

while the outcome here may be viewed as preferable, the non-interference of the Tribunal is less consequential here than that of the judiciary in the *HSI v Kyodo*. Moreover, the Tribunal, like Allsop J at first instance in *HSI v Kyodo*, refrained from engaging in any dialogue that may have supported the plaintiff's efforts in securing reform of Australia's conservation efforts for southern bluefin tuna in any international forum.

### C Petrotimor

*Petrotimor* concerned a claim against the Commonwealth by Portuguese and American companies in relation to an oil concession granted by Portugal in 1974 in the Timor Gap. Australia and Timor-Leste have overlapping claims to the continental shelf in this area, and the continental shelf delimitation has proven a slow and changing process both because of the history of Timor-Leste<sup>233</sup> and the considerable oil and gas resources located in the area.<sup>234</sup> After Timor-Leste was annexed by Indonesia, Australia entered into the *Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia* ('*Timor Gap Treaty*')<sup>235</sup> with Indonesia in 1989, with the treaty entering into force in 1991. The *Timor Gap Treaty* created a Zone of Cooperation for exploration and exploitation between the two states.<sup>236</sup> The zone was divided into three areas, one being held by each state and the middle area involving a shared allocation of the resources administered by a Joint Authority created under the treaty.<sup>237</sup> The Joint Authority issued a production sharing contract to the Phillips companies<sup>238</sup> (also respondents in the case) within the shared area.<sup>239</sup> Two of the areas in the Zone of Cooperation, including the shared area, comprised substantially the same area as that covered by the applicants' Concession Agreement.<sup>240</sup>

<sup>233</sup> Timor-Leste was first a Portuguese colony, which was then subsumed within Indonesia before coming under United Nations administration, after which it finally gained independence. The history of Timor-Leste in this regard, including the various delimitation agreements that have been in place, is set out in the judgment of Beaumont J in *Petrotimor* (2003) 126 FCR 354, 388–99.

<sup>234</sup> The Timor Sea 'is estimated to contain the world's 23<sup>rd</sup> largest oil field, with reserves of five billion barrels of oil and 50 trillion feet of liquid natural gas': Katsumi Ishizuka, 'Australia's Policy towards East Timor' (2004) 93 *The Round Table* 271, 277. Australia and Timor-Leste have agreed to defer the delimitation of the continental shelf for 50 years, during which time it is anticipated that the Greater Sunrise gas field will be fully exploited under the terms of a bilateral treaty between Australia and Timor-Leste: see *Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea*, signed 12 January 2006, [2007] ATS 12 (entered into force 23 February 2007). See generally Clive Schofield, 'Minding the Gap: The Australia–East Timor Treaty on Certain Maritime Arrangements in the Timor Sea (CMATS)' (2007) 22 *International Journal of Marine and Coastal Law* 189.

<sup>235</sup> Signed 11 December 1989, [1991] ATS 9 (entered into force 9 February 1991).

<sup>236</sup> *Timor Gap Treaty* art 2.

<sup>237</sup> *Timor Gap Treaty* art 2.

<sup>238</sup> Namely, ConocoPhillips (91-12) Pty Ltd, ConocoPhillips JPDA Pty Ltd and Phillips Petroleum Timor Sea Pty Ltd: *Petrotimor* (2003) 126 FCR 354, 355 (Beaumont J).

<sup>239</sup> See *ibid* 385 (Beaumont J).

<sup>240</sup> *Ibid* 383.

The applicants claimed that their property rights had been expropriated as a result of the Commonwealth entering into the *Timor Gap Treaty*.<sup>241</sup> Alternatively, declarations were sought that the *Timor Gap Treaty* was void<sup>242</sup> and that certain Australian legislation<sup>243</sup> was also void to the extent that it was inconsistent with the applicants' Concession Agreement. It was further claimed that a beneficial interest existed under a constructive trust in respect of the permits issued to the Phillips companies.<sup>244</sup> The Commonwealth sought to have the applicants' claims set aside, dismissed or permanently stayed on the basis that the claims were not justiciable or enforceable and that the claims did not give rise to a 'matter' within the jurisdiction of the Court.<sup>245</sup> In doing so, the Commonwealth highlighted how the submissions of the applicants called into question, either directly or indirectly, a range of international law issues.<sup>246</sup>

Although the applicants' arguments were of course based on Australian law and legal concepts, the claims squarely concerned international law questions relating to the delimitation of the continental shelf and the state's exclusive right to decide how to explore and exploit the natural resources located therein. The claims directly challenged the validity of the *Timor Gap Treaty*, questioning whether it was outside the executive power of the Commonwealth on various bases recognised for invalidating treaties under international law.<sup>247</sup> The applicants emphasised that they sought to test the validity of actions of the Australian government under Australian law, whereas the Commonwealth sought to show Australia's international affairs, as well as the acts of Portugal and Indonesia, were being inappropriately subjected to judicial scrutiny.<sup>248</sup> As a result, issues of non-justiciability and act of state were squarely before the Court.

