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The aim of this article is to provide a balanced assessment of the critiques of environmental regulation as it affects the rural sector and of the main proposed alternatives: deregulation or the use of markets. We argue that the deregulatory and free market alternatives tend to overstate the costs and understate the benefits of regulation and that they do not provide clear insights into what is “efficient” because the methods tend to aggregate necessary and intended costs, collateral and unintended costs, opportunity costs and transaction costs. However despite these significant caveats it is clear that it is in the public interest to create laws that do work better and are less costly. We suggest that one measure to achieve effectiveness and efficiency must be robust review and reform of the system of laws, not just individual laws. We also argue that the pursuit of sustainability must involve a synergistic relationship between traditional and more contemporary governance approaches and that any treatment of them as alternative rather than complementary instruments unnecessarily narrows strategic options for effective resource management. Further, intrinsic to far more effective regulation is managing total transacting systems using a variety of instruments and behavioural interventions, rather than focusing on a limited set of transactions with a limited set of interventions. This represents a significant change to natural resource management (and particularly natural resource regulatory practice) but it is essential if we are to move beyond the present unsatisfactory situation.

One of the crucial issues of our time is how to avoid serious and, perhaps cataclysmic, damage to the natural environment. The causes of such damage are complex and sometimes controversial. They arise from a wide variety of social and economic pressures. The evidence that pollution, land degradation, deforestation, climate change, misallocation of water and the loss of biological diversity are inflicting serious and in some cases irreversible damage is increasingly compelling. It is generally considered that it is in the public interest to minimize such environmental harm, but in ways that are compatible with other interests of society in its use of nature. One challenge is how to achieve a reasonable balance between the need for environmental protection and the needs of those who pursue their livelihood in reliance upon the use of the environment without undue interference or unreasonable financial burdens. Different forms of regulation, including attaching an economic value to uses of the

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This paper was produced with the support of an Australian Research Council grant on Compliance and enforcement of non-urban water extraction in New South Wales, with whom Professor Gunningham is a Chief Investigator and the Australian Research Council’s Linkage research project ‘Next Generation Rural Landscape Governance’, for which Professor Martin is a Chief Investigator.
environment to discourage harm-doing or rewarding restoration, are used to try to achieve this balance between use and protection.

Major environmental governance bodies have begun to shift attention away from developing regulatory instruments to a concern for the effectiveness of the system of legal governance as a whole. The Rio+20 outcome document “The Future We Want” highlighted that the achieved results of a vast array of legal instruments fall well short of their goals and signals that the next frontier must be governance effectiveness. The UNEP has also begun to shift in this way and the IUCN has initiated a governance program which possesses the mandate to assess the effectiveness of legal arrangements within the system of natural resource governance. What all these initiatives point to is that environmental law is making a shift from narrow instrumentalism towards a concern for governance systems effectiveness. In this paper we want to consider some reasons why environmental law may be proving to be less effective than it ought to be and to suggest directions for improvement. The paper does not set out to provide empirical data, rather it addresses possible directions for systematic improvement in the effectiveness of legal arrangements for environmental governance and to ‘ground’ the observations by linking them to a particular environmental law issue which illustrates basic challenges for effective legal governance. We believe that undertaking this enquiry will be most beneficial to the development of environmental law scholarship which is beginning to grapple with the widening focus of our field.

A key endeavour in the governance of natural resources is to design rules that produce social and environmental gain at the lowest possible cost to individuals and to society as a whole. These objectives have traditionally been pursued through government regulation, although increasingly the use of environmental markets (e.g. creating a tradeable private right to extract water) is finding favour as a means to balance these public and private interests. There are strong reasons of principle why those who use or harm the environment should pay for doing so, as a means for motivating stewardship norms of behaviour. The argument is usually couched in terms of the ‘polluter pays’ or ‘user pays’ principles. It is in the public interest to require (and governments increasingly do require) those who would otherwise ‘externalise’ some of the ecological costs of production (i.e. pass them on to others, such as users of polluted water downstream, or future generations) to ‘internalise’ those costs. However even market instruments generally rely (in part) upon a regulatory framework so as to form the basis for a market attaching a price to environmental use. Ultimately the use of least-cost and effective regulation remains a cornerstone of many forms of environmental governance, regardless of whether they rely upon implementation directly by the state or through the workings of the market.

Regulation and its implementation are conventionally evaluated against three objectives: effectiveness (success in achieving policy objectives), efficiency (ensuring those objectives are

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achieved at least cost to the regulated community and regulators themselves) and legitimacy (often viewed in terms of community acceptability and fairness, or ‘equity’). In this article we discuss some reasons why the rules intended to produce more sustainable primary production often fall short of achieving these objectives. We also outline some directions that could lead to an improvement. To illustrate the recommendations we focus on one concrete, important and topical example: rules to ensure sustainability of groundwater based farming systems.

The gap between the ‘ideal’ of effective, efficient and legitimate regulation, and the reality, is graphically illustrated by the case of Peter Spencer. Peter Spencer is a farmer who sought compensation when his freedom to use his land was eroded by the accumulation of regulatory restrictions that in his view are a socially unjustifiable interference with his capacity to earn a living. He argued that particular laws about land clearing, protection of biodiversity and carbon markets cumulatively reduced his freedom to exploit his asset as he wished and that these restrictions interacted with other factors (both specific to his situation and common to many other farmers) to make his farming operation no longer viable for him.7 His plight has evoked sympathy from many, including the judges through whom he has unsuccessfully sought compensation, though attitudes to his situation are polarized between environmental and farming interests.

Without commenting on the legitimacy of his legal or moral claims, his story does illustrate the public policy challenges of designing and implementing good environmental regulation to protect the public interest. Many would concede the importance of laws to preserve the environment and to restrict harmful farming practices or other activities that will deprive future generations of their natural heritage. On the other hand, they would deplore regulation that could threaten the viability of agricultural enterprises and the livelihood of farmers. ‘Why’, we might ask, ‘isn’t it possible to create laws that achieve their public policy goals (effectiveness) but do so in such a way as is efficient (minimizing costs to landholders)?’ In turn, laws that achieved both these two objectives would be much more likely to be perceived by the wider community as ‘fair’ or legitimate.

The short answer is that it is possible to create laws (and other forms of social policy) that do a much better job of delivering effectiveness, efficiency and legitimacy but that policy makers rarely seem capable of doing so in practice. There are far too many natural resource management laws that impose a high cost on landholders and others, while achieving too little in terms of conservation and the restoration of natural resources and which fail to meet the legitimate expectations of landholders, environmentalists or the broader community. Australians are too often incurring a high cost of regulation for too little environmental gain.

I LOOKING TO AN IMPROVED SYSTEM OF RULES

Environmental regulation falls far short of the ideal, not least because of ineptitude, history and the dynamics of environmental politics. A plethora of badly designed and poorly implemented laws and regulations has grown up and not been the subject of systematic reform. It is also the case that effectiveness, efficiency and legitimacy are sometimes in tension and trade-offs must be made between them. What is likely to be most environmentally effective may also be the


7 The original case is Spencer v NSW Minister for Climate Change, Environment and Water [2008] NSWSC 1059; For a potted history of the issues see Spencer v Commonwealth of Australia [2010] HCA 28.
most costly (and thus not efficient). What is both efficient and effective may not have community or political support and so may not be seen as legitimate.

In this article we propose ways to substantially improve the effectiveness, efficiency and legitimacy of legal arrangements to protect the ecological systems upon which we (and our children) will depend. We suggest ways of steering a path between these different objectives so as to achieve, if not an ‘optimal’ approach to environmental policy, at least one that substantially improves on the regulatory status quo. We illustrate our arguments with a focus on groundwater-based agriculture but could equally focus on biodiversity law, laws to control invasive species, or any of a large number of other environmental rules to illustrate the same points.

Why select groundwater as an illustration? The scientific evidence is that groundwater is being over-extracted. This poses a risk to future farming uses and to groundwater dependent ecosystems. The National Water Commission has highlighted the challenges of dealing with complex interconnected systems where the dynamics of that system are ill-understood. It has suggested as an interim approach (pending better science) that the conservative assumption be made that surface and groundwater systems be treated as intrinsically interconnected. The Guide to the Murray Darling Basin Plan proposes significant reductions of the groundwater Sustainable Diversion Limits in some areas, the consequences of which are acknowledged to be costly and painful to a large number of farmers and dependent communities. That Guide was intended to ‘kick off’ a period of consultation and refinement to create binding arrangements through regulation and markets which in turn bring water extraction back to more sustainable levels. However that period has proven fraught, highlighting deficiencies in the process and the legislation itself and foreshadowing future conflict in the courts and political arena. We wish to contribute some constructive ideas to this important debate, going beyond narrow discussions about the wording of laws to engage with larger issues of substantial reform of the law from a systems perspective. This approach will reflect the contribution that was made by Land & Water Australia in suggesting innovative approaches to address otherwise intractable challenges of landscape-scale sustainability.

One key to getting better value from regulation is to understand just how much of it there is and to shift from a focus on individual statutes (laws) to considering how to make law as a whole work better. The rules that regulate agriculture are no longer confined to statutes. Agriculture operates within a network of rules, ‘soft’ as well as ‘hard’ and only some are imposed by government. As well as statutes at a national and state level, subordinate regulations provide the implementation arrangements. Regulations also operate at the local government level (such as the zoning, noise and nuisance controls on peri-urban irrigators, or the water access and pricing arrangements that govern their activities).

Coupled with these are delegated controls created through the administration of laws and regulations, such as annual water allocations, or approval for water trades across irrigation districts. To illustrate, a comprehensive understanding of the laws governing groundwater in the Murray Darling system would need to take into account the Water Act 2007 (Cth), the State

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10 Murray-Darling Basin Authority, above n 8.
rules for groundwater licenses and regional groundwater arrangements (such as those developed under the Murray Darling Plan\textsuperscript{11}). However, water rules do not stand alone on governing the use of this resource. To understand the constraints on a groundwater irrigator’s decisions, water-specific rules would need to be considered alongside requirements for the protection of habitats and species, land use, land-clearing, control of feral species and other laws that collectively establish the legal boundaries of farming. These create a web of regulation with which a responsible farmer needs to comply. In 2002 there were more than 250 national and state level statutes that overtly control the use of natural resources, with over forty in Victoria alone.\textsuperscript{12} Our observation is that rather than being streamlined, the number of regulatory instruments has been increasing. Each is underpinned by regulations and (in many cases) by administrative rule-making and implementation arrangements.

There are also rules implemented by private bodies that can have equivalent force to laws of the state, or which reflect a partnership between government and the private sector. The combination of these rules are sometimes referred to as quasi-law. In terms of agricultural sustainability, industry standards, certification schemes and industry codes of practice that impose environmental restrictions are the most obvious examples. A groundwater irrigator who is an organic farmer is expected to comply with the certification schemes of Biological Farmers Australia; a cotton grower may be implementing Cotton Australia Best Management Practices (BMP) or another form of Environment Management System; or a Queensland farmer leaseholder may be subject to the Delbessie Agreement which incorporates a duty of care to the environment.\textsuperscript{13} In some regions, the rules of a district irrigation authority may also apply. Some farmers may also be subject to specific rules imposed by the supply chain, as different retailers seek to strengthen their sustainability credentials with consumers. Most farmers will also be subject to a variety of contractual obligations, such as to their financier, which also may have ecological management implications. It is not unusual for neighbouring farms producing similar products to be subject to differing rules reflecting different business strategies.

With water, the nationally agreed paradigm is the use of markets to control over-extraction and to allocate the scarce resource. Market mechanisms that enable its purchase by those who value it most highly, are seen to help the seller, buyer and society realize the value of an endowed asset, a productive input and a social good, respectively. Under the National Water Initiative, the intention is to properly apply the market to groundwater. A farmer using groundwater will have a valuable and perhaps tradeable entitlement, but that private interest depends on rules that govern water use and the basis for trading, registration and protection of that interest. Increasingly, as well as surface or groundwater licenses, the agricultural enterprise may involve environmental property rights such as biodiversity banking credits, or perhaps salinity or carbon credits.

‘Environmental goods or services’ markets rely on an underpinning of regulation, notably in the form of property rights created through statute and governance arrangements to protect private contracts. Property rights depend on laws to define and protect the owner’s interest and, with the proliferation of markets for ecological services, the complexity of rural proprietorship arrangements has escalated. The systems used to transact property involve many legal rules. Often market instruments rely upon government managing the transaction mechanisms.

\textsuperscript{11} Murray Darling Basin Authority, \textit{Basin Plan} (Murray Darling Basin Authority, 2012).
\textsuperscript{13} Edward Barbier, Joanne C Burgess and Carl Folke, \textit{Paradise Lost? The Ecological Economics of Biodiversity} (Earthscan Publications Ltd, 1994).
intervening in the market to ensure that the ecological and economic values are preserved and being the ‘risk-underwriter of last resort’. The ways in which government has managed the risks associated with groundwater is a controversial feature of management to date and is likely to be no less so as we tackle the challenge of sustainable groundwater use.

Water trading regimes also rely on controls against water theft or fraud and for protection of the integrity of the market. The laws controlling the water market intersect with other natural resource management regimes discussed above. These include rules governing land use, native vegetation protection, regional natural resource management and biodiversity conservation. Such rules intersect with the administrative approvals that are pre-requisites for some water trading or other farming activities. The intersecting rules often set the boundaries that constrain how water is used and conserved. The clearest example is peri-urban irrigators who are subject to many legal controls based on use zoning and the protection of residential amenity.

What this description suggests is that regulatory arrangements for the protection of rural natural resources have become cumbersome and that the trend is towards greater rather than less complexity. Some of this complexity is attributable to the increasing variety and sophistication of the issues and the management approaches being used, but a substantial part is attributable to a failure to address the structure and administrative efficiency of the ways in which rules are being created and implemented. We would argue that excessive structural complexity mitigates against efficiency, effectiveness and acceptability.

Whilst there will often be benefit in improving particular laws and environmental markets, this first part of our essay has demonstrated the limitations of any approach that is based only on considering the detailed rules governing particular issues. The experience in Australia and overseas is that such an approach results in an unwieldy proliferation of acts and regulations and quasi-laws. It becomes likely that each new policy approach, or the failure of a law in practice automatically leads to a new law rather than to rationalization of the system of rules. Over time the result is to make it difficult for landholders and others to identify what their obligations are and increasingly (and unnecessarily) expensive to comply. Such an approach arguably encourages too much reliance on state regulation and rather too little on developing and supporting norms of stewardship. It reflects a world-view in which virtue as a motivator for action is discounted and belief in the power of government to manage what is happening ‘on the front line’ is elevated to unrealistic levels given available resources and the scale of the supervisory challenge. This may be a relatively ineffective mechanism for protecting natural resources.

The above discussion serves to highlight one way in which Australia might improve its regulatory approach: by shifting from an approach almost exclusively focused on individual laws and market mechanisms to one that considers systemic inter-connections between laws, markets and other frameworks to shape natural resources use and conservation. In environmental sciences great improvement has been achieved by grafting an understanding of system interactions onto the traditional focus on reductionist understanding of particular species.\(^\text{14}\) Systems science has become an important source of innovation in resource management, as it has in understanding complex socio-economic endeavours. Thinking about laws as part of a system that shapes behaviour would lead to a greater emphasis on the

‘architecture’ of laws and their interaction with other instruments and to a greater concern for the overall efficiency and effectiveness of the system. It would almost certainly lead to major reform to address complexity and overlap as well as a better structure for considering where law reform might achieve improved environmental outcomes, reduced regulatory cost and greater fairness.

A more productive approach would be to concentrate on instruments such as groundwater entitlements or regulation at the same time as improving the dynamic interaction between different instruments and between them and the broader context within which these operate. This simple-to-describe shift, to consider system-wide rules reform, is in practice likely to be daunting to achieve. It would ultimately require fundamental reforms to the architecture of environmental laws and the processes used to create these laws. It would involve re-thinking laws that have been the result of hard-fought battles. However the economic and social case for major reform is strong and in the next section we set out this case.

II A Balanced Argument for Significant Reform

Our challenge is how to get ecological benefit from our suite of laws at less cost, while also ensuring fairness and legitimacy in the eyes of the community. A starting point is to have a clear perspective on why regulation is imposed, what is its costs, who bears that cost and what parts of this cost are unnecessary (i.e. inefficiencies). It is also important to understand the strengths and limitations of the alternative strategies to traditional regulation that are proposed by its’ antagonists, such as deregulation and the use of environmental markets.

The core function of regulation is to prevent some people from doing things that they would otherwise wish to, where the activity is judged by Parliament to be harmful to the larger public interest. A regulation should be judged to be effective if it achieves Parliament’s intent by precluding or restricting the designated activity, even if this imposes a cost of foregone economic opportunity. These costs are not inefficiencies, as they demonstrate that Parliament has exercised its rightful role in our society and judged that this loss of opportunities is in the public interest.
However, costs imposed by regulation that go beyond those necessary to achieve its public interest goals are inefficient and therefore undesirable. So too are ill-targeted laws that extend constraints beyond the activities they are intended to curb and intrude into other socially legitimate activities, imposing unnecessary collateral costs. Such impositions can be correctly considered as inefficient, supporting calls for reform in the interests of efficiency and legitimacy.

For example, across Australia it has been judged to be in the public interest to prohibit land-clearing to protect native biodiversity. Given the tragic loss of biodiversity the arguments for this prohibition are strong. However, critics of these laws have argued among other things that they sometimes prevent farmers from controlling invasive native plants that are weeds in the farming context and from changing farming activities, where such constraints do not materially aid biodiversity.15 To the extent that these claims are correct, they point to a wasteful consequence. Farmers like Peter Spencer also point to the cumulative but unintended effect of a variety of laws as making it less feasible to operate the farm as a productive unit. This would indicate that at least in some situations the costs go well beyond what is needed to achieve the Parliamentary intent. To the extent that this is true, it is an undesirable inefficiency.

As well as the costs of constraint, there are also the costs to government of implementation and, to both citizens and government, a wide variety of transaction costs. These include the costs of verifying whether the land-clearing laws apply to a particular site or activity, costs of permit-seeking and the costs to government of ensuring compliance and enforcement. Furthermore, because costs and constraints will impact on different people to different degrees, there is always the potential for unfairness in how the costs of regulation are distributed.

What is the cost of having 250 separate laws and the myriad of regulations and quasi-laws and what is the level of inefficiency in this system? We cannot know. It is not possible with the available research to ‘unbundle’ the direct costs of regulation to distinguish those that are efficient demonstrations of Parliamentary intentions to control particular harms, from those that arise as collateral but unproductive constraints. Further it is not possible from the studies

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that have been done to distinguish transaction costs from other costs, nor to have a complete evaluation including both private and public costs.

The failure to distinguish between transaction costs and the direct costs of regulation is significant. The strategies to reduce transaction costs in either markets or regulation are quite distinct from the strategies to reduce direct costs. They speak rather to the need to streamline administration than to the need to reduce substantive environmental safeguards. However, even whilst we are dubious about many of the cost of regulation studies themselves, the clear message is of the need to create a system of environmental law that is less costly and at the same time more potent.

Some analysts (particularly from a neo-liberal viewpoint) point to the costs of regulation such as those identified above, in order to support arguments for deregulation. Deregulation in this context generally means removing the direct constraints of regulation, both those that are determined by Parliament as necessary in the public interest and those that are incidental to the useful constraints. The principal arguments for deregulation are that regulation is unjustifiably costly and that approximately the same social outcome could be achieved by less interventionist means, namely the free market. One can hear echoes of the pre-GFC claims of some finance market analysts in this argument.

As to the argument that regulation is unduly costly, because a public activity is costly does not imply that it is not a good investment. There are many costly public investments that add greatly to the public good, such as schools, hospitals, defence, support for the arts, roads and infrastructures. The relevant economic and social question is whether the value achieved justifies that investment and, even if it does, whether greater value can be achieved at lower cost. Parliament (on behalf of the people) has already answered the first question in the affirmative for the laws and other instruments it has created. Advocates of deregulation might contest this judgment, but they all too frequently do so by pointing to the costs of regulation (which are relatively easily calculated) while heavily discounting or ignoring the benefits (which are not so calculable). Whilst cost is readily denominated in dollars, ecological value to current and future generations is not. Neither is it possible to account for the value of a democratic system under which (arguably) functionally irrational choices can be made by the people through democratic processes – are the resulting constraints inefficient if there is a payoff in terms of maintaining the hegemony of the majority, through active democratic institutions? Issues of value intrinsically involve consideration of values. Even the best available techniques are complex and contestable, as the embryonic ecosystems services literature and contingent valuation techniques attest.

Many studies of the costs of regulation, rather than justifying less environmental protection, on closer examination indicate the need for more sophisticated and streamlined approaches to environment protection. They point particularly to the idea that the pursuit of structural


17 Martin, P et al, ‘Developing a Good Regulatory Practice Model for Environmental Regulations Impacting on Farmers’ (Full Report, Australian Farm Institute and Land and Water Australia, September 2007); see also Lisa Heinzerling and Frank Ackerman, Pricing the Priceless: Cost-Benefit Calculations of Environmental Protection (Georgetown Environmental Law and Policy Institute, 2002) <http://www.ase.tufts.edu/gdae/publications/C-
efficiency in regulation, rather than deregulation per se, ought to be given more consideration. We would suggest that the experiences of financial markets, added to the arguments we make below, indicate that to rush to the conclusion that deregulation or reliance on markets are a reliable answer to concerns about regulatory cost and inefficiencies may in many cases fit the situation identified by Henry Louis Mencken: For every complex problem, there is a solution that is simple, neat, and wrong.

Proponents of deregulation who do believe in the need for some intervention suggest the use of markets instead of regulation. This raises the question: are free markets intrinsically better than environmental regulation? “Free market environmentalists” seek greater efficiency by replacing traditional regulation with the use of markets that they argue will be sufficient in themselves to protect natural resources. For example, they advocate the allocation of private property-rights for natural resources that are under threat and trading of these interests, so that these under-valued resources come to have a higher economic value. In its full-blown form this approach proposes that all environmental outcomes should be determined by the accumulation of bargains struck between individual owners of natural resource property-rights.

Falling short of the full-blown approach but increasingly common are market mechanisms that in part rely on government regulation to limit over-exploitation but then use markets to allocate these limited use rights. These are a “middle way” between free markets and government regulation. Such approaches include ‘cap and trade’ or ‘tradeable permits’ markets, or auctions for temporary access. Other approaches that combine regulation and markets include Pigouvian taxes and access pricing arrangements such as royalties. Also increasingly used are “market-like” arrangements such as auctions to more efficiently allocate government or private environmental investments or supports.

The particular virtue of market based approaches is that:

> regulatory instruments require the central authority to determine the best course of action, whereas economic instruments decentralise much of the decision-making to the [individual duty holder], which typically has better information for determining the appropriate individual response to given economic conditions.  

The regulatory role of government varies with the market approach that is adopted. Even in the most free market approaches there is a role for government in creating and protecting individual property-rights and in protecting the integrity of the market by outlawing deception. Frequently government is also called upon to ensure that there is a reliable trading and registration ‘platform’ and to intervene as a market participant (for example by buying back interests to meet public policy goals). Government is also involved creating the legal frameworks for ‘unbundling’ environmental interests from land and registration and documentation of interests. To treat regulation and markets as alternative rather than complementary instruments is, in many ways, misleading.

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18 Barbier, Burgess and Folke, above n 13, 182.
Environmental markets have proven to be far less reliable in practice than they are often predicted to be in theory.\textsuperscript{20} The impediments to success include less than perfect market information, high transaction costs and difficulties in pricing collective goods so as to ‘internalise the externalities’ in the price of the interests that are created.\textsuperscript{21} To no small degree, failures of market instruments can be tied to failures of regulation and other traditional government roles.

Economic instruments generally require significant investment by government in regulation and in creation of strong and efficient institutions. Failing such investment the probability of them being effective falls. Potential shortcomings of economic interests include the risk that markets themselves may fail and that firms may not respond as expected to price signals and the need to align the water or other natural resources regime with the requirements of sustainability. This may be because of many factors that have been shown to subvert market mechanisms including high transaction costs, lack of confidence in the market, an economic or legal incapacity to adjust to the changed economic conditions, or the influence of countervailing economic or social forces. We make these points not to suggest that traditional regulation is generally to be preferred over economic instruments. Rather they indicate that there are risks and costs with all types of instrumental intervention and that reliance on a limited suite of interventions to change a complex socio-economic system that is shaped by a very diverse set of transactions does carry risks of failure.

The downward spiral in the state of our national environment continues even in the face of a large investment in regulation, substantial direct investments in landscapes and rivers by both the public and the private sector, the growing use of environmental market instruments and increasing consumer pressure towards sustainability. That we need a better way to stem the losses and restore the environment and that significantly more effective and efficient environmental law will be a necessary part of this revolution, is to us self-evident. In the balance of this essay we will point to some directions for environmental law reform that, based on our research and that of many other colleagues across the world, have the potential to lead us to a system that better integrates and streamlines regulation, market instruments and other forms of public and private action to advance sustainability.

\textbf{III Reform Principles}

The protection of the environment in Australia (as in the rest of the world) has proceeded through a couple of generations of government intervention. The first generation can be characterized as using regulation as the tool of choice (although too rarely effectively enforced), married to direct works by government that were largely prioritised and carried out with a focus on scientific and technical considerations. The emphasis was upon advice and persuasion, upon direct action like soil conservation and weed control and upon the delivery of technical advice to rural landowners. Overwhelmed by the extent of the challenge, the limitations of resources and resistance to regulation from agricultural producers, this first generation has evolved into a paradigm in which market instruments, large-scale voluntarism and the use of market-like mechanisms such as auctions of government subsidies have come


to the fore. This new paradigm has required significant innovations that have proven to be useful and efficient in many settings where the first generation approaches proved wanting. But as we have demonstrated, this second generation also contains a number of inefficiencies and the potential for failure and will have to be supplemented with a next generation of strategies. It is toward the creation of this third generation that we turn our attention.

We wish to use the balance of this essay to outline proposals about how this reform might be pursued to achieve radical improvement in environmental governance. In a variety of previous studies we have developed concepts that ought to lead to marked improvement in the system of environmental laws. These are summarised in Box 2. What is particularly of note is that these concepts are not about how particular laws might be drafted, they are about how the system of laws and other instruments might be reformed as a whole. They focus on a better system of law, going beyond a consideration of the laws themselves to take into account institutions, processes and strategies. Whilst improvement at the level of specific instruments is necessary, this is insufficient to achieve the effectiveness, efficiency and equity that is required. The legal architecture, institutions and the processes to create and review laws also need to be markedly improved.

Einstein’s reputed aphorism that “no problem can be solved from the same level of consciousness that created it” seems nowhere more appropriate than in consideration of the challenges of achieving more effective and economical environmental regulation. The thinking that has characterized the creation of the problems we have discussed is to identify a particular decision and action (or set of decisions and actions), ‘problematise’ these and then create an instrument intended to directly control the aspects of these transactions that are considered undesirable. This thinking (coupled with our fragmented heritage of legal and governmental institutions) has often led us to respond to any failure of prior rules with an additional set of equally fragmented controls. At the same time, other agencies in other parts of government may be deploying incentives to encourage specific desired behaviours, or creating distinct rules to deal with perhaps related problems. The result can be that one arm of government is encouraging actions that run counter to the purposes of another arm. Through such mis-coordination we end up with a complex web of administrative and implementation arrangements that is far from coherent.

This approach has lost sight of the fact that any transaction is embedded within a network of other transactions that have preceded it in time and which will follow it. Thus, a farmer deciding to what extent they will extract groundwater will be heavily influenced by the legacy of infrastructures and enterprise activities that they have, shaping their management options. Their actions will be shaped by economic and institutional constraints and by information that they have at the time from a variety of sources. Their decisions will be shaped by their perception of future transactions, such as their anticipation of what the market will reward and what the physical environment such as climate will do. In this calculus their moral values and personal or family needs will form part of their reasoning and collectively the flows of information, calculations of potential gains or losses and weighting by values will determine their actions. The law may be one consideration, but it is at best only one factor and each farmer will be responding to their distinct beliefs, influences and constraints.

Thus, the farmer’s decisions and actions will be substantially shaped by transactions carried out by many other people and by the farmer’s perception of what these people might do. The influence of bankers, neighbours, the purchasing chain, accountants, family and many others directly or indirectly linked to the farmer will either support or frustrate the intention of
environmental laws. In some cases this variety of factors may make it impossible for the farmer to do what the regulators would wish, or cause these responses to be far slower than policy makers expect.

In practice, compliance with environmental rules will be least costly and most comprehensive when the dictates of the law are supported by the flows of information and incentives and by the embedded values and decision-making approaches that characterize this total transacting system. This observation applies equally to market-based instruments. Their success is also likely to be shaped by the context of transactions and institutions that surround them and which shape decisions to use them (or not).

IV IMPROVING GROUNDWATER REGULATION

The core of the National Water Initiative, the Water Act 2007 (Cth) and the principles for the Murray Darling Basin Plan announced in October 2010 is a commitment to the market as the organizing instrument for water use. The combination of the Water Act and additional regulations (particularly additional water trading rules) in the Murray Basin Plan focus management on one instrument, the tradeable license to extract a capped volume of water. Expressly, government will be largely prohibited from direct intervention in this market other than as a buyer on behalf of the environment. Government will develop economic adjustment plans to address the social harms that may arise and the regulatory structure of metering, observation and licensing will continue in force to support that market. The implicit belief is that groundwater users will be willing and able to rapidly adjust their water use in response to the economic signals, so that the plan goals will be achieved in a reasonable time.

These observations make us sceptical that the proposed approaches to groundwater use are optimal, in large part because they are dependent on a limited set of interventions that address only some of the transactions that shape groundwater use. The behavioural instruments are directed to only some parts of the complex transacting system that shapes water use. A comprehensive approach to align as many transactions and forces as possible to support the proposed water regime would seem to be a more robust approach. It is possible to envisage, for example, an integrated strategy that combines groundwater cap and trade with a precisely targeted social intervention and an industry-based performance improvement programme. Such an approach would involve a variety of interventions throughout the system of transactions that shapes water use. What has tended to happen is that various elements do tend to evolve but not in an integrated and coordinated manner.

We have proposed ten design concepts for improved regulation (see Box 2 below) that are intended to operate at two levels. We propose in effect a major restructure of the architecture of environmental law, including rationalization of the number of laws and their implementation at a national, state and local level.22 We also propose a changed approach when addressing particular issues. That approach involves a shift towards the integration of markets, regulation and other interventions in a more systematic ‘smart’ manner than has been traditionally used. We demonstrate an issue-specific application of the concepts with reference to groundwater regulation.