Black CJ and Hill J considered acts of state to fall within the overall rubric of non-justiciability. Their judgment addresses the issue of non-justiciability in relation to the right of the executive to define the boundaries of Australia,<sup>249</sup> the adjudication of acts of a foreign sovereign within their own territory (invoking the embarrassment principle),<sup>250</sup> and whether there were judicial or manageable standards that could be applied.<sup>251</sup> They noted the overlap and linkage between

<sup>241</sup> Ibid 368–9 (Black CJ and Hill J).

<sup>242</sup> This question had been raised before the High Court in *Horta v Commonwealth* (1994) 181 CLR 183. There, the Court did not decide on the validity of the *Timor Gap Treaty* as it was enough in the context of that judgment to determine that the laws adopted on the basis of the treaty were constitutionally valid: at 195 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ). As a result of this decision, the Court was not required to address issues related to justiciability: at 195–6.

<sup>243</sup> Namely, the *Petroleum (Australia–Indonesia Zone of Cooperation) Act 1990* (Cth) and the *Maritime Legislation Amendment Act 1994* (Cth): see *Petrotimor* (2003) 126 FCR 354, 380 (Beaumont J).

<sup>244</sup> *Petrotimor* (2003) 126 FCR 354, 386 (Beaumont J).

<sup>245</sup> Ibid 360 (Black CJ and Hill J).

<sup>246</sup> Ibid 409 (Beaumont J).

<sup>247</sup> Ibid 383.

<sup>248</sup> Ibid 360–2 (Black CJ and Hill J).

<sup>249</sup> Ibid 361–2.

<sup>250</sup> Ibid 369–70. See above n 193 and accompanying text.

<sup>251</sup> Ibid 369–72. See also *Buttes* [1982] AC 888, 938 (Lord Wilberforce).

the different concepts and considered that it was not simply a matter of judicial restraint, but also one of jurisdiction — that is, whether there was a ‘matter’ upon which a court could adjudicate.<sup>252</sup> In other words, broader issues related to the international law aspects of the case were incorporated into the assessment of jurisdiction — as opposed to ascertaining first whether jurisdiction existed and, secondly, whether the dispute was otherwise inadmissible because of possible international law violations. According to Black CJ and Hill J, ‘[i]t may be accepted that if the issue is not capable of judicial determination it would not relevantly be a “matter” upon which Parliament might confer upon the court jurisdiction’.<sup>253</sup>

Beaumont J determined at the outset that there was no ‘matter’ arising under a Commonwealth law in light of his interpretation of the *Seas and Submerged Lands Act* and concluded that the Court lacked jurisdiction as a result.<sup>254</sup> He nonetheless considered whether the Court would feel obliged to exercise that jurisdiction if it otherwise existed (which suggests he would have found the case inadmissible even if jurisdiction existed). In his analysis, he noted that there were difficulties in defining acts of state and non-justiciability, as much depended on the facts of any given case.<sup>255</sup> Instead, Beaumont J concluded that the question related to whether the applicants’ claims were enforceable or not.<sup>256</sup> It is these aspects of whether the issues were ‘enforceable’ or ‘capable of judicial determination’ that are of most interest here, particularly in light of the international law issues also at stake in the case.

For the consideration of non-justiciability in the definition of Australia’s boundaries, Black CJ and Hill J recalled the views of Gibbs J in *New South Wales v Commonwealth* (‘*Seas and Submerged Lands Case*’)<sup>257</sup> and of Brennan J in *Mabo v Queensland [No 2]*<sup>258</sup> to the effect that the judiciary should accept the position of the executive as to whether territory is or is not part of Australia.<sup>259</sup> The applicants argued that the continental shelf boundary in the Timor Gap was the median line by virtue of the incorporation of the 1958 *Continental Shelf Convention* into the *Seas and Submerged Lands Act*.<sup>260</sup> On this basis, it was submitted, the boundary could be understood to have been settled by that legislation as being the median line between the two countries. However, the *Convention on the Continental Shelf* (‘*Continental Shelf Convention*’) did not definitively establish the median line as the boundary between overlapping

<sup>252</sup> *Petrotimor* (2003) 126 FCR 354, 373–4 (Black CJ and Hill J).

<sup>253</sup> *Ibid* 373.

<sup>254</sup> *Ibid* 414–15.

<sup>255</sup> *Ibid* 415.

<sup>256</sup> *Ibid* 415–16. In taking this approach, Beaumont J was well aligned with the approach advocated by Koh in addressing separation of powers questions: Koh, above n 8, 2383–6.

<sup>257</sup> (1975) 135 CLR 337, 388.

<sup>258</sup> (1992) 175 CLR 1, 31–2.

<sup>259</sup> *Petrotimor* (2003) 126 FCR 354, 362 (Black CJ and Hill J).

<sup>260</sup> *Ibid* 361 (Black CJ and Hill J). Beaumont J disputed that the delimitation principles of the *Continental Shelf Convention* had been incorporated into the *Seas and Submerged Lands Act*, considering instead that only the definition had been drawn into the Australian legislation: at 412.

entitlements to continental shelf, but instead emphasised that the neighbouring states were to reach agreement and that the median line could be applied but with adjustment for any special circumstances, leaving states free to negotiate how the median line might be shifted in any given situation.<sup>261</sup> While reference to ‘special circumstances’ may leave open a wide range of factors that could influence the placement of a boundary, this formula still provides a judicially manageable standard, as may be seen by the large number of maritime boundary cases decided by international courts.<sup>262</sup> Although Black CJ and Hill J considered that they did not need to decide this point conclusively, they correctly recognised that there was a standard that could be applied as a question of domestic law.<sup>263</sup>

In relation to the possible application of the act of state doctrine, the applicants and the Commonwealth disagreed on whether the validity of the act of a foreign state arose incidentally or was the gravamen of their claims.<sup>264</sup> Black CJ and Hill J considered that it was ‘an essential ingredient of most of the applicants’ claims that they did hold a valuable concession.’<sup>265</sup> For the applicants to succeed in their case, it would be critical to establish that they held a valid concession from the Portuguese government, but the Court lacked jurisdiction to make this assessment.<sup>266</sup> Beaumont J also considered that courts should refuse to enforce foreign governmental interests<sup>267</sup> and would have agreed to the summary dismissal of the majority of the applicants’ claims on this basis, had he not already determined that there was no ‘matter’ arising under Commonwealth law.<sup>268</sup>

In addition, Black CJ and Hill J noted that:

<sup>261</sup> *Continental Shelf Convention* art 6(1) reads:

Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

This formula was changed with the adoption of *UNCLOS* to permit states even more freedom in determining their maritime boundaries: see above nn 49–50 and accompanying text.

<sup>262</sup> See, eg, *Continental Shelf (Libyan Arab Jamahiriya v Malta)* [1985] ICJ Rep 13; *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras)* [1992] ICJ Rep 351; *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (United Kingdom v France)* (1977) 18 RIAA 3; *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (United Kingdom v France)* (1978) 18 RIAA 271; *Delimitation of the Maritime Boundary between Guinea and Guinea-Bissau (Guinea v Guinea-Bissau)* (1985) 19 RIAA 149; *Delimitation of Maritime Areas between Canada and France (Canada v France)* (1992) 21 RIAA 265.

<sup>263</sup> *Petrotimor* (2003) 126 FCR 354, 365–6 (Black CJ and Hill J). Their Honours further considered, without deciding the issue, that there was a role for the Court under the *Seas and Submerged Lands Act* since Parliament had implicitly excluded the executive from its traditional role of declaring boundaries in setting out the manner of exercise of its power through proclamation: at 363, 365.

<sup>264</sup> *Ibid* 368.

<sup>265</sup> *Ibid*.

<sup>266</sup> *Ibid* 369.

<sup>267</sup> *Ibid* 415–16.

<sup>268</sup> *Ibid* 416–18. The exception was the claim for breach of confidence.

the agreed facts themselves make it clear that there would be considerable embarrassment in the Court deciding what had been a most contentious issue between Portugal and Australia and which is still a subject of delicacy between Australia and the newly created East Timor.<sup>269</sup>

They therefore concluded that the present case was an appropriate one for the exercise of judicial restraint, as required by the embarrassment principle.<sup>270</sup> Beaumont J similarly referred to the 'public policy' issues involved, including 'the ongoing international arrangements made by this country with Indonesia and East Timor and ... the diplomatic stance Australia has taken with Portugal in this area.'<sup>271</sup> Without specifically considering the international law rights and obligations, the matter of Australia's international standing thus constituted an additional reason as to why the applicants' claims to compensation could not be enforced. Reliance on non-justiciability to deprive the court of jurisdiction was clearly appropriate here given that Australia and Timor-Leste were in the midst of negotiations over the Timor Gap resources and the boundary at the time of the case. The Court did not perceive that there was any need for it to intrude into the executive's negotiations or that it should utilise its powers to bolster the plaintiff's attempts to seek redress in any alternative forum.