We believe that both traditional regulation and more modern environmental market instruments are prone to fail more often than advocates of either approach acknowledge. Variables that can retard (or, if properly aligned, support) change include institutional incapacity, the inability or unwillingness of the users of resource to alter their behaviour, the high cost of securing information needed to make the instrument work and an overall imbalance of incentives towards consumption rather than protection. What makes an instrument of any type work is not only the design and choice of the instrument, but also a variety of factors related to the environmental and social systems within which the intervention takes place. Reliance on the instrument alone, without addressing systemic relationships, does not seem to be a robust approach in the light of real world experience. The potential exists to increase the effectiveness of groundwater management and reduce the cost of achieving change by better aligning the elements in the transacting system towards the goals of reducing water extraction whilst improving economic returns from that water. This approach, using multiple instruments of a variety of types to shift the total social or economic system, is the essence of “Smart Regulation”.  

Box 2: Ten concepts to improve Australian regulation

1. Focus on shaping the systems that generate unsustainable outcomes, not creating instruments to address only some of the symptoms of the systemic problem.
2. Embrace the principles of ‘smart regulation’, using multiple instruments of different types simultaneously to achieve maximum effect.
3. Increase the behavioural sophistication of laws (and other instruments) so that we are likely to obtain better outcomes from our interventions.
4. Streamline the architecture of the laws and market arrangements we use, to reduce the inefficiencies that arise from complexity.
5. Improve the processes of regulatory evaluation and review, including more rigorous regulatory impact assessment that takes into account implementation feasibility and the social impacts of new regulations and market interventions.
6. Make greater use of the opportunities for ‘collaborative governance’ and ‘co-regulation’, whilst improving public confidence in such approaches by ensuring objective scrutiny and accountability.
7. Provide more opportunities for private citizens to take direct action in defence of the public interest in the environment.
8. Manage transaction costs, so as to create more effective laws and market instruments that operate more efficiently.
9. Evaluate and manage environmental policy risk more explicitly, including the use of commercial risk management approaches and more thorough evaluation of the risks of proposed instruments.
10. Apply the scientific model to improving environmental law, being more explicit about the theories that underpin proposed interventions and more scientific in evaluating and learning from real-world experience in implementing these theories.

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23 Neil Gunningham and Peter Grabosky, Smart Regulation: Designing Environmental Policy (Oxford University Press, 1998)
Of course, careful attention has to be given to the interaction between concepts and particularly between the general concepts (Principles 1-5 and 9-10) and the more specific ones (Principles 6-8). For the most part, there will be a complementarity between the different principles but this cannot be assumed in all cases. For example, collaborative governance implies a cluster of characteristics including participatory dialogue and deliberation, devolved decision-making, flexibility rather than uniformity, inclusiveness, transparency and institutionalised consensus-building practices. Most of these characteristics fit comfortably with the other concepts set out above. They fit squarely within concept 7 and do not preclude the use of multiple instruments as contemplated by concept 2 or input of the scientific model or environmental risk management as part of the decision-making process, as contemplated by concepts 9 and 10 (although stakeholders may not prioritise these in the decision-making process). However, collaboration is usually resource intensive and so may increase transaction costs (contrary to concept 8) and does not sit comfortably with concepts 4 (streamlining) or 5 (regulatory impact assessment). This suggests there may need to be a trade-off between different principles in some circumstances. This is hardly a new challenge. Indeed policymakers frequently have to make trade-offs between the three overarching principles of efficiency, effectiveness and legitimacy and the above dilemmas are examples of these trade-offs in particular circumstances.

The broader point is that strategies to address environmental degradation are context-specific. What sorts of policies work will be highly dependent upon the characteristics of the environmental issue under consideration. As a result, it would be futile to attempt to construct a single optimal regulatory solution that would be applicable to a wide variety of circumstances. Moreover, there are so many possible permutations of instrument and institutional interactions as to make the task of producing a general causal model of relationships between the multiple variables impractical even if problems of context specificity were overcome. Notwithstanding the context-specific nature of most environmental problems, it is possible to build a process and principle based framework for designing environmental regulation in any given circumstances. By this we mean an approach which, while falling short of providing determinative regulatory solutions, leads policymakers to ask the crucially important questions (processes) and assess their decisions against a set of criteria (our ten concepts) which form the basis for reaching preferred policy outcomes.

For example, applying this approach to dealing with groundwater, might involve grafting onto the proposed market for water, a collaborative governance model involving irrigators, farmer organizations, farm financiers and the wholesale/retain buying chains and organizations who provide frameworks such as certification, standards and Environment Management Systems. Our prior work has suggested that it is possible to negotiate credible co-regulation, backed by transparent public scrutiny and firm sanctions against failure, which could harness market

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25 A benefit of this approach is that policymakers will avoid expending scarce resources exploring in detail inappropriate and unproductive regulatory strategies at the early stages of the design process, thus reserving resources for a more detailed assessment once the available options have been refined down to a short-list. For example, McGarity refers to a ‘phased system of reducing options’ whereby regulators begin with ‘a large number of options initially’ and ‘as options are rejected, the remaining options should be analysed with increasing thoroughness’ Thomas O McGarity, ‘Regulatory Analysis and Regulatory Reform’ (1987) 65 Texas Law Review 1243.
forces and the goodwill of many producers and consumers.\textsuperscript{26} Experience in other sectors (such as finance markets and packaged goods producers), in Australia and overseas, does suggest that such smart approaches can be powerful and economical complements or alternatives to either regulation or market instruments.\textsuperscript{27}

Such thinking also suggests the need to become far more sophisticated in the behavioural design of interventions. Users of groundwater are not homogeneous. They are a highly segmented group of people implementing varied strategies in response to quite different conditions, motivations and values. What is feasible and attractive for a multinational grazing corporation in the Great Artesian Basin is likely to be quite different to what will stimulate the willing involvement of a struggling family business dependent on groundwater in Western Victoria. In turn this is different to what might work with an Aboriginal pastoral company in Central Australia. One only needs to look to the demonstrated power of marketing in its various forms to see the potential for more behaviourally sophisticated approaches to regulation and market instruments than has been thus far demonstrated in Australia. The few instances where social marketing approaches have been married to regulation provide empirical evidence of the potential to improve the effectiveness and reduce the costs of regulation by applied behavioural science.\textsuperscript{28} This is perhaps best illustrated with the multi-faceted strategies that have evolved to control smoking. In doing so, we need to be particularly sensitive to the considerable extent to which the behaviour of individuals may deviate from that of the ‘rational actor’ of mainstream economic theory.

For us, what is most interesting about the approach to the management of groundwater under the Water Act 2007 (Cth) and the Murray Darling Basin Plan is what is missing from the regime. The mechanism used to adjust groundwater use to more sustainable limits is a cap-and-trade approach, of necessity linked to policing and administrative arrangements to preserve the integrity of the cap and provide good governance for the trades. The role of government is explicitly constrained to creating and protecting the market and the provision of adjustment support (outside the core framework), as it is prohibited from intervention in the workings of the water directly.

At least four considerations that will influence the effectiveness of the implementation of the chosen instruments seem to have been given little attention in this strategy.

1. The economic and other capacity of the groundwater users to respond rapidly to these opportunities (and costs). The data on economic and social characteristics of the groundwater dependent farming communities of inland Australia suggest that there are many potential inhibitors to their ability to do so. These include relative disadvantage


\textsuperscript{28} Amanda Kennedy, ‘Using Community-Based Social Marketing Techniques to Enhance Environmental Regulation’ (2010) 2 Sustainability 1138.
in education, wealth and access to professional services to support decision-making. An optimized approach would consider complementary programs and expand the population of water users who are enabled to adjust to the new regimes and to exploit the opportunities that are meant to drive the shift to sustainability.

2. The role of private institutions in this transition, including banks and investors, produce buyers and investors in the environment. The power of financiers and the supply/purchasing chain and the potential role of industry and consumer standards, to shape what happens could be substantial. Engaging the private sector in shaping the transitions that are needed could significantly accelerate change.

3. The interaction between these new groundwater rules and other institutional and legal arrangements, such as regional natural resource management arrangements and regulations. Based on experience in other water quality and quantity markets it is likely that unexpected ‘details’ will reduce the ability of groundwater users to make necessary changes. To at least some degree these will likely be the unintended consequences of other arrangements intended to advance sustainability or productivity, or protect (particularly indigenous) welfare. An optimizing approach would engage with these issues and seek to streamline the total suite of arrangements before it becomes an inhibitor of change.

4. The role of farmer and other peers in shaping attitudes and developing capacity. Formal bodies like industry organisations, informal peer groups and industry standards and practice change, all have the potential to contribute to (or retard) desirable change. A systematic approach that moved beyond a focus on instruments would aim to integrate social change and non-state regulation or persuasion with the instrumental strategy. Such considerations are lacking from the approaches announced to date.

Empirical evidence supports the proposition that a key to greater cost-effectiveness is to reduce the transaction costs of the regulatory and market instruments that are used. This issue operates at two levels. The first is to reduce the transaction costs associated with the particular instruments that are deployed and, the second, is to reduce the transaction costs of the total regulatory or market system that is encountered by the citizen. It is not within the scope of this article to document the transacting and regulatory system, but even surface water trading is proving to be an excessively complex operation for many irrigators. The indications are that the challenges of groundwater markets will be even greater. Some of the reasons include scientific uncertainty about key issues such as the state of groundwater resources, their connectivity and recharge, the limits of reliable metering and the absence of automated reliable information to support both trading and regulation.

The appointment of the Bureau of Meteorology to manage the data and intelligence aspects of national water markets speaks of the importance of the information issues, but the investment and time frames involved in their resolution do suggest that transaction costs are likely to be a serious impediment to effective and efficient groundwater management for some time. Public under-investment in solving these detailed issues is likely to be reflected in under-performance of groundwater management because of excessive cost and complexity being borne by those who are expected to alter their behaviour in response to the new policy settings.

V REFORMING THE NATIONAL LEGAL ARCHITECTURE

Many of the ten concepts relate to reform of the national legal architecture for natural resource management. Overlaid on any consideration of how to better regulate a particular issue like groundwater is consideration of the transaction costs challenge associated with the over-
arching regulatory and market ‘architecture’ for natural resource management, of which groundwater management is only one dimension. We have outlined early in this paper the various elements of this system that involves state and federal (and occasionally local) government laws; administrative regulation; and a variety of private rules. We have elsewhere documented the effects that this ‘higgledy-piggledy’ structure is likely to have on the cost-effectiveness and fairness of natural resources regulation. As has been demonstrated by business law reform it is possible to reduce complexity and cost by reducing the number of instruments, even without altering the balance between the interests of those who pursue conservation and those who most value productive use of our natural resources. It is possible to envisage a structure in which we have a handful of environmental laws that incorporate all of the key elements of the hundreds that we have today, which provide the same levels of protection but far less of complexity.

One of the triggers for such reforms would be a more robust system of regulatory review, that considers not only the commercial benefit/cost effects of the particular proposed instrument, but also considers such things as the implementation resources that will be required.

Our earlier discussion of the different ‘market segments’ of the citizens who depend upon groundwater suggests that at least some segments are likely to be vulnerable, or at least at a disadvantage compared to others who are subject to the same management regime. One would expect, on the basis of history and demographics of the Great Artesian Basin, that the people most likely to be exposed are Aboriginal people in remote locations. A thorough risk-evaluation of the emerging groundwater regime is likely to indicate the need for targeted intervention to avoid the likely social spillovers and to equip less-advantaged citizens with the knowledge and resources that they will need to participate in whatever economic opportunities may arise from groundwater management through the market. From the information that has been released about the Murray Darling Basin Plan it seems that a detailed social risk review of groundwater management instruments has yet to occur. It is suggested that the strategy to manage such risks as will inevitably arise will be developed over time in consultation with communities and state agencies, but this does seem to be leaving one core issue, risks from the intervention, to an afterthought.

This is not intended to be particularly critical of the authorities charged with this work, for policy risk evaluation of the type we suggest is not required in any jurisdiction in Australia. The methods for doing so are not well developed. Deficiencies in processes for regulatory evaluation (and particularly assessing the risks of failure or perverse effects) explain why progress in creating regulation that is efficient, effective and fair has not been adequate in Australia or elsewhere. Without the stimulus that stronger review processes provide, it is hard to see how environmental regulation will benefit from a strong scientific approach to continuous improvement.

The limits of government funding and the effects of politics on the ability of government agencies to defend the environment are matters of practical importance. The move to greater use of markets rather than government regulation in part reflects this concern. The pursuit of private philanthropic funds and the use of ‘green consumer’ pressures is a further illustration of a shift towards private market action to replace or supplement government funds. This ought to raise the question of the extent to which private legal action in defence of the environment or social justice values ought to be enabled, for this too is a private market approach that relieves responsibility from government. Whilst many support the use of private market instruments for other purposes, providing greater scope for citizen litigation is likely to be
contentious even among free market environmentalists who are otherwise strong advocates of the private interest being harnessed to achieve public good and of the benefits of ‘getting government out of the environment’. It could be argued that, as the Water Act and the Murray Darling Basin Plan have limited the role of government in direct intervention other than as a trader, society needs to strengthen other mechanisms to protect the public interest and to ensure that those charged with managing the system do what is required in the public interest.

VI CONCLUSIONS

In this article we have tried to provide a balanced assessment of the critiques of environmental regulation as it affects the rural sector and of the main proposed alternatives: deregulation or the use of markets. We have argued that the deregulatory and free market alternatives tend to overstate the costs and understate the benefits of regulation and that they do not provide clear insights into what is ‘efficient’ because the methods tend to aggregate costs that are necessary and intended, collateral and unintended costs, opportunity costs and transaction costs. However, even given these significant caveats it is clear that it is in the public interest to create laws that do work better and are less costly. We have identified that one key to the pursuit of effectiveness and efficiency must be robust review and reform of the system of laws, not just individual laws.

The evidence is that neither deregulation nor the use of markets can be sufficient to replace effective environmental regulation. This is in part because of their own limitations, but also because of the intrinsic links between good regulation and effective markets. The reality is that the pursuit of sustainability must involve a synergistic relationship between traditional and more contemporary governance approaches. Any treatment of them as alternative rather than complementary instruments unnecessarily narrows strategic options for effective resource management. A philosophical bias in favour of one or the other is not very useful.

We have argued that all instruments carry the risk of failure and that often it is the same sorts of things that will determine their effectiveness. Contextual conditions such as the capacity of those whose behaviours are being managed to alter what they do and the influence of the many surrounding transactions and interests that shape response to markets or regulation are significant among these. So too are issues such as the capacity and efficiency of the institutions charged with implementing the interventions. We have proposed that intrinsic to far more effective regulation and markets is the importance of managing total transacting systems using a variety of instruments and behavioural interventions, rather than focusing only a limited set of transactions with a limited set of interventions. This represents a significant change to natural resource management (and particularly natural resource regulatory) practice but it is essential if we are to move beyond the present unsatisfactory situation.

The ten regulatory reform concepts we have outlined provide at least a starting point for considering how Australia might proceed to a more fruitful approach to regulation and markets and we have demonstrated in the case of groundwater some of the ways that this might be approached.
THE POLLUTER PAY PRINCIPLE AND LAND REMEDIATION: A COMPARISON OF THE UNITED KINGDOM AND AUSTRALIAN APPROACHES

SALLY-ANN JOSEPH*

The Polluter Pays Principle (PPP) is the commonly accepted practice that the costs of pollution should be borne by those who cause it. It is recognised as a principle of international environmental law and is a fundamental policy of the Organisation for Economic Co-operation and Development and the European Union, and their member states. The taxation system can be used to implement pollution control aspects of environmental policy. One way this can be affected is in the form of financial assistance through subsidies (such as tax credits for installing carbon capture equipment on a coal plant) or tax expenditures. While such assistance compromises the strict interpretation of the PPP (because it spreads the cost to all taxpayers, not only polluters), exceptions have been devised to assist in implementing the principle.

One form of pollution is contamination of the land. The United Kingdom provides acquirers of contaminated land relief from corporation tax for expenditure incurred in remediating land for urban development. This tax expenditure provision fails a strictly applied PPP. However, an exception to the PPP applies to ensure that this measure is not inconsistent with the PPP. Australia, on the other hand, provides an income tax deduction for the costs of land rehabilitation provided certain conditions are met. There is no one scheme but rather a number that are industry-centric focused rather than activity based. These tax expenditures also fail a strictly applied PPP. In addition, there is no exception to the PPP that can be applied. Australia’s practice of using tax expenditures (as currently legislated) to address land degradation measures therefore violates the PPP.

INTRODUCTION

Taxation has a social, economic and political role in society.¹ In addition, it is increasingly being used as an environmental tool. Using taxation policy to encourage environmental responsibility is consistent with an Organisation for Economic Co-operation and Development (OECD) report that advocates member countries use environmentally related taxes to ‘provide an incentive to polluters to modify their production and consumption behaviour’.²

An alternative to, and in many cases complementary to, ‘environmentally related taxes’ is financial assistance provided by the tax system in the form of tax expenditures. This equates to taxpayer-funded subsidies. Yet there is an adage that says the polluter should pay. Can these two diametrically opposed propositions be reconciled? This paper attempts to answer this by examining, comparing and contrasting specific tax incentives that are either designed to, or

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have the effect of, cleaning up or rehabilitating contaminated land. These are the United Kingdom’s (UK) land remediation relief (LRR) and the Australian mine site rehabilitation, land degradation and environmental protection provisions. Specifically, these tax provisions are assessed as to whether they adhere to the polluter pays principle (PPP). This paper does not address whether those who benefit should compensate the community, that is, the beneficiary pays principle.

The next section describes the polluter pays principle as it has evolved from its economic origins to its application to environmental issues and acceptance as a legal principle. It also canvasses the exceptions to the PPP and when taxpayer-funded assistance is permissible under the PPP. Section 3 outlines the UK and Australian assistance packages and assesses whether these are consistent with the PPP. The uneasy affiliation between the exceptions and tax expenditures is discussed in section 4 followed by the conclusion in section 5.

II THE POLLUTER PAYS PRINCIPLE

A Description

The ‘polluter-pays principle’ (PPP) underpins most of the regulation pertaining to the environment in particular and sustainable development generally. Originally an economic principle, it has evolved into being both an environmental principle and a legal principle.

In economic terms, the PPP is designed to correct improper cost allocation. This improper cost allocation has resulted from the common belief that resources such as air and water were not scarce and, as a result, freely available. By not taking the cost of these resources into account in the production and/or consumption of goods and services, an ‘externality’ arises. An externality (or external cost) results when someone’s actions cause an uncompensated loss of welfare to others. This is generally referred to as a cost on society. Costs associated with pollution are considered to be externalities.

Another way of phrasing this is that the costs of these resources are not adequately reflected in the product price. This failure to properly allocate costs stimulates over-production, which, in economic theory, ultimately leads to market failure. This can be avoided if polluters are made to bear the cost of their pollution. Thus, by ‘internalising’ these externalities, the cost of pollution is borne by the polluter. This is the basis of the PPP.

Applying the PPP in economic theory suggests that the polluter should pay the full cost of environmental damage caused by their activity. This would create an incentive to reduce the damage caused, at least to the level where the marginal cost of pollution reduction is equal to the marginal cost of the damage caused by such pollution. While this may control pollution, in economic theory it does not reduce it.

3 Used here in its ordinary meaning rather than as a reference to command and control measures.
6 Kettlewell, above n 5.
This has led to an extended interpretation of the PPP whereby polluters should pay damage costs as well as control costs. From an environmental perspective, the aim of the PPP is to integrate the use of the environment, including its waste assimilation capacity, into the economic domain through the use of economic instruments such as pollution charges and permits. Thus the PPP implies, and supports, establishing a system of fiscal charges by which polluters finance public policy to protect the environment. As such, it serves as a mechanism for pollution abatement and control and is acknowledged as an official benchmark for the evaluation of environmental policy. As an environmental principle, the focus is on how much should be paid rather than who should pay.

The PPP has been incorporated into both national and international environmental policy. It is included in the United Nation’s 1992 Rio Declaration and Agenda 21 as part of a set of broad principles to guide sustainable development globally. The European Community adopted the principle when establishing the European Union. It is also the basis of tax provisions encouraging land rehabilitation in both the UK and Australia.

As the PPP has evolved and assumed additional functions and meanings, it has become widely recognised and accepted as a legal principle. Although its precise legal definition remains difficult to ascertain, the core of the principle derives from basic principles of fairness and justice: people and entities should be held responsible for their actions, intended or otherwise.

It has become a frame of reference for lawmakers as well as policymakers. It is the essential conceptual basis for a range of legal instruments at the core of environmental legislation. It can be non-binding, only mentioned in the preamble of legislative documents, or it can be binding in that the PPP is included as an operative measure in legislation. The courts have also invoked it as an interpretive aid.

In the same way it has evolved from an economic principle, to an environmental principle and then legal principle, so the PPP has evolved from an economic control cost, to an environmental damages cost and then to a compensatory cost. Having developed into a

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8 Ian Mann, A Comparative Study of the Polluter Pays Principle and its International Normative Effect on Pollutive Processes (Forbes Hare, 2009).
10 Kettlewell, above n 5.
17 Examples include the Court of Justice of the European Union Case C-378/08 and joined cases C-379/08 and C-380/08; the UK High Court in Re Mineral Resources Ltd, Environment Agency v Stout [1999] 1 All ER 746; India Supreme Court in Indian Council for Enviro-Legal Action v Union of India & Ors (1996) 3 SCCC 212; Canada Supreme Court in Imperial Oil Ltd v Quebec (Minister of the Environment) 2003 SCC 58 and Switzerland Federal Supreme Court in 1C_231/2012.
The Polluter Pays Principle and Land Remediation

principle of polluter liability, the PPP is epitomised in international law in the ‘Trail Smelter’ case.\(^\text{18}\). Here the arbitration tribunal held that the polluting state (Canada) should pay compensation to the United States for the trans-boundary harm\(^\text{19}\) caused by activities in its territory. The owner and operator of the polluting smelter was not a party to the arbitration. That is, strict liability was invoked.

If liability is ‘strict’ then fault, whether intentional or negligent, need not be established. The decisive factor is that the damage was caused by the defendant’s conduct and therefore only a causal link need be established between the action (or lack thereof) and the damage. Because it can be difficult to establish fault in environmental liability cases, it is considered that environmental objectives are better reached using strict liability.\(^\text{20}\) Strict liability is also consistent with the PPP.\(^\text{21}\)

### B Exceptions

Whether viewed as an economic, environmental or legal principle, the ideology of the PPP is that the PPP precludes public aid. That is, taxpayers should not fund the costs of cleaning up or otherwise rectifying pollution.

The PPP was first formulated in 1972 when the OECD promulgated the ‘Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies’ (‘Guiding Principles’).\(^\text{22}\) In accordance with its mandate to further international trade, the OECD adopted the PPP as the recommended method for allocating costs of production. Specifically, it stated that ‘[s]uch measures should not be accompanied by subsidies that would create significant distortions in international trade and investment.’\(^\text{23}\)

This was reiterated in the OECD’s 1974 ‘Recommendation on the Implementation of the Polluter-Pays Principle’ (‘Implementation’), which stated that member nations should observe the PPP, and, as a general rule, ‘not [to] assist the polluters in bearing the costs of pollution control whether by means of subsidies, tax advantages or other measures’.\(^\text{24}\) However, it did provide for three specified exceptions.\(^\text{25}\) Firstly, governmental assistance is permissible where the implementation of environmental policy objectives within a prescribed and specific time results in the development of significant socio-economic problems. The circumstances must

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\(^{19}\) The term ‘trans-boundary harm’ is used almost exclusively for environmental issues arising under international law. It implies a direct line of causation from activity to physical consequences. This is to be contrasted with the terms ‘cross-border’ and ‘transnational’ that arise from less tangible impacts that arise from economic or political activities that cross sovereign borders. See X. Hanqin, Transboundary Damage in International Law (Cambridge: Cambridge University Press, 2003).


\(^{23}\) OECD, above n 22.


\(^{25}\) OECD, above n 24.
be exceptional such as to facilitate transitional periods when implementing stringent pollution control regimes. The second exception relates to aid provided to encourage the development of pollution control technologies and abatement equipment. In addition, if government provides aid to achieve specific socio-economic objectives that ‘would have the incidental effect of constituting aid for pollution-control purposes’, then such aid is not considered to be inconsistent with the PPP.

These exceptions were devised as a result of negotiations between governments where it became apparent that environmental subsidies were preferable to import duties in aiding distressed industries. That is, limited use of government subsidies to assist in underwriting environmental costs could mitigate demands for trade protection. The Implementation did note that, if assistance was to be given, this should be selective and targeted to the specific economic sector experiencing difficulties. It should also be adapted to the specific socio-economic problem and limited to predetermined and well-defined transitional periods, as well as structured to minimize distortion of international trade and investment. In addition, all OECD members should be notified of such assistance.

In 1991, the requirement against assistance was further relaxed, permitting redistributive charging systems, also referred to as ‘self-financing environmental management schemes’. Here pollution charges imposed on a specific group of polluters are redistributed back to the same group, providing them financial assistance. The European Community Commission holds that where the revenue is applied to public pollution control measures, the PPP is not compromised but applying it to private measures would be a deviation.

A strict interpretation of the PPP disallows such assistance. Proponents of this argument advocate that environmental costs should be considered a cost of doing business and the ability to cover these costs as a factor in industry competitiveness. This view is supported by multilateral trade negotiations, which are increasingly aimed at removing or winding-back government subsidies such as export credits and agricultural supports.

Traditionally, subsidies have been understood as financial assistance provided by government to the private sector. Such assistance may be in the form of spending government revenue such as investment in interest and providing loans at preferential interest rates, or in the form of revenue foregone such as tax concessions or exemptions. The OECD has attempted to

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27 OECD, above n 24.
identify, measure and monitor environmental subsidies, including establishing a notification and consultation system.\textsuperscript{34} However, as many of these subsidies are classified under different types of government assistance (such as regional, research or employment assistance), the data is incomplete and unreliable. Indeed, what is considered to be a subsidy also varies between countries.

Whilst all OECD member countries acknowledge the PPP, some governments may decide that the public should bear all or part of the costs of pollution control, or at least that they aid polluters with some form of technical or financial assistance. Reasons over and above the permissible exceptions include the difficulty of accurately defining and/or identifying the classes of polluters and the acknowledgement that some polluters may not be fully capable of internalising these costs without assistance.\textsuperscript{35}

Subsidies, or forms of financial assistance, are often considered important environmental policy tools.\textsuperscript{36} They have varying and complicating impacts on the environment so much so that it has been commentated that ‘the role of subsidies has been one of the most controversial issues in environmental policy’.\textsuperscript{37} That the harm caused by subsidies in not sufficiently recognised is suggested to be one reason why subsidies have not be properly regulated.\textsuperscript{38}

### III COUNTRY COMPARISON

No OECD member country formally ratified the Guiding Principles or Implementation recommendations.\textsuperscript{39} However, the ‘Declaration on Environment: Resource for the Future’\textsuperscript{40} was adopted by the governments of OECD member countries (which includes the UK and Australia).\textsuperscript{41} Specifically, the governments declared that they would:

- Seek to introduce more flexibility, efficiency and cost-effectiveness in the design and enforcement of pollution control measures in particular through a consistent application of the Polluter-Pays Principle and a more effective use of economic instruments in conjunction with regulations.\textsuperscript{42}

While the 27 principles enshrined in the United Nations Rio Declaration on Environment and Development are legally non-binding, they were endorsed by the 178 countries meeting there, including the UK and Australia. Designed to commit governments to ensure environmental protection and responsible development, Principle 16 states:

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\textsuperscript{34} OECD, ‘Financial Assistance Systems for Pollution Prevention and Control in OECD Countries’ (OECD Environment Monographs No 33, June 1990); OECD, ‘Trade and Environment: Environmental Subsidies’ (Report on a meeting of management experts held under the OECD Labour/Management Programme, OCDE/GD (95) 16, 1995).


\textsuperscript{36} Kim, above n 33.

\textsuperscript{37} Ibid, 117.

\textsuperscript{38} Ibid, 139.

\textsuperscript{39} Larson, above n 20; Kim, above n 33.


\textsuperscript{42} OECD, above n 41, [8].
National authorities should endeavour to promote the internalization of environmental costs and
the use of economic instruments, taking into account the approach that the polluter should, in
principle, bear the cost of pollution, with due regard to the public interest and without distorting
international trade and investment.43

Essentially, the implementation of the PPP depends on government policies. With respect to
the rehabilitation of contaminated land using the taxation system, the UK applies a strict
interpretation of the PPP. It also focuses on the activity that gives rise to the pollution. Australia, on the other hand, does not overtly apply the principle and is industry (or taxpayer)
centric.

A United Kingdom

A basic rule of UK taxation is that capital expenditure cannot be written off (as a total single
deduction) for tax purposes. Instead, tax relief for capital expenditure is given via the capital
allowances system which allows for periodic deductions over time. Governments may target
investment in specific assets for policy reasons. The ‘land remediation relief’ (LRR) is a
corporation tax concession for expenditure incurred to clean up contaminated land, derelict
buildings and to eradicate Japanese knotweed. It is not a type of capital allowance but has a
similar effect.

In UK law, ‘pollution’ is defined as the release of harmful or potentially harmful substances
into the land, water or air.44 Under the Environmental Protection Act 1990 (EPA) it is the role
of local authorities to identify ‘contaminated land’. Such land is defined as being in a condition,
caused by substances in, on or under the land, firstly so as to cause, or has the ‘significant
possibility’ of causing, significant harm or, secondly, to cause, or likely to cause, water
pollution.45 ‘Harm’ is defined broadly to cover health, environmental quality, sensory offences
and damage to property.46 The Corporation Tax Act 2009 (CTA 2009), on the other hand, does
not require that the harm be ‘significant’ or that the possibility of harm be significant.47 The
CTA 2009 also makes it clear that the substances must be the only cause of the contamination.

The LRR is a financial incentive to rehabilitate land deemed unusable as a result of
contamination by previous industrial activity.48 That is, it must have been acquired in a
contaminated state. It was introduced as an urban regeneration measure. It was designed to
provide an incentive towards the redevelopment of previously developed (or brownfield) land
and thereby increase the amount of land available for housing.49 It also had the objective of
increasing the rate of remediation of contaminated land.50 Chemicals and hydrocarbons are the
principal causes of pollution but the LRR is also used to facilitate the removal of asbestos from
commercial buildings.51

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Environment and Development, Rio de Janeiro, 3-14 June 1992)
44 EPA s 1; Pollution Prevention and Control Act 1999 section 1.
45 EPA s 78A.
46 EPA sub-s 1(4).
47 CTA 2009 s 1145.
48 The Corporation Tax (Land Remediation Relief) Order, 2009 No 2037, Explanatory Memorandum.
49 The Corporation Tax (Land Remediation Relief) Order, 2009 No 2037, Explanatory Memorandum.
No. 16, May 2006).
51 Ibid.
Originally the *Finance Act 2001*, the principal legislation is now the CTA 2009. The relief is in the form of a 50 per cent deduction over and above an accelerated allowance of 100 per cent and applies to both capital and revenue qualifying expenditure. Companies with losses arising from remediating qualifying land are able to claim a cash payment of 16 per cent of the loss.