#### D Lessons from Marine Resources Cases

In sum, the decisions in each of these cases show different approaches by the judiciary to the international law issues at stake. In *HSI v Kyodo*, once the Full Court found that it had jurisdiction under the *EPBC Act*, there was no further consideration as to whether the international law dimensions should render the dispute inadmissible or, more specifically, whether those dimensions warranted that discretion should be exercised to deny service of process outside Australia. As a result, Australia may now be in violation of international law. However, the applicant was given an opening by the Court to influence Australia's position within the IWC, in addition to various fora in the ATS. Jurisdiction similarly existed for the claims under the *EPBC Act* in *Re HSI and Minister for the Environment*. Australia's reputation before the SBT Commission appeared to be taken into account in the Tribunal's review of the Minister's decision but, even so, Australia's rights and obligations were not in jeopardy. Finally, Australia's reputation and its international law rights and obligations were at issue in *Petrotimor*, and the Court took these into account in deciding it lacked jurisdiction. The difficulty with the *Petrotimor* decision is that there is an obfuscation as to whether questions of international law go to the court's jurisdiction or whether they affect the admissibility of the dispute. In *Re HSI and Minister for the Environment* and *Petrotimor*, international law seems to have achieved greater resonance, yet the tendency has been to deny applicants the opportunity to utilise the national court proceedings to push for institutional reform. In light of these

<sup>269</sup> Ibid 370.

<sup>270</sup> Ibid 370–2.

<sup>271</sup> Ibid 416.

inconsistencies, it would be preferable for the courts to consider specifically the international law issues arising in disputes over marine resources (particularly whether Australia may be placed at risk of violating international law) and clarify whether such a concern goes to jurisdiction or admissibility.

#### VI RECONCILING THE ROLE OF AUSTRALIAN COURTS IN RELATION TO INTERNATIONAL LAW ON MARINE RESOURCES

In the cases concerning the protection of marine resources that have been recently considered in Australian courts, Australia's rights and obligations under international law have not been specifically decided even though questions of international law were before the court. Instead, the courts and tribunal concerned have avoided these particular issues either by focusing on the domestic law involved (as was the situation in the Full Court decision in *HSI v Kyodo* and Allsop J's subsequent decision at trial), by viewing questions of international law as contextual or political considerations (again, the Full Court's approach in *HSI v Kyodo* and *Re HSI and Minister for the Environment*), or by considering questions of international law as sufficiently problematic that the court should not determine the case at all (as was the case in *Petrotimor* and as was Allsop J's preferred approach in deciding against leave for service). In tracing these different approaches, our strongest impression is that Australian courts are reluctant to engage specifically with questions concerning Australia's rights and obligations under international law. This trend has both positive and negative aspects.

As an initial matter, it is clear that the courts are willing to utilise various tools available to them to manage cases that implicate, to varying degrees, the rights and responsibilities of Australia under international law.<sup>272</sup> This has been the case despite ambiguity as to how or when the different doctrines may be applied. In *Petrotimor*, there were different views as to whether the case was justiciable, whether the doctrine of act of state fell within the issue of justiciability, and whether the case had to be assessed in terms of the applicants' claims being enforceable or not. In *HSI v Kyodo*, there were differing views on how judicial discretion should be exercised. Judges need to be confident to use these tools as it is highly likely that whenever any question dealing with marine resources arises international law will be implicated, if not squarely at issue. The repercussions under international law may be considerable and should be fully taken into account. It may be disappointing that Australian courts will not address international law questions specifically, but it is nonetheless appropriate that there are restraints (however labelled or characterised) on the extent to which domestic courts will engage with these issues. The courts should be prepared to assess whether jurisdiction exists or whether, if jurisdiction does exist, the case is inadmissible.

<sup>272</sup> See generally Sam Blay and Karen Bubna-Litic, 'The Interplay of International Law and Domestic Law: The Case of Australia's Efforts to Protect Whales' (2006) 23 *Environmental and Planning Law Journal* 465, 482-3, discussing various ways by which the courts may take account of international law in their judgments.

A key reason for supporting some restraint is that once international law is at issue, any decision that the court makes is relevant under international law. Notably, courts should appreciate that their decisions may contribute to the development of international law in the particular area in question. For instance, there are a range of discretionary issues left for resolution by the coastal state in the conservation and management of its fisheries, such as determining the allowable catch, deciding the maximum sustainable yield and assessing whether allocations should be made to other states. Furthermore, states fishing highly migratory species are subject to general obligations of cooperation.<sup>273</sup> The precise standards required of states in these circumstances are not laid out in international law, but if national courts take a role in assessing the decisions of the government then they contribute to the elucidation and clarification of the international law standards. However, while there are arguably advantages to bringing greater clarity to such issues, judicially denying the discretionary powers of the coastal state by articulating standards for the exercise of these powers prevents the state from balancing a range of considerations in its international affairs.<sup>274</sup> This balance of considerations is better left to the other branches of government rather than the courts.

Under Professor Benvenisti's theory of inter-judicial cooperation, whereby courts in various countries address similar issues that arise under international law in a similar way, this role for national courts is to be encouraged as a means of 'nurtur[ing] transnational deliberations.'<sup>275</sup> But as Professor Benvenisti himself acknowledges, this approach is most appropriate when there is a need to redress external pressures that have been imposed on the executive or when the benefits of cooperation between courts prevail over national interests.<sup>276</sup> It is clear that national interests in relation to whaling, southern bluefin tuna and the resources of the Timor Sea were paramount in each of the cases discussed here. Moreover, any effort by the Australian courts to promote a particular position favouring greater conservation than had been agreed by the government or other concerned states would have been in advance of general international sentiment and may have been disregarded as a result.<sup>277</sup> Instead, in two of the three case studies addressed here, the courts mostly shied away from the possibility of issuing judgments that may be used in other fora for political bargaining or to agitate for reform. The exception is *HSI v Kyodo* and, paradoxically, the decision creates this normative utility precisely because of its failure to take into account the international law questions at stake.

<sup>273</sup> UNCLOS art 64.

<sup>274</sup> It may well be the case that a state will wish to take into account a broad range of factors, including political, economic and social as well as legal factors, in managing its fisheries.

<sup>275</sup> Benvenisti, above n 11, 273. This interaction between national courts has been analysed by other commentators: see, eg, Anne-Marie Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 *University of Richmond Law Review* 99; Knop, above n 5.

<sup>276</sup> Benvenisti, above n 11, 247, 249–51.

<sup>277</sup> *Ibid* 249: 'If only one national court adopted assertive policies, it would face the danger of being singled out as an individual troublemaker whose jurisprudence does not reflect general state practice.'

*HSI v Kyodo* was an extremely difficult case in terms of its implications for international law specifically and international relations generally.<sup>278</sup> From the applicant's perspective, it was appropriate in pursuing the anti-whaling cause to utilise every (legal) tool available. An increasing amount of pressure from a range of sources may provide the means to influence a state's behaviour.<sup>279</sup> The possibility of an action being filed by an interested party under the *EPBC Act*<sup>280</sup> to trigger the application of Australian law fits well within this activist model. The decision of the Full Court, followed by the injunctions issued by Allsop J, could well be seen as reinforcing demands that Japan cease its scientific whaling program in Antarctic waters. Certainly, the Sea Shepherd activists who were trailing the Japanese whaling fleet at the time the injunctions were issued were able to utilise the Australian court decision as further justification for their confrontations. Although the threat that Australian law may be enforced against the Japanese whaling vessels is not great,<sup>281</sup> given that it is unlikely that these vessels will enter Australia's territorial sea or ports unless in distress,<sup>282</sup> the result of the litigation may be seen as sending a further message about Australia's stance on whaling.<sup>283</sup>

However meritorious such activism may be, Allsop J showed great perspicacity in his initial decision dismissing the application for leave to serve originating process outside the Commonwealth; he was cognisant of the complex international legal questions raised and realised the considerable diplomatic stakes at issue for Australia in relation to the ATS.<sup>284</sup> His Honour highlighted that there has been international disagreement over Australia's claims to the AAT and to

<sup>278</sup> Commentators have noted the international controversies provoked by the case: see generally Blay and Bubna-Litic, above n 272; Donald K Anton, 'False Sanctuary: The Australian Antarctic Whale Sanctuary and Long-Term Stability in Antarctica' (2008) 8 *Sustainable Development Law and Policy* 17; Davis, above n 59. While acknowledging this controversy, Chris McGrath, junior counsel for HSI, has argued that there exist bases under international law justifying Australia's enforcement of its legislation in the maritime area adjacent to the AAT: Chris McGrath, 'The Japanese Whaling Case' (2005) 22 *Environmental and Planning Law Journal* 250; McGrath, 'Australia Can Lawfully Stop Whaling within Its Antarctic EEZ', above n 57.