The PPP is stated to be fundamental to the policy underlying the LRR.\(^{52}\) It applies only for dealing with legacy issues created by previous owners of the land. That is, an unrelated third party must have acquired the land in a contaminated state. Introduced in 2001\(^{53}\) for contaminated land only, the LRR was extended in 2009 to cover derelict buildings and land infested with the noxious Japanese knotweed. Amendments were also made to ensure ‘that polluters do not benefit directly or indirectly from the relief’\(^{54}\) thereby further endorsing the strict application of the PPP. Relief is denied if the company, or a person connected with it, was responsible for any part of the contamination.\(^{55}\) This can extend to the contamination spreading or worsening, and applies even if, at the time the action was taken, it was standard industry practice and not considered to be contamination.

Thus, in the UK and with respect to the LRR, the PPP is applied strictly in that the polluter does not receive any benefit. However, neither does the polluter pay. The taxpayer effectively pays 150 per cent of the expenditure incurred in cleaning up contaminated land and derelict buildings and removing infestations of Japanese knotweed.

The question then becomes: does one of the exceptions apply? The policy intent behind the LRR is to regenerate previously unusable land for housing. The land is unusable because it is contaminated by previous industrial activity, particularly through chemicals and hydrocarbons. This meets the definition of ‘pollution’. The presence of asbestos would also qualify as ‘pollution’ as defined in UK law.

The first exception deals with a significant socio-economic problem arising in exceptional circumstances as a result of implementing environmental policy objectives. While a shortage of housing land could be considered a ‘significant socio-economic problem’, this was not the result of the implementation of an environmental policy objective. It is also not a temporary measure and therefore fails the first exception. For the second exception to be applicable, there must be an investment in pollution-control technologies or abatement equipment. This, therefore, also does not apply. Considering the definition of ‘pollution’, the third exception is satisfied. That is, the LRR is consistent with having a specific socio-economic objective that, incidentally, also serves a pollution-control purpose. The LRR is therefore not considered to be inconsistent with the PPP.

That the polluter does not receive any benefit needs to be qualified. There is the potential for conformity with the PPP to be undermined by commercial reality. Instances can arise where the vendor and purchaser agree to ‘share’ the tax credit. While this may speed up the negotiation process for qualifying sites, if the vendor is also the polluter they may gain a share of the benefit of the LRR through a higher land price.

\(^{52}\) HMRC, ‘CIRD60000 Land Remediation Relief’ (HMRC Manual), CIRD60025, CIRD60120.


\(^{54}\) HMRC, ‘Land Remediation Relief’ (HM Revenue & Customs, Technical Note, 24 November 2008) [4.2].

\(^{55}\) CTA 2009 s 1150; Refer to the Corporate Intangibles Research & Development Manual CIRD60000 for details on the operation of the LRR <http://www.hmrc.gov.uk/manuals/cirdmanual/CIRD60000.htm>.
B Australia

Australian taxation only permits an immediate deduction for capital expenditure in particular circumstances where the tax law specifically permits. Concessional provisions pertaining to the prevention and cleanup of contaminated land are contained within the income tax division dealing with capital allowances.

In Australia, the Environment Protection and Biodiversity Conservation Act 1999 (EPBCA) is the Federal Government’s central piece of environmental legislation. It provides a legal framework to protect and manage nationally and internationally important flora, fauna, ecological communities and heritage places — defined in the EPBCA as matters of national environmental significance. Pollution, however, is a state matter with each state and territory having a form of environmental protection legislation. Federal governments have, nevertheless, attempted to introduce pollution-related legislation such as carbon pricing.

In New South Wales’ Protection of the Environment Operations Act 1997, ‘pollution’ is categorised as water, air, noise or land pollution and each is individually defined. ‘Land pollution’ or ‘pollution of the land’ is defined as the release of any solid, liquid or gaseous matter that causes, or is likely to cause, degradation of the land that results in any actual or potential harm, loss or property damage, provided it is not trivial. What is considered ‘trivial’ is not stated and no guidance is provided in regulations or otherwise. While the ‘harm’ referred to in the land pollution definition is in relation to the health or safety of human beings, animals, terrestrial life or ecosystems, ‘harm’ to the environment is defined to include any direct or indirect alteration of the environment that results in its degradation and includes any act or omission that results in pollution.

Although the term ‘pollution’ is statutorily defined in Western Australia’s Environment Protection Act 1986 to include ‘direct and indirect alteration of the environment…to its detriment or degradation’, the Supreme Court decided that the term ‘pollution’ should be given its ordinary meaning of ‘physically impure, foul or filthy’ otherwise the mere cutting of the lawn or picking flowers could constitute an alteration to the environment to its detriment. Dictionary definitions include to ‘contaminate or defile (the environment)’, ‘to make foul or unclean; dirty’. The principal applicable taxation legislation is the Income Tax Assessment Act 1997 (ITAA 1997). There are three major sets of provisions dealing with the cleaning up of and/or rehabilitation of contaminated land. Terms such as ‘pollution’, ‘harm’ and ‘contaminated land’ are not defined and therefore take on their ordinary meaning when used. Indeed, the Commissioner of Taxation contends that the statutory definition of non-tax related legislation does not translate to tax legislation. It is the Commissioner’s opinion that (1) the ordinary meaning of ‘pollution’ is limited to some sort of contamination and (2) an adverse change to the environment not due to contamination is not pollution.

57 Australian Oxford Dictionary.
58 Macquarie Dictionary.
59 See Joseph, above n 56.
60 ATO ID 2003/17, 22.
The provisions dealing with land rehabilitation are the mine site rehabilitation, the land degradation and the environmental protection provisions. These differ in scope and application but have the rehabilitation of ‘damaged’ land in common. When introduced, their policy intent was not always clearly articulated and, in these circumstances, must necessarily be inferred from the accompanying documentation and discourse.

The mine site rehabilitation concession is a financial incentive provided to mining and quarrying companies to restore the mine site to its pre-mining condition. Its purpose was commercial, recognising that such capital expenditure was necessary to comply with state legislation but would not be tax deductible.

The land degradation provisions extend deductibility for expenditure incurred by primary producers, water irrigators and eligible rural businesses that undertake specified preventative and corrective measures to restore damaged land. Historically, these provisions did not always have an environmental purpose. However, following a series of amendments it can be inferred that the current provisions do reflect an environmental purpose.

The third set of provisions provides tax deductions for expenditure on environmental protection activities relating to pollution and waste. Originally introduced to provide a deduction for otherwise non-deductible capital expenditure, its use is predominantly confined to the removal of asbestos. As such, it could now be considered as having an environmental and social purpose. However, as a result of being prescriptive in their operation, qualifying for a tax deduction under these provisions is difficult. In addition they apply only in very narrowly defined situations.

No reference to the PPP is made in any documentation accompanying the introduction of, or subsequent amendments to, the Australian tax provisions dealing with the rectification of ‘damaged’ or contaminated land. This does not necessarily imply that there was a conscious effort not to include the principle of polluter pays. Nevertheless, merely because it was not explicitly incorporated does not mean that its application cannot be assessed.

The first exception allows for financial assistance to be given in circumstances where introducing an environmental policy objective will result in socio-economic hardship. The second exception requires the aid be used to stimulate new technologies and/or abatement equipment. Neither of these exceptions applies to the mine site rehabilitation, the land degradation or the environmental protection tax expenditure provisions.

The third exception requires that there be predominantly a non-environmental purpose. However, it may be difficult to characterise an objective that is not explicitly environmental as ‘non-environmental’. This is because the environmental consequences are too interwoven in the analysis of the ‘non-environmental’ objectives. This is certainly the case with the three

61 ITAA 1997 subdiv 40-H.
62 ITAA 1997 subdiv 40-G.
63 ITAA 1997 subdiv 40-H.
64 For a detailed discussion on these, see Sally Joseph, ‘Income tax and environmental provisions –green gold or lead weight’ (2013) 8(1) Journal of the Australasian Tax Teachers Association 169.
65 For more details on these provisions see Joseph, above n 56.
Australian tax expenditures examined here. The third exception also requires that the incidental effect pertains to ‘pollution-control’ purposes. This is narrower than being for an environmental purpose. Thus, applying the third exception requires determining if there is, firstly, a socio-economic objective and, secondly, an incidental pollution-control effect.

It is arguable that the purpose behind the mine site rehabilitation tax expenditures was commercial rather than environmental.67 This is not a ‘socio-economic’ objective with an incidental pollution-control effect. Indeed, the restricted application of the tax provision means that most environmentally induced damage that meets the definition of ‘pollution’ is outside scope. For example, tailings dams that store waste material from mineral processing at mine sites are often the most significant environmental liability yet these are specifically excluded from the tax expenditure.68

The land degradation provisions, as currently drafted, are essentially environmental. However, they were not always so, providing tax deductions for land clearing.69 The third exception cannot apply as originally they had no incidental environmental benefit and currently their environmental benefit is not incidental. In any event the activities that constitute the tax deduction, while environmental, largely do not meet the definition of pollution.

A tax deduction for environmental protection activities was introduced for similar reasons to the mine site rehabilitation provisions – to provide a deduction for otherwise non-deductible capital expenditure. The clearing, removal and storage of pollution and waste could be seen as a socio-economic objective but is the pollution-control aspect only incidental?

It can therefore be deduced, with some reservations, that the third exception also does not apply. Based on this analysis, Australia’s land rehabilitation tax concessions do not comply with, or adhere to, the PPP.

IV Exceptions Revisited

The UK’s approach to rectifying land contamination through tax deductions is ‘not considered to be inconsistent’ with the PPP. This is not the same as stating that it is consistent with the principle. It gets its qualified support only by meeting the third exception. However, the PPP was certainly considered in deriving the policy of the LRR and legislators endeavoured to ensure adherence to the principle, at least to the extent that the polluter should not benefit from the financial assistance. However, it is not impervious to misuse.

Australia’s tax expenditures with respect to contamination of the land, on the other hand, fail to meet the PPP criteria, including the exceptions. There is nothing to support the contention that the PPP was even considered.

The use of financial assistance in the form of tax expenditures (or subsidies) will generally violate the strict application of the PPP. The PPP implies a payment made by the polluter; tax expenditures are a credit-based system whereby taxpayers subsidise pollution rectification.

It is generally possible that the PPP is most violated when the polluter benefits from tax expenditures that are used to subsidise activities required by governmental regulations. By

67 For a detailed discussion on this, see Joseph, above n 64.
68 Ibid.
69 Ibid.
receiving financial assistance, regulatory compliance is subsidised with the cost shifted from
the regulated entity as polluter to the broader taxpayer community.\textsuperscript{70} This applies to the
Australian mine site rehabilitation tax expenditures as the mining industry is required, under
state and territory legislation, to provide non-tax-deductible bonds for the rectification of mine
sites.

However, it is still possible to theoretically comply with the PPP if one of the exceptions
applies. The first exception requires the policy to be environmental, the resulting problem to
be socio-economic, the impact significant and the period short-term or transitional. However,
by their nature, tax expenditures are not short-term. They require to be legislated for and, once
implemented, are difficult to remove. It is possible for the legislature to put an expiration date
in the tax expenditure provision, although these are frequently extended.

The second exception is designed to foster investment in pollution control technologies and
abatement equipment. However, in the tax system, research and development provisions
already serve this function. Nevertheless tax expenditures could be employed here to
specifically target predetermined technologies and equipment. This, however, requires
governments to ‘pick winners’, subsidising the development of particular technologies, and may
result in old technologies being locked in and new technologies locked out.\textsuperscript{71}

The third exception requires a socio-economic objective with an incidental pollution-control
effect. This is narrower than requiring an incidental environmental effect. However, it is
important to promote broader environmental land recovery and tax expenditures can be
beneficial here.

As noted above, redistributive charging systems can be viewed as an additional exception in
certain circumstances. It is now opportune to consider other situations as being worthy of
exception. An obvious starting point is to extend the third exception to any incidental
environmental effect rather than restricting it to a pollution-control effect.

Another exception could relate to a situation where the polluter cannot be identified.
Degradation of the land should not be allowed to continue merely because a specific polluter
can no longer be held to account. Indeed, there may not even be a polluter per se. For example,
land degradation may be the result of climate change such as loss of vegetative cover, increased
salinity and the inundation of seawater in delta areas.

A full formulation of the circumstances that warrant an exception to the PPP is beyond the
scope of this paper. This would involve assessing a range of factors including an analysis of
the incentive effect of the tax expenditure, competitive conditions and evaluating the types of
activities and/or environmental issues to address.

V CONCLUSION

An inquiry with respect to the consistency of tax expenditures with the PPP is not merely
academic. It has very real implications from a policy perspective. It addresses the fundamental
question of who should pay for the remediation of environmental damage – the polluters or the
taxpayers. Is it permissible to expect taxpayers to bear the cost? Or, more pointedly, are there

\textsuperscript{70} Milne, above n 66.

\textsuperscript{71} For more on this see Joseph, above n 15.
any circumstances when it is permissible to expect taxpayers to bear the cost? Environmental works can be expensive. Determining who should pay for them takes on increasing importance.

The environment is a public (or community) good that needs to be managed for the benefit of current and future generations. Decisions on how to share the burdens of environmental policy typically reflect a mixture of efficiency and equity criteria.\textsuperscript{72} In most cases avenues that implement the PPP have both efficiency and equity advantages over other methods. Efficiency is gained by imposing the cost of environmental harm on those responsible for it, thereby providing an incentive for behavioural change, reducing the damage their actions cause. It is equitable to require those responsible for the damage to pay for it rather than those who are forced to live with the consequences. But generally only a strict interpretation of the PPP ensures this. It is lost with the effect of the exceptions.

It is expected that tax policies and environmental policies be mutually reinforcing.\textsuperscript{73} This will require a linkage between environmental policy and the direct tax system. The effectiveness of the incentive or subsidy depends on how closely that tax measure is linked with the environmental damage to be remedied.\textsuperscript{74} Specifically, the OECD stresses the importance of accurate targeting and the need to limit investment in direct tax incentives to those ‘which will have a beneficial environmental impact’.\textsuperscript{75} It is noted, however, that the extent of environmental damage cannot be objectively ascertained over the short to medium term.

It has been stated that the ‘PPP does not have the force of law … but it should have the force of sound policy’.\textsuperscript{76} It has also been suggested that the PPP be applied to prevent a change to a more polluting activity but that a form of government funding be used to encourage a change to a more environmentally beneficial outcome.\textsuperscript{77} Tax expenditures are one form of government funding. This calls into question whether the PPP is sound policy. Indeed, as shown in this paper, reality dictates that the PPP may not always be relevant, may not always be correct. It is also political. How a government balances the politics and the policy may well contribute to its environmental legacy.


\textsuperscript{73} OECD above n 2.

\textsuperscript{74} OECD, Taxation and the Environment: Complimentary Policies (OECD, 1993) 53.

\textsuperscript{75} OECD, above n 2.

\textsuperscript{76} Milne, above n 66, 126.

GIVING A VOICE TO FUTURE GENERATIONS: INTERGENERATIONAL EQUITY, REPRESENTATIVES OF GENERATIONS TO COME, AND THE CHALLENGE OF PLANETARY RIGHTS

JANE ANSTEE-WEDDERBURN

Faced with unsustainable patterns of development and continuing environmental degradation, advocates for the interests of future generations argue that those interests ought to be recognised at international law. The idea of ‘intergenerational equity’ — of the human species holding the natural and cultural environment of the planet in common with all generations in trust, to be passed to future generations in at least comparable condition to that in which it was received — was given detailed expression by Edith Brown Weiss in 1989 yet it is not recognised as a binding principle of international law, and future generations do not enjoy legally enforceable rights. Despite this, in the lead-up to Rio+20, advocates urged that future generations should be given a voice, through ombudspersons and High Commissioners for Future Generations. These proposals were not embraced by member states, and the Secretary-General was asked instead to prepare a report considering the issue. His report, released in September 2013, contemplates a modest role for any representative of future generations. This article argues that the proposals which emerged at Rio+20 for more inquisitorial representatives, with powers of enforcement, are unlikely to be realised given the many challenges of recognising legal rights for future generations, and that any international representative of future generations will be limited to performing an educative, consultative and advocacy role.

I INTRODUCTION

In September 2013, the Secretary-General of the United Nations delivered a report on the need for promoting intergenerational solidarity for the achievement of sustainable development, taking into account the needs of the future. The report was the culmination of a process that was revived at the 2012 United Nations Conference on Sustainable Development (‘Rio+20’), in which advocates for future generations challenged the purported failure of the international community to respect the needs of future generations, highlighting continued environmental degradation and unsustainable patterns of

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1 Intergenerational Solidarity and the Needs of Future Generations - Report of the Secretary-General, 68th sess, Agenda Item 19, UN Doc A/68/322 (15 August 2013) (‘Report of the Secretary-General’).

development, and presented various institutional mechanisms by which intergenerational solidarity may be advanced.\(^3\)

Humankind possesses the power to cause, and has already caused, great damage to the environment, including resource depletion, ecosystem degradation, pollution, and a continued decline in biodiversity.\(^4\) Human activity is placing increasing pressure on environmental conditions and is destabilizing environmental systems.\(^5\) Efforts to reduce humankind’s environmental footprint are proving largely ineffective and the short-term thinking that characterises contemporary political decision-making has resulted in an ever-widening gap between necessary protection measures and action.\(^6\) International environmental law has struggled to respond effectively to contemporary environmental crises, including climate change.\(^7\) The failure of legal and political systems to assure the integrity of the planet has given rise to a growing concern about the legacy that present generations will leave to the future, prompting many to assert that current generations owe a duty to generations to come and must act, in furtherance of that duty, to ensure the continued enjoyment of the earth and its resources.\(^8\)

While the idea of generations acting as stewards of the earth can be found in many traditions and cultures,\(^9\) contemporary expression was given to the concept of intertemporal trusteeship of the planet by Edith Brown Weiss in 1989.\(^10\) Her doctrine of intergenerational equity provides that each generation holds the planet on trust, obliged to pass it to all future generations in no worse condition than that which they enjoyed and to provide equal access to its cultural and natural resources.\(^11\) This sharing of the earth’s resources is achieved through a ‘planetary trust’, and the grant and imposition of ‘planetary rights’ and ‘planetary obligations’.\(^12\)

While many regard it as incontrovertible that humankind has a responsibility to take account of its actions for the future,\(^13\) this moral charge has found only limited recognition in law. The idea of taking into account the needs of future generations appears in national laws, constitutions and international instruments — including non-binding declarations, preambles of multilateral environmental agreements and, most notably, the operative


\(^{5}\) Ibid 26.

\(^{6}\) Collins describes the privileging of short-term thinking in environmental decision-making as ‘the ascendance of the present’, in which ‘the concept of long-term often does not seem to go beyond the next election’. Lynda M Collins, ‘Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance’ (2007) 30 Dalhousie Law Journal 79, 96.


\(^{9}\) Collins, above n 6, 96.

\(^{10}\) Edith Brown Weiss, In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity (United Nations University, 1989).

\(^{11}\) Ibid 21.

\(^{12}\) Ibid.

provisions of the *United Nations Framework Convention on Climate Change*.\(^\text{14}\) While important, this indeterminate awareness of future generations’ interests and incipient commitment to the objective of intertemporal justice does not reflect the intricate principle of intergenerational equity as conceived by Brown Weiss. No comprehensive international legal doctrine of intergenerational equity exists and no binding international instrument has sought to grant to future generations enforceable rights or impose enforceable intergenerational obligations.\(^\text{15}\)

Although not enjoying legal rights at international law, there have been repeated calls for future generations to be given a voice, including through the establishment of offices to represent the future: to advocate, to intervene in policy-making, and to advise on environmental issues affecting future generations. Proposals for such representatives date back to the 1992 United Nations Conference on Environment and Development (‘UNCED’),\(^\text{16}\) with more recent proposals being advanced in the lead up to Rio+20.\(^\text{17}\) Stakeholders lobbied for national level ombudspersons and an international ‘High Commissioner for Future Generations’. Certain of the proposals were ambitious, contemplating an interventionist and enforcement role for the High Commissioner.\(^\text{18}\) Ultimately, they were not taken up by the Member States.\(^\text{19}\) The subsequent September 2013 report by the Secretary-General, examining intergenerational solidarity and the institutional mechanisms for achieving it, contemplates a modest role for any future generations’ representative.\(^\text{20}\)

This article will begin by outlining Brown Weiss’ concept of intergenerational equity, with its emphasis on planetary rights and obligations, before contending that intergenerational equity does not exist as a binding legal principle at international law and that future generations do not enjoy legal rights. It will then identify some of the ways in which the needs of future generations may be given expression, examining the recent calls at Rio+20 to establish a High Commissioner, with powers of monitoring and enforcement similar to those enjoyed by the human rights Charter-based and treaty-based bodies. The article will then argue that seeking to enforce purported rights of future generations is problematic, and that the translation of any current awareness of the interests of future generations into legally enforceable rights and obligations is complex and appears unlikely to be taken up by the world’s states. This article will argue that, absent legal rights and obligations, a representative for future generations cannot hope to compel or constrain action but should assume an educative, consultative and advisory role — interposing the interests of future generations into decision-making and policy. Although less exacting than the missions proposed by several future generations’ advocates at Rio+20, such a role should be embraced, in seeking to ensure that the interests of future generations are not undermined by contemporary wants and needs.

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\(^{15}\) Collins, above n 6, 120.


\(^{17}\) These proposals are discussed in Part III(B) below.

\(^{18}\) See, eg, Ward above n 3.

\(^{19}\) Member States agreed, in the outcome document, *The Future We Want*, to ‘consider the need for promoting intergenerational solidarity for the achievement of sustainable development, taking into account the needs of future generations, including by inviting the Secretary-General to present a report on this issue’. *The Future We Want*, GA Res 66/288, UN GAOR, 66th sess, Agenda Item 19, UN Doc A/RES/66/288 (11 September 2012, adopted 27 July 2012) para 86.

\(^{20}\) Report of the Secretary-General, UN Doc A/68/322.
II THE DOCTRINE OF INTERGENERATIONAL EQUITY

A The Legacy of Environmental Degradation

Human kind has caused alarming damage to the environment. Forests are being destroyed, biodiversity is being lost, vast areas of the earth are polluted, and climate change is projected to have a devastating impact on the earth’s systems. Yet the effects of many of these pressures will not be felt by current generations but by generations to come, with present generations possessing an unprecedented ability to influence negatively the lives of future generations through this damning environmental legacy. As Rachel Carson wrote in 1962, ‘only within the moment of time represented by the present century has one species — man — acquired significant power to alter the nature of this world’.

Yet contemporary political institutions are constrained in their ability to respond effectively. Election cycles and the need to give pre-eminence to the voting present have created a ‘democratic deficit’, with powerful incentives to privilege the needs of the present generation and to discount the anticipated impacts of current actions on the future. Awareness of the destructive power of present generations and the inadequacies of short-term thinking has given rise to calls, anchored in notions of equity and justice, for an increased intertemporal regard for future generations within international environmental law.

B Intergenerational Equity: Earnest Planetary Trust

The most detailed account of a theory of intergenerational responsibility in environmental matters is the doctrine of intergenerational equity proposed by Brown Weiss. Her seminal work, In Fairness to Future Generations, represents an innovative effort to address global environmental concerns by transcending temporal boundaries and seeking to bring the future into contemporary decision-making. Published in 1989, it was presented both as a conceptual framework and a call to action.

23 Rachel Carson, Silent Spring (First Mariner Books, 2002) 5.
25 It is important to note that other models for recognising and accommodating the interests of future generations have been proposed. See discussion in Part III below. This article, however, focuses on the doctrine as outlined by Brown Weiss, with its particular focus on enforceable rights and obligations that are given form through an intergenerational trust.
27 Richard Falk, Preface, in In Fairness to Future Generations by Brown Weiss, above n 10, xxiii.
28 Ibid xxii.
Brown Weiss’ theory of intergenerational equity is grounded in diverse cultural and legal traditions\textsuperscript{29} and draws from many political theorists and philosophers.\textsuperscript{30} It posits that each generation holds the planet and its natural and cultural resources on trust for future generations, with each generation a trustee of the earth for future generations and a beneficiary of the trust settled by previous generations. This dual role, as both trustee and beneficiary, imposes obligations on each generation — referred to as ‘planetary obligations’, and affords certain rights — known as ‘planetary rights’.\textsuperscript{31} Each generation is subject to planetary obligations to conserve the diversity of the natural and cultural resource base, to maintain the planet’s quality, and to provide equitable access to the legacy of the past and conserve future access.\textsuperscript{32} These planetary obligations are ‘integrally linked’ with the collective, planetary rights of future generations,\textsuperscript{33} derived from their status as beneficiaries. These rights are conceived as intergenerational, group rights, held by one generation as a group in relation to all others — past, present and future.\textsuperscript{34} Intergenerational equity provides that the natural environment and natural and cultural resources may be used by one generation but this common patrimony must be passed on to future generations in at least comparable condition to that in which it was received.\textsuperscript{35}

By invoking the concept of trusteeship of the earth’s resources, Brown Weiss’ theoretical framework of rights and obligations promises to humankind the opportunity to afford distributive justice to future generations.\textsuperscript{36} It is a compelling entreaty for further action. However, while Brown Weiss acknowledged that the doctrine needed to be translated into positive law,\textsuperscript{37} its formal acceptance has been limited and her elaborate concept has been little advanced as a binding principle at international law.

C Status of Intergenerational Equity: Lacking Recognition at International Law

Brown Weiss’ theory of intergenerational equity has not enjoyed widespread support at international law. No binding international measure has sought to advance intertemporal legal rights and obligations, and the comprehensive doctrine of intergenerational equity is not currently a principle of customary international law.\textsuperscript{38} While it is possible to identify a

\textsuperscript{29} The idea of equity between generations and of stewardship of the earth’s resources has its roots in the common and civil law traditions, Islamic law, African customary law, and Asian nontheistic traditions. See Brown Weiss, above n 10, 18.


\textsuperscript{31} Brown Weiss, above n 10, 21.

\textsuperscript{32} Referred to as the ‘conservation of options’, ‘conservation of quality’, and ‘conservation of access’. See Brown Weiss, above n 10, 38.

\textsuperscript{33} Ibid 45.

\textsuperscript{34} Ibid 96.

\textsuperscript{35} Ibid 97.

\textsuperscript{36} Solum defines ‘distributive justice’ as being concerned with sharing the benefits and burdens of social co-operation, and argues that questions of distributive justice are more fundamental to intergenerational justice than corrective justice, presenting questions about the distribution of rights and obligations across generations. Lawrence B Solum, ‘To Our Children’s Children’s Children: The Problems of Intergenerational Ethics’ (2001) 35 Loyola of Los Angeles Law Review 163, 174.

\textsuperscript{37} Brown Weiss, above n 10, 103.

\textsuperscript{38} Collins, above n 6, 120.
concern for future generations in treaties, declarations, and decisions of the International Court of Justice, none embodies Brown Weiss’ vision of intergenerational equity grounded in a planetary trust, and the extent of state practice and opinio juris is not yet at a level to constitute custom.39

1 National Safeguarding of the Environment for Future Generations

At the national level, numerous legislative instruments seek to protect the environment for the benefit of present and future generations. A number of federal statutes in the United States, for example, make express reference to future generations,40 and Australia’s Environment Protection and Biodiversity Conservation Act also makes reference to the principle of intergenerational equity.41

A recognition of the needs of future generations has also been codified in various national constitutions, with a number either imposing obligations on states to protect the environment for present and future generations or extending constitutional rights to the environment so

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39 This article looks to the sources of international law as set out in the ICJ Statute, in particular international conventions and international custom. Statute of the International Court of Justice art 38. As to evidence of state practice and belief necessary to establish a customary law principle, see Jan Klabbers, International Law (Cambridge University Press, 2013) 26-30; James Crawford, Brownlie’s Principles of Public International Law (Oxford University Press, 2012) 24. The ICJ has stated that actions by States ‘not only must amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of the rule of law requiring it. The need for such a belief, ie the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation’. North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) (Judgment) [1969] ICJ Rep 3, 44 (‘North Sea Continental Shelf Cases’).


41 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 3 defines ‘ecologically sustainable development’, which is one of the objectives of the Act, by reference to a number of principles, including the principle of intergenerational equity. Peel criticises the concept of ecologically sustainable development as a ‘vague, contradictory concept’, claiming that there are very few examples of its effective implementation. She contends that, although ‘the development of the [ecologically sustainable development] concept in Australia seems impressive on the surface, there is little underlying substance when it comes to practical implementation’. Jacqueline Peel, ‘Ecologically Sustainable Development: More than Mere Lip Service’ (2008) 12 Australasian Journal of Natural Resources Land Policy 1, 2. The principle of intergenerational equity or references to future generations also appear in various state measures including the Environment Protection Act 1970 (Vic) which provides in section 1D that ‘the principle of intergenerational equity should ensure that the … environment is maintained or enhanced for the benefit of future generations’; Environment Protection Act 1986 (WA) s 4A; Protection of the Environment Administration Act 1991 (NSW) s 6; Nature Conservation Act 1992 (Qld) s 11; Environment Protection Act 1993 (SA) s 10; Nature Conservation Act 2002 (Tas) sch 2 item 2. See also, National Environmental Management Act 1998 (South Africa) preamble. In New Zealand, the Resource Management Act 1991 (NZ) s 3 provides that the purpose of the Act includes sustaining resources to meet the ‘reasonably foreseeable needs of future generations’. It has been argued that courts in New Zealand have failed adequately to consider the needs of future generations and how best to provide for them in decision-making on environmental matters. Sacha Hollis, ‘Old Solutions to New Problems: Providing for Intergenerational Equity in National Institutions’ (2010) 14 New Zealand Journal of Environmental Law 25, 36.
as to safeguard future generations’ interests. These references remain exceptional, however, and none represents an attempt to concretise the planetary trusts, rights and obligations embodied in Brown Weiss’ vision of intergenerational equity.

There has also been exploration of intertemporal justice and intergenerational equity in decisions of national courts. The most celebrated is the decision of the Philippines Supreme Court in Oposa v Factoran, JR, in which the petitioners asserted, and the court accepted, that they represented both their own interests and those of future generations. This decision is regarded by a number of commentators and scholars as significant, representing a ‘future-oriented and progressive step to implement[ing] and enforc[ing] the principle of intergenerational equity and responsibility’. Houck goes even further, describing the decision as one that changed the Philippines ‘in ways from which there would be no return’. Other commentators contend, however, that the significance of the case has been overstated.