<sup>279</sup> See generally Andrew Hutchinson, 'Baleen Out the IWC: Is International Litigation an Effective Strategy for Halting the Japanese Scientific Whaling Program?' (2006) 3 *Macquarie Journal of International and Comparative Environmental Law* 1.

<sup>280</sup> *EPBC Act* s 475.

<sup>281</sup> This is a point that was recognised throughout the proceedings. The applicant maintained that this point did not, however, make the order futile as a matter of Australian law: see, eg, *HSI v Kyodo (Full Court)* (2006) 154 FCR 425, 437 (Moore J).

<sup>282</sup> Under international law, a coastal state's law does not usually apply to vessels entering a port due to distress or force majeure: see R R Churchill and A V Lowe, *The Law of the Sea* (3<sup>rd</sup> ed, 1999) 68.

<sup>283</sup> This is one of the points used by the applicants to justify the injunction: HSI, 'Applicant's Outline of Submissions for Leave to Serve outside the Jurisdiction', Submission in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd*, NSD 1519/2004, 12 November 2004, [31]; HSI, 'Applicant's Reply to the Submissions of the Attorney-General and to the Court's Questions', Submission in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd*, NSD 1519/2004, 10 February 2005, [10]; HSI, 'Appellant's Outline of Argument', Submission in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd*, NSD 995/2005, 15 November 2005, [35].

<sup>284</sup> See also Blay and Bubna-Litic, above n 272, 481, commenting on the persuasiveness of Allsop J's judgment and stating that it 'accord[ed] with the reality of the regulation of whaling.'

the accompanying maritime zones, and that states interested in the region have endeavoured to move beyond their disputes over sovereignty in formulating a successful, cooperative regime. This cooperation could be jeopardised if one of the participants appears to be asserting their sovereignty claim actively, particularly in denying rights to other states' nationals that would otherwise exist in the absence of such a claim. Australia risks pariah status within the ATS if it seeks to enforce the injunctions against the Japanese whalers in its claimed EEZ off the AAT. In at least acknowledging (albeit not resolving) the unsettled questions of international law and the delicate diplomatic positions of various states, Allsop J sought to avoid inflaming this situation.<sup>285</sup>

The Full Court may have been equally sensitive to these conundrums in light of the decision at first instance. Ultimately, though, the Federal Court regarded itself as bound to play the hand it had been dealt under the *EPBC Act*. Through that legislation, the Australian Parliament had allowed for the whale sanctuary and the accompanying prescription of offences regarding the taking and killing of whales etc to be applied to the EEZ claimed off the AAT.<sup>286</sup> The generous standing provisions under the *EPBC Act* allowing interested persons to seek enforcement of those provisions consolidated the right of the applicant to have its case decided. As a matter of Australian law, as set forth by the Full Court, there was no scope within the legislation or in the injunction procedure to deny the applicant's motion.<sup>287</sup> The international law issues (characterised as political considerations)<sup>288</sup> were essentially removed from consideration by the Full Court, and Australian law was left to be applied as if it were the only law having a bearing on the matter. Following the Full Court decision, Allsop J had little choice but to issue the injunctions requested.

Even if the claim of an EEZ off the AAT had been a calculated move to ensure that Australia was taking small but deliberate steps to reinforce its sovereignty claim in the area in the event that the ATS ceased to exist, it is questionable whether the rights of interested persons to enforce the *EPBC Act* should have been retained in relation to the AAT. In allowing for this right by interested persons, the legislature surrendered a certain amount of control in relation to how Australian law is applied and enforced in this sensitive area. Clearly, the government has chosen not to enforce the injunctions, as the *Oceanic Viking* vessel sent to monitor the whaling fleet during the 2007–08 season was there to collect

<sup>285</sup> *HSI v Kyodo (First Application for Leave to Serve)* (2004) 212 ALR 551, 562.

<sup>286</sup> *HSI v Kyodo (Full Court)* (2006) 154 FCR 425, 429 (Black CJ and Finkelstein J):

The Parliament may be taken to know about the remoteness and general conditions pertaining to the [Australian Whale] Sanctuary which its legislation has established. It may also be taken to have appreciated that the circumstances under which its laws may be enforced in relation to the Sanctuary are quite exceptional. It nevertheless made no provision for the exclusion of the general enforcement provisions of the *EPBC Act* to matters occurring within the Sanctuary, even where those matters relate to conduct by foreign persons aboard foreign vessels.