See, eg, Bolivia’s constitution which includes a right to a healthy environment safeguarding the rights of future generation. Political Constitution of the State 2009 (Bolivia) art 9. Ecuador’s constitution provides that ‘the State shall exercise sovereignty over biodiversity, whose administration and management shall be conducted on the basis of responsibility between generations’. Constitution of 2008 (Republic of Ecuador) art 400. Norway’s constitution provides for a right to an environment that is conducive to health safeguarded for future generations. Constitution of Norway 1814 (Norway) art 110(b). South Africa’s constitution provides that ‘everyone has the right to have the environment protected for the benefit of present and future generations’. Constitution of the Republic of South Africa 1996 (South Africa) art 24. Kenya’s constitution provides for the right to a ‘clean and healthy environment … protected for the benefit of present and future generations’. The Constitution of Kenya 2010 (Kenya) art 42. The constitutions of Guyana (Constitution of the Co-operative Republic of Guyana Act 1980 (Guyana) art 36); Papua New Guinea (Constitution of the Independent State of Papua New Guinea 1975 (Papua New Guinea) art 4); Germany (Basic Law for the Federal Republic of Germany 1949 (Germany) art 20a); and Vanuatu (Constitution of the Republic of Vanuatu 1980 (Vanuatu) art 7) impose duties to conserve the environment including for future generations. See Tremmel, above n 22, 192 for a comprehensive list of constitutional provisions that refer to the environment and future generations.


Gatmaytan argues that protection of the rights of future generations was ‘already inscribed in Philippine law’; the court’s decision did not bring about the desired change (ie the cancellation of Timber Licensing Agreements); the court’s statement recognising standing to sue for future generations was obiter dictum; a liberal approach has always been adopted in Philippines case law to questions pertaining to standing; and intergenerational equity was ‘ultimately useless in the resolution of the case’ as the court would have decided the case ‘exactly the same way had the children filed the case solely on their own behalf’. Dante B Gatmaytan, ‘The Illusion of Intergenerational Equity: Oposa v Factoran as Pyrrhic Victory’ (2003) 15 Georgetown International Environmental Law Review 457, 460. Lowe has characterised the assertion by the named plaintiffs that they ‘represent their generations as well as generations yet unborn’ as scarcely more than a rhetorical device. He argues that it was not the rights of a future generation that were being enforced, but that the duty of certain members of the present generation was being enforced by other members of the present generation. Vaughan Lowe ‘Sustainable Development and Unsustainable Arguments’ in A Boyle and D Freestone (eds) International Law and Sustainable Development: Past Achievements and Future Challenges (Oxford University Press, 1999) 19, 27.
There has also been a series of decisions of State courts and tribunals in Australia (including the NSW Land and Environment Court, and the Victorian Civil and Administrative Tribunal) concerning the principle of intergenerational equity as set out in legislation.\footnote{47} Courts in India, Kenya, Sri Lanka, and South Africa have mentioned or promoted intergenerational equity in their decisions.\footnote{48}

2 International Regard for Future Generations

At the international level, there has been a more modest process of ‘creeping intergenerationalisation’ than that experienced at the national level.\footnote{49} An emerging regard for future generations can be found in treaties, declarations and decisions of the International Court of Justice.

\(\text{(a) Non-binding Instruments and Treaty References}\)

The international concern to afford justice to future generations in environmental matters emerged in the preparatory meetings to the United Nations Conference on the Human Environment (‘Stockholm Conference’), and the resulting \textit{Stockholm Declaration} expressed the international community’s ‘solemn responsibility to protect and improve the environment for present and future generations’.\footnote{50} In the decades since the Stockholm Conference, a number of non-binding instruments have similarly articulated the need to maintain the natural resources of the earth for future generations.\footnote{51}

This same concern for future generations heavily influenced the 1992 UNCED and the adoption of the concept of sustainable development, with all three non-binding UNCED instruments making reference to future generations.\footnote{52} The \textit{Rio Declaration on Environment}


\footnote{48} The High Court of Kenya made explicit reference to ‘the important principle of intergenerational equity’ in a 2006 case concerning water pollution. The court stated that ‘the water table and the river courses affected are held in trust by the present generation for future generations’. \textit{Waweru v Republic of Kenya} (2007) AHRLR 149 (KeHC 2006). See discussion in Rajendra Ramlogan, \textit{Sustainable Development: Towards a Judicial Interpretation} (Martinus Nijhoff Publishers, 2011) 222.

\footnote{49} Catherine Redgwell, \textit{Intergenerational Trusts and Environmental Protection} (Juris Publishing, 1999) 186.

\footnote{50} United Nations Conference on the Human Environment, Stockholm, Sweden, 5-16 June 1972, \textit{Declaration}, UN Doc A/CONF.48/14/Rev.1 (16 June 1972) principle 1. There is an intergenerational element in the UN Charter, referring in the preamble to the determination of the peoples of the United Nations to save succeeding generations from the scourge of war. \textit{Charter of the United Nations}, preamble. However, for the reasons identified in Part IV of this article, there are significant challenges to attempting to afford rights to future generations, and international human rights law is generally not regarded as extending rights to future generations.

\footnote{51} See, eg, the 1982 \textit{World Charter for Nature} which reaffirms that natural resources must be used in ways that ensure ‘the preservation of the species and ecosystems for the benefit of present and future generations’. \textit{World Charter for Nature}, UN GAOR, 48th mtg, UN Doc A/RES/37/7 (28 October 1982) preamble. See also the \textit{Earth Charter} which contains four ‘broad commitments’ including ‘Secure Earth’s bounty and beauty for present and future generations: (a) Recognize that the freedom of action of each generation is qualified by the needs of future generations; (b) Transmit to future generations values, traditions, and institutions that support the long-term flourishing of Earth’s human and ecological communities’. \textit{Earth Charter Commission, Earth Charter} <http://www.earthcharterinaction.org/content/pages/Read-the-Charter.html>.

and Development, which consists of principles designed to govern the environmental practices of states, provides that ‘the right to development must be fulfilled so as to equitably meet the developmental and environmental needs of present and future generations’. While certain commentators contend that intergenerational equity forms one of the four ‘recurring elements’ of sustainable development, the concept does not incorporate Brown Weiss’ ideal of planetary rights and obligations but a more general desire to preserve the environment for the benefit of future generations.

The most comprehensive commitment to future generations and intertemporal equity is found in the UNESCO Declaration on the Responsibilities of the Present Generations Towards Future Generations. The Declaration places on present generations the responsibility for ensuring that the needs and interests of present and future generations are fully safeguarded. While it incorporates a number of the key components of Brown Weiss’ intergenerational thinking, it eschews the grant of rights to future generations and instead focuses solely on present obligations.

Several environmental treaties, dating to 1946, recognise the need to protect the environment and safeguard it for future generations. These have included treaties that seek to preserve particular natural resources and assets, such as endangered species, water

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53 Rio Declaration on Environment and Development, UN Doc A/CONF.151/26/REV.1, principle 3. This language draws from the Brundtland Commission’s definition of sustainable development: ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’, World Commission on Environment and Development, Our Common Future, 42nd sess, UN Doc A/42/25 (1987) Part I [27].

54 See, eg, Philippe Sands and Jacqueline Peel, Principles of International Environmental Law (Cambridge University Press, 2012), 207. The Secretary-General asserts that ‘fairness between generations is embedded in the concept of sustainable development’. Report of the Secretary-General, UN Doc A/68/322, [9].


56 Ibid art 1.

57 Cf the draft Bill of Rights for Future Generations which preceded the adoption of the UNESCO Declaration. It was the result of a process begun in the 1990s by the Cousteau Society. Its opening article declared that ‘future generations have a right to an uncontaminated and undamaged earth’. Cousteau Society, ‘Rights for Future Generations’ <http://www.cousteau.org/about-us/futuregen>. See the discussion in Maja Göpel, ‘Intergenerational Environmental Justice: Tackling a Democratic Deficit with Ombudspersons for Future Generations’ (2011) 14 Effectus Newsletter 3 <http://www.worldfuturecouncil.org/library.html>. See also the Goa Guidelines on Intergenerational Equity, which articulate a number of strategies for implementing intergenerational rights and obligations, which ‘will become enforceable as they find expression in customary and conventional law’. Goa Guidelines on Intergenerational Equity, adopted by the Advisory Committee to the United Nations University Project on International Law, Common Patrimony and Intergenerational Equity, adopted in Goa, 15 February 1988, reprinted in Brown Weiss, above n 10, 293. The Goa Guidelines summarise and endorse the principles enunciated by Brown Weiss in In Fairness to Future Generations and were signed by the members of the Advisory Committee in their personal capacities. Collins concludes that ‘though worthy of mention, the Goa Guidelines have little significance regarding the legal status of intergenerational equity’. Collins, above n 6, 124.


resources, migratory species, and the earth’s cultural and natural heritage for the benefit of present and future generations, and those that seek to address particular threats to human health and the environment. Importantly, however, these references to future generations have tended to be confined to the preambles of the various conventions or are otherwise hortatory in nature.

The two binding instruments that were adopted at the UNCED in 1992 represent an advancement in recognising intertemporal environmental concerns. Rather than making only passing reference to future generations in preambular provisions, the Convention on Biodiversity Diversity and the UNFCCC both refer to future generations in the convention text. The UNFCCC identifies five ‘principles’ that are intended to guide the states parties in their actions to achieve the Convention’s objectives, with the first providing that parties should protect the climate system for the benefit of present and future generations on the

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60 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, opened for signature 17 March 1992, 1936 UNTS 269 (entered into force 6 October 1996) art 2(5)(c). A chapeau precedes the principle in paragraph 5(c) that water resources shall be managed so that the needs of the present generation are met without compromising the ability of future generations to meet their own needs. It purports to limit the parties’ responsibility to be guided by the principle to the measures that they are required to take under paragraphs 1 and 2 of article 2 of the Convention.


64 With limited exception including, for example, Joint Convention on Spent Fuel and Radioactive Waste. Gardiner explains that ‘[t]he preamble … usually consists of a set of recitals. These recitals commonly include motivation, aims, and considerations which are stated as having played a part in drawing up the treaty. … The recitals in the preamble are not the appropriate place for stating obligations, which are usually in operative articles of the treaty or in annexes. … [T]he substantive provisions will usually have greater clarity and precision than the preamble; but where there is doubt over the meaning of a substantive provision, the preamble may justify a wider interpretation, or at least rejection of a restrictive one’. Richard K Gardiner, Treaty Interpretation (Oxford University Press, 2010) 186. The Vienna Convention on the Law of Treaties article 31 states ‘(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. (2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes …’. Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

65 The Convention on Biological Diversity requires parties to pursue strategies for the sustainable use of biodiversity, with ‘sustainable use’ defined to mean the use of biological diversity in a way that does not lead to its long term decline, ‘thereby maintaining its potential to meet the needs and aspirations of present and future generations’. Convention on Biodiversity Diversity, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) (‘Biodiversity Convention’) art 2 and 6. UNFCCC art 3.
The references to future generations both in the preambles to environmental conventions and the operative provisions of the *UNFCCC* and *Biodiversity Convention* demonstrate a recognition of the interests of future generations in environmental issues. However, they do not represent an attempt to implement, in legal terms, Brown Weiss’ comprehensive doctrine of intergenerational equity. To date, there exists no binding instrument at international law that commits states to protect the rights of future generations and, even those measures that express a desire to safeguard the environment for future generations and to contemplate their needs, do not stipulate what consequences (if any) flow from comprehension of those needs.

(b) Cognisance of Future Generations in International Case Law

The concept of intergenerational equity has been little advanced by the International Court of Justice and no legal dispute decided by the Court has been resolved by reference to the doctrine. However, the Court has made reference to environmental obligations owed to future generations. A small number of dissenting and concurring opinions refer to the principle of intergenerational equity, with Justice Weeramantry a notable advocate of future generations.

Justice Weeramantry’s first reference to the principle appears in his separate opinion in *Maritime Delimitation in the Area between Greenland and Jan Mayen*, in which he refers, in a footnote, to the use of equity as providing a basis for developing principles of intergenerational equity in international law. In the 1995 *Nuclear Tests* case, two of the dissenting opinions refer to future generations, with Justice Weeramantry characterising intergenerational equity as ‘an important and rapidly developing principle of contemporary environmental law’.

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66 *UNFCCC* art 3.

67 It is reported that during negotiations, these countries insisted that, if such a ‘principles’ article were to be included, it should focus specifically on climate change. Bodansky explains that the United States successfully pushed for a number of changes to article 3 in order to limit its legal implications. ‘First, a *chapeau* was added, specifying that the principles are to ‘guide’ the parties in their actions to achieve the objectives of the Convention and to implement its priorities. Second, the term ‘states’ was replaced by ‘parties’. Finally, the term ‘inter alia’ was added to the *chapeau* to indicate that parties may take into account principles other than those in article 3. These three modifications were intended to forestall arguments that the principles in article 3 are part of customary international law and bind states generally. Instead, the principles clearly apply only to the parties and only in relation to the Convention, not the general law’. Bodansky also notes that the United States attempted to remove all references to the term ‘principles’ and, when it failed to delete the term from the title to article 3, it added a footnote stating that ‘titles of articles are intended solely to assist the reader’, intending this to mean that the titles lacked legal significance. Daniel Bodansky, ‘The United Nations Framework Convention on Climate Change: A Commentary’ (1993) 18 *Yale Journal of International Law* 451, 501. See also, Philippe Sands, ‘International Law in the Field of Sustainable Development’ (1995) L XVI *British Year Book of International Law* 303, 337 n 140. Redgwell questions whether it is possible to ‘ring-fence’ article 3 in this way and argues that the Convention may be viewed as ‘beginning the process of defining the obligation of the present generation to absorb the costs of reducing the risk of global warming for future generations’. Redgwell, above n 49, 118.


69 *Request for an Examination of the Situation in Accordance with Paragraph 64 of the Courts Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France) Case (Judgment)* [1995] ICJ Rep 288, 341 (‘Nuclear Tests Case’). In his dissenting opinion, Judge Sir Geoffrey Palmer quotes from *In Fairness*
Nuclear Weapons the majority of the Court refers to the interests of future generations,\(^70\) with Weeramantry again referring to the ‘principle of intergenerational equity’ in his dissenting opinion.\(^71\) Importantly, the Court did not go so far as to rely on the principle or to expressly recognise rights of future generations. In *Gabčíkovo-Nagymaros Project*, Weeramantry again spoke of the principle of intergenerational equity and of trusteeship of the earth’s resources in his separate opinion.\(^72\) The majority of the Court made passing reference only to future generations.\(^73\)

While advocates for future generations might find it encouraging to see the International Court of Justice acknowledge the interests of future generations, there has been no determination by the Court that future generations enjoy rights, except by Justice Weeramantry, in his separate or dissenting opinions. This sporadic regard for the needs of future generations falls considerably short of the demanding doctrine of intergenerational equity.

### 3 Indeterminate Awareness of Future Generations’ Interests

There currently exists no binding international legal obligation on states to secure environmental conditions for future generations on the basis of equity as contemplated by Brown Weiss. Nor do future generations enjoy self-executing and enforceable rights under international law. While there is some support for the doctrine of intergenerational equity in the International Court of Justice\(^74\) and in soft law instruments, Brown Weiss’ doctrine — with its attendant planetary rights and obligations — has not been codified and does not represent customary international law.\(^75\) There are a number of treaty references to future generations but these are expressed in very general terms, and evidence of custom — in terms of the national legislation and constitutions, judicial decisions, treaties and soft law instruments referred to above — do not appear to constitute sufficient state practice or *opinio juris*.\(^76\) On one view, these references may support a claim that a nascent customary law principle of intergenerational equity is evolving. This does not, however, reflect the elaborate doctrine proposed by Brown Weiss but a more general regard for future generations and a recognition of their interests.\(^77\)

The references to future generations in municipal laws that are discussed above may be taken into account in determining the existence of custom.\(^78\) However, the evidential value of these measures is arguably affected by the extent to which they are implemented and

\(^{70}\) *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 244.

\(^{71}\) Ibid 233.