<sup>287</sup> *HSI v Kyodo (Injunction)* (2008) 165 FCR 510, 515 (Allsop J).

<sup>288</sup> '[T]he primary judge was in error in attaching weight to what we would characterise as a political consideration': *HSI v Kyodo (Full Court)* (2006) 154 FCR 425, 430 (Black CJ and Finkelstein J). See also *HSI v Kyodo (Injunction)* (2008) 165 FCR 510, 516–17, where Allsop J notes that the Full Court broadly characterised both international law questions and non-justiciable political positions flowing from the uncertain legal situation as being 'political'.

evidence for potential use in international litigation, rather than for policing purposes.<sup>289</sup> The *Oceanic Viking* was in direct contact with the Japanese whaling fleet as it served as the intermediary in seeking the return of two Sea Shepherd activists from a whaling vessel to their own vessel, the *Steve Irwin*.<sup>290</sup> This occasion was not used for the delivery of the injunction, nor were any steps taken to prevent whales being killed or processed by the whaling fleet, as prohibited under Australian law.<sup>291</sup>

Even within the strictures of the *EPBC Act*, it is regrettable that an Australian court should take such an insulated view of cases involving the regulation of marine resources under international law. The issuance of the injunctions clearly fell within the embarrassment principle<sup>292</sup> and the case could have been considered inadmissible as a result. Despite the applicant's submissions to the contrary,<sup>293</sup> the rights of Australia to claim an EEZ off the AAT are not settled as a matter of international law; rather, claims to sovereignty over Antarctica and claims to sovereign rights over adjacent maritime zones are in the nature of an agreement to disagree among the participants in the ATS. To take the position that there is a clear outcome under international law when Australia's approach has been to avoid this legal controversy to facilitate cooperative governance in Antarctica would certainly cause embarrassment.<sup>294</sup> Further, the decision to issue an injunction against the Japanese whalers essentially called into question the right of the Japanese government to issue special permits for scientific whaling under the *ICRW*<sup>295</sup> in what Japan considers a high seas area.<sup>296</sup> The applicants set forth a very narrow reading of the act of state doctrine in referring only to matters that happen on Japanese territory, rather than considering the acts of the government in issuing the permits and overseeing the research to the extent allowed under the *ICRW*.<sup>297</sup> There was nothing preventing the Full Court from taking international law into consideration, and concepts of inadmissibility may have been brought to bear even in the face of the grant of jurisdiction.

Nonetheless, in *HSI v Kyodo*, the Full Court's focus on Australian law and a judgment purely on that basis cannot be completely faulted in view of the

<sup>289</sup> See 'Customs Ship to Shadow Japanese Whalers', *ABC News* (online), 19 December 2007 <<http://www.abc.net.au/news/stories/2007/12/19/2122840.htm>>.

<sup>290</sup> See Chris Griffith, Elizabeth Gosch and Mark Dodd, 'Two Activists Captured on a Japanese Whaling Vessel Have Been Returned to Their Ship the *Steve Irwin*', *The Australian* (online), 18 January 2008 <<http://www.theaustralian.news.com.au/story/0,25197,23069680-601,00.html>>.

<sup>291</sup> See McGrath, 'Australia Can Lawfully Stop Whaling within Its Antarctic EEZ', above n 57, 2, 20.

<sup>292</sup> See above n 193 and accompanying text.

<sup>293</sup> HSI, 'Appellant's Outline of Argument', Submission in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd*, NSD 995/2005, 15 November 2005, [29].

<sup>294</sup> Nor does it present an instance of a clear violation of international law, which was the exception to the *Buttes* principle (of non-judiciability where there are no judicial or manageable standards by which to judge the issues) set forth in *Kuwait Airways* [2002] 2 AC 883, 1080-1 (Lord Nicholls): see above Part IV.

<sup>295</sup> *ICRW* art 8(1).

<sup>296</sup> *HSI v Kyodo (Injunction)* (2008) 165 FCR 510, 516 (Allsop J).

<sup>297</sup> See HSI, 'Applicant's Outline of Submissions for Leave to Serve outside the Jurisdiction', Submission in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd*, NSD 1519/2004, 12 November 2004, [32].

legislature's decisions in the drafting of the *EPBC Act* and its application of the whale sanctuary to Australia's claimed EEZ off the AAT. Further, the decision of the new Attorney-General not to take any position on the matter following the election of the Rudd government compounded the imbroglio in which the Federal Court found itself.<sup>298</sup> The international law problems were largely the making of the executive and the legislature, and the courts did not need to entangle themselves in the controversy as well. It might be argued that in proceeding as it did, the Court acted consistently with the legislature and the executive in reinforcing Australia's claims to the AAT, but the issuance of the injunctions reduces Australia's diplomatic room to manoeuvre. The decision not to take action (so far) to enforce the Court's order may provide some salve on the international level, but it leaves open the possibility of further proceedings within Australian courts and hence the potential for causing more confusion as to Australia's legal position and as to the status of international law generally in relation to Antarctica. Given that the decisions were made without regard to international law, the Australian courts have not contributed to the development of international law but have only risked findings of state responsibility against Australia. In these circumstances, it would therefore have been preferable (issues of anti-whaling activism aside) for Allsop J's initial decision to have been upheld by the Full Court.

Better results, from an international law perspective, may be seen with the Tribunal's decision in *Re HSI and Minister for the Environment* and the Federal Court's decision in *Petrotimor*. In the former decision, the Tribunal appears to have considered Australia's reputation within the SBT Commission and respected that the coastal state has considerable discretionary power when it comes to decisions on allocation. It may still be acknowledged, though, that a decision in favour of HSI would not have placed Australia in violation of international law.

In *Petrotimor*, the questions before the court essentially asked for a determination as to which state had exclusive rights to explore and exploit the natural resources of the continental shelf. A judgment that Portugal had these rights instead of Australia would have involved the Australian court deciding on an international maritime boundary when the relevant countries were not in agreement on that matter and had not provided any consent for that boundary to be established through judicial proceedings. In other words, such a decision would have violated the norms associated with international maritime boundary delimitation under international law. In addition, this case was being decided at a point when Timor-Leste had finally gained its independence and was in a position to enter into negotiations with Australia as a sovereign state with its own entitlements over its adjoining maritime areas. Difficult questions for Timor-Leste as to the legal status of *Petrotimor's* concession agreement would

<sup>298</sup> Anton, above n 278, 19, quoting Letter from Tony Burslem, Australian Government Solicitor, to Ngaire Ballment, Associate to Justice Allsop, 12 December 2007, which stated that the 'Government believes that the matter would best be considered by the Court without the Government expressing its view.' See also McGrath, 'Australia Can Lawfully Stop Whaling within Its Antarctic EEZ', above n 57, 2.

have been triggered had the Australian court upheld the applicants' claims. The better outcome was the one achieved by the Court in finding that it did not have jurisdiction to decide the case.

These examples tend to illustrate that Australian courts should not trespass at all into matters that raise questions implicating marine resources and the international law of the sea. That may well be true, but it is not the position taken here. As noted above, a decision in the applicant's favour in *Re HSI and Minister for the Environment* would not have been as far-reaching or significant under international law compared to *HSI v Kyodo* and *Petrotimor*. Certainly, Australian courts have shown that they are not willing to discontinue consideration of a matter simply because it touches on foreign relations<sup>299</sup> or because the executive has so decided.<sup>300</sup> Instead, it is worth recalling the view of Beaumont J in *Petrotimor* that each case considering the role of Australian courts in dealing with matters that have international law implications is highly fact-specific.<sup>301</sup> Such recognition is appropriate given the fluid nature of many aspects of international relations generally. It may well be the case that a factual pattern will arise where Australian law is squarely at issue and the international law questions are simply contextual and will not be affected by any decision of an Australian court. If, on the other hand, the facts indicate that a particular judgment of an Australian court could place Australia in violation of international law, then the national court should not proceed with that case.

The point to emphasise here is that it is important for the Australian courts to be fully cognisant of and engage with the international law issues arising in cases involving marine resources,<sup>302</sup> rather than trying to decide a case purely by reference to domestic law and/or otherwise characterising questions of international law as political considerations. It is also important that Australian courts appreciate the impact their judgments might have in the international legal system in terms of triggering state responsibility or influencing the development of rules of international law. The tools available for the courts to avoid entering this particular fray should be taken into account in assessing the court's jurisdiction or deciding whether a dispute is inadmissible. However, given that there are ambiguities and overlaps in interpretation and application of these tools, their availability should be considered only following an assessment of each case that grapples with the questions of both international and domestic law.

<sup>299</sup> See, eg, *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 373 (Gummow J).

<sup>300</sup> See, eg, *Spycatcher* (1988) 165 CLR 30, 47 (Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ).

<sup>301</sup> *Petrotimor* (2003) 126 FCR 354, 415.

<sup>302</sup> Cf *Blay and Bubna-Litic*, above n 272, 486, 488, arguing this point in relation to *HSI v Kyodo (Full Court)* (2006) 154 FCR 425.