\(^{73}\) Ibid 78.

\(^{74}\) With support from Justice Weeramantry, in particular. See above nn 68-72.

\(^{75}\) Collins, above n 6, 120.

\(^{76}\) See above n 39.

\(^{77}\) To the extent that this regard for future generations in environmental matters is one of the elements of sustainable development, some have argued that it already forms part of customary international law. See especially, Justice Weeramantry in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (1997) ICJ Rep 7, 86. Cf Lowe, above n 46, 31.

enforced, rather than remaining ‘on paper’ and exhortative.79 There is also evidence of intergenerational concern in a number of national constitutions, yet these remain the exception rather than the rule.80 Those constitutional provisions that include references to future generations do not purport to grant rights to future generations or attempt to impose clear obligations owed to future generations. The majority refer to the protection of the environment for present and future generations and, in a number of cases, express this in terms of a right held by present generations.81 Nevertheless, some commentators look to these provisions as supporting the emergence of a customary law principle of environmental responsibility towards future generations,82 while others argue that these references should be regarded as general political statements.83

As discussed above, there are numerous international treaties which refer, principally in their preambles, to future generations.84 While activities relating to the conclusion of treaties can be regarded as evidence of state practice,85 these preambular references do not purport to impose on parties any binding obligations and ‘their character is hortatory in nature’.86 The references to future generations that appear in operative provisions of multilateral environmental agreements — in particular, article 3 of the UNFCCC — are more compelling evidence of an emerging principle of customary international law.87 However, the influence of article 3 of the UNFCCC is potentially limited by the efforts made by a number of developed countries to confine the operation of its ‘principles’ to the UNFCCC.88 The protests of the United States and other nations may indicate that the consensus that is at the core of the development of principles of customary international law may be lacking.89

It is necessary to consider whether these references to future generations at the national and international level evidence the stable and consistent participation necessary to establish

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79 A number of scholars contend that a law that exists on paper only and which is not enforced cannot constitute state practice. See, eg, Karol Wolfrke, Custom in Present International Law (Martinus Nijhoff Publishers, 1993) 77.
80 Collins, above n 6, 137. In addition, the number of states that have established institutional mechanisms to give voice to the interests of future generations (such as ombudspersons or commissioners) is arguably too few to justify any claim of general state practice. See Collins, above n 6, 138.
81 See above n 42.
82 Collins, above n 6, 137.
83 Fitzmaurice, above n 30, 151.
84 Further, there is a growing body of non-binding declarations and decisions of international institutions that make reference to the needs of future generations and of preserving the environment for future generations. There is support for the idea that these can constitute evidence of custom, to the extent that they provide indirect evidence of state attitudes. See Brian D Lepard, Customary International Law: A New Theory with Practical Applications (Cambridge University Press, 2010) 180.
86 Fitzmaurice, above n 30, 128.
87 It is accepted that a treaty principle can transform into custom. North Sea Continental Shelf Cases [1969] ICJ Rep 3, 41.
88 See above n 67 and accompanying text.
89 As Thirlway observes, ‘one State (or a small group of States) may make it clear from the outset that it or they do not consent to the growth of the customary rule; and in that event, a State in that position will or may be exempted from the application of the new rule. … The recognition of this possibility emphasises the consensual nature of custom’. Hugh Thirlway, The Sources of International Law (Oxford University Press, 2014) 13. Further, the opposition of a sufficient number of states to a developing rule will prevent the rule from coming into existence: at 87. Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, 255.
sufficient state practice.\textsuperscript{90} The number of states that have adopted national measures is limited and the references to future generations and intergenerational concerns in treaties are inconsistent. Certainly, it is not yet possible to claim the participation of ‘all or almost all states who are going to be bound by the emerging customary normative prescription’,\textsuperscript{91} or that the principle has ‘generally been adopted in the practice of States’.\textsuperscript{92} State practice has not been constant and uniform.\textsuperscript{93}

In addition, while there is a growing catalogue of laws, declarations and treaties that use the term ‘future generations’, there is insufficient evidence that the authors of these measures held a belief that their practice was rendered obligatory by the existence of a rule of law requiring it.\textsuperscript{94} As Lowe observed in relation to the concept of ‘sustainable development’, ‘there may be evidence of the frequent use of the term but that is by no means the same as evidence of a general practice accepting the concept as law’.\textsuperscript{95}

Perhaps the greatest obstacle to recognising a customary law principle of intergenerational equity is the lack of specificity in the alleged norm. The concept of intergenerational equity (or of a more general intergenerational regard in environmental matters) has received inconsistent treatment in laws and treaties and is inherently vague. This lack of consistency and its indeterminate character are arguably material impediments to elevating this broad concept to a binding legal principle.\textsuperscript{96} What exactly is the content of the rule and what does it require or forbid? How is it to be applied in practice? What does it mean for a state to safeguard the environment for future generations?\textsuperscript{97} Arguably, the concept of responsibility to future generations lacks ‘sufficient, identifiable, normative meaning’, rendering it incapable of giving rise to a norm of customary international law.\textsuperscript{98} For these reasons, Lowe argues that, in normative terms, the principle of intergenerational equity is ‘a chimera’.\textsuperscript{99} It is currently difficult to conclude that the regard for the interests of future generations that

\textsuperscript{90} Danilenko, above n 78, 94. The ICJ Statute refers to ‘general practice accepted as law’. Statute of the International Court of Justice art 38.
\textsuperscript{91} Danilenko, above n 78, 94.
\textsuperscript{92} Anglo-Norwegian Fisheries Case (United Kingdom v Norway) [1951] ICJ Rep 116, 128. In the North Sea Continental Shelf Cases, the ICJ remarked that state practice must be ‘extensive’. North Sea Continental Shelf Cases [1969] ICJ Rep 3, 43.
\textsuperscript{93} Asylum Case (Colombia v Peru) [1950] ICJ Rep 266, 276. Rights of Passage Over India (Portugal v India) [1960] ICJ Rep 6, 40.
\textsuperscript{94} North Sea Continental Shelf Cases [1969] ICJ Rep 3, 44.
\textsuperscript{95} Lowe, above n 46, 24.
\textsuperscript{97} As Sands notes, ‘evidence of a broad acceptance of the principle [that the activities of present generations are limited by the obligation to take account and safeguard the developmental and environmental needs of future generations] does not however translate easily into prescriptions as to what the principle means in practice’. Philippe Sands, ‘Protecting Future Generations: Precedent and Practicalities’ in Emmanuel Agius, et al (eds), Future Generations and International Law (Earthscan Publications Ltd, 1998) 83, 86.
\textsuperscript{98} Lowe, above n 46, 30. In the North Sea Continental Shelf Cases, the ICJ observed that ‘it would in the first place be necessary that the provision concerned should, at all events potentially, be of a fundamentally norm-creating character’. The court noted that the ‘very considered, and still unresolved controversies’ as to the exact meaning and scope of the equidistance principle denied it the necessary norm-creating character. North Sea Continental Shelf Cases [1969] ICJ Rep 3, 42.
\textsuperscript{99} Lowe, above n 46, 29. See also, Warren who argues that ‘if it is a principle, then surely it is an ethical principle rather than a legal one. Although it has been incorporated in a number of international legal instruments … references are aspirational and do not elaborate on how the principle is to be implemented or enforced’. Lynda M Warren, ‘Legislating for Tomorrow’s Problems Today – Dealing with Intergenerational Equity’ (2005) 7 Environmental Law Review 165, 168.
has been expressed at the national and international level can be viewed as possessing the necessary norm-creating character required to give rise to a principle of customary international law that is binding on states. While it may be argued that humankind should owe an obligation to the future, the nature of any such obligation remains undeveloped. Arguably, it may be characterised as a broad injunction to have regard to the interests of future generations when undertaking, or permitting others to undertake, activities that have an effect on the environment.

The view that the broad concept of intergenerational concern in environmental matters exists without the imprimatur of law may be contested by some commentators, who argue that there is evidence of the emergence of a principle of customary international law. It is clear, however, that international law has not moved beyond this general concern for future generations to recognising the detailed doctrine of intergenerational equity advanced by Brown Weiss. There is no legally binding international instrument that commits states specifically to the protection of future generations and the references in laws and treaties do not demonstrate an endorsement of the generational rights perspective proposed by Brown Weiss or support the conclusion that future generations have been afforded justiciable rights under international law. Regrettably, some 25 years after the publication of Brown Weiss’ seminal work, the detailed doctrine of intergenerational equity remains an inchoate call to action — a ‘cultural value’ — with international law having done little to promote the comprehensive doctrine of intergenerational justice as a binding principle.

### III INSTITUTIONALISATION OF FUTURE GENERATIONS’ INTERESTS

Although intergenerational equity does not enjoy the status of a binding legal principle at international law, and Brown Weiss’ vision of planetary rights and obligations does not exist in enforceable terms, there have been repeated demands to give a voice to future generations. Commentators have proposed the use of trustees, guardians, ombudspersons, and commissioners to act as representatives for future generations.

Brown Weiss couched her doctrine of intergenerational equity in terms of a planetary trust. However, it is not clear, as a matter of law, that a trust form yet exists that can accommodate her notion of trusteeship — unlimited geographically or temporally. Given that the international community of states has shown little interest in proposals that seek to invoke

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100 Lowe, above n 46, 29.
101 See, eg, Collins, above n 6, 138. Collins however concedes that intergenerational equity will not meet its full potential without the development of a detailed legal framework, pointing to Brown Weiss’ doctrine in In Fairness to Future Generations as an appropriate framework.
102 Collins, above n 6, 124.
103 Report of the Secretary-General, UN Doc A/68/322, [36].
105 Report of the Secretary-General, UN Doc A/68/322, [4]. The Secretary-General writes that, ‘few would question the responsibilities that the world owes to its children and grandchildren, at least in the moral sense if not strictly in the law’: at [3] (emphasis added).
106 Interestingly, Brown Weiss commented in 2010 that ‘the international legal community has taken significant steps towards incorporating intergenerational equity into policies, laws and institutions at the international, national and local levels’. Edith Brown Weiss, ‘Implementing Intergenerational Equity’ in Malgosia Fitzmaurice, David M Ong and Panos Merkouris (eds) Research Handbook on International Environmental Law (Edward Elgar Publishing Limited, 2010) 100, 108. She goes on to acknowledge that more is required in order to put in place rights and obligations, and that the advances to which she refers are ‘miniscule in relation to the challenges’: at 108.
107 See, eg, International Human Rights Clinic at Harvard Law School, above n 40.
the trustee-beneficiary relationship for future generations, this article will focus on the recent calls for bespoke institutional mechanisms for giving a voice to future generations that featured at Rio+20.

A Guardians and Ombudspersons as Spokespersons for Future Generations

In In Fairness to Future Generations, Brown Weiss proposed that ‘ombudsmen for future generations’ would be responsible for ensuring that the planetary obligations and rights are observed, for responding to complaints, and for alerting communities to threats to the conservation of our planetary heritage. Brown Weiss urged that such ‘ombudsmen’ be appointed at the international, regional and national level and her idea is enjoying renewed support decades later.

1 Legal Custodian and Advocate for the Interests of Future Generations

Guardians seek to advocate for the best interests of those who are unable to represent themselves. A guardian for future generations would extend this custodial relationship to those who, for reason of not yet having been born, are incapable of advancing their own interests. A guardian would give a voice to the otherwise silent future, advocating for their best interests, and exercising and enforcing any rights they might enjoy. Christopher Stone has long advocated for the role of the guardian in environmental matters, including the possibility of appointing guardians to secure an effective voice for the environment itself.

While guardians advocate for the best interests of those unable to administer their own affairs, an ombudsperson is understood to occupy a more investigative and advisory role. Typically, an ombudsperson is an independent official that acts as a representative of public interests, scrutinising governmental administration and actions, performing an evaluative function, and seeking to ensure legality and fairness in public administration.

Brown Weiss contemplated an expansive role for ombudspersons for future generations. She proposed that they would be responsible, at the national level, for ensuring the proper execution of agreements incorporating planetary obligations and rights, and, at the international level, for ‘monitor[ing] compliance with international agreements.

108 Secretary-General Kofi Annan proposed in 1997 to reconstitute the UN Trusteeship Council ‘as the forum through which member states exercise their collective trusteeship for the integrity of the global environment and common areas, such as the oceans, atmosphere and outer space’. Renewing the United Nations: A Program for Reform – Report of the Secretary-General, 51st sess, Agenda Item 168, UN Doc A/51/950 (14 July 1997) [85]. Justice Weeramantry proposed that the International Court of Justice should act as the trustee of intergenerational rights, ‘in the sense that a domestic court is a trustee of the interests of an infant unable to speak for itself.’ Nuclear Test Case [1995] ICJ Rep 288, 341.

109 For a detailed consideration of the use of intergenerational trusts for environmental protection, see Redgwell, above n 49.

110 Brown Weiss, above n 10, 124.

111 Black’s Law Dictionary defines a guardian as ‘one who has the legal authority and duty to care for another’s person or property, esp. because of the other’s infancy, incapacity or disability’. Bryan A Garner (ed), Black’s Law Dictionary (West Publishing, 9th ed, 2009) 774.

112 Christopher Stone, Should Trees Have Standing: Towards Legal Rights for Natural Objects (W Kaufmann, 1973) 18.

investigat[ing] alleged violations and publicis[ing] findings’.114 They would also be empowered to respond to citizen complaints and act as ‘watchdogs’ to alert communities to problems affecting future generations.115

2 Existing National Institutions

A number of institutions exist at the national level for protecting the interests of future generations. Each differs in terms of its structure and the powers enjoyed by the office, but they have tended to be advisory and consultative, playing a more modest role than Brown Weiss’ proposed ombudspersons for future generations.

Israel established the first Commission for Future Generations in 2001. The Commission acted as a voice for future generations in policy-making, with broad advisory and investigative powers, reviewing legislation and advising on its effects on future generations.116 The Commission was disbanded in 2007.117

In 2008, Hungary established a Parliamentary Commissioner for Future Generations, with power to review and propose legislation, to investigate complaints, to advocate for future generations’ needs and to perform an advisory function. The Commissioner enjoyed significant independence in advocating for the interests of future generations but the office was replaced in 2012 by the Office of the Commissioner for Fundamental Rights, with a Deputy Commissioner charged with protecting future generations’ interests.118

Governmental agencies and organs with responsibility for sustainable development and for future generations’ interests exist in a number of countries. These include Canada,119 France,120 New Zealand,121 Finland,122 Germany123 and Wales.124

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114 Brown Weiss, above n 10, 125.
115 Ibid 126.
117 Report of the Secretary-General, UN Doc A/68/322, [43].
120 Council for Future Generations (lapsed).
B Renewed Calls for a Future Generations’ Representative at Rio+20

The idea of a guardian or ombudsperson to speak for future generations is appealing: It offers a way of irrupting future needs into contemporary policies and of countering the short-term thinking that threatens to stymie environmental protection efforts. It allows generations that do not yet exist to hold present generations accountable for their actions and it gives a voice to those yet unborn. While previous proposals to establish such offices have not been successful, the idea re-emerged in the preparations for Rio+20 — the United Nation’s Conference on Sustainable Development, held to mark the 20th anniversary of the 1992 UNCED and the 10th anniversary of the 2002 World Summit on Sustainable Development. Several stakeholders once again advocated that the international community should establish institutional mechanisms for the representation of generations to come. Proposals were advanced for institutions, at both the national and international level, to safeguard the needs of future generations. They took much of their inspiration from Brown Weiss and from the institutions that exist in national legal systems, and combined elements from the roles of guardian and ombudsperson.

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125 See, eg, the 1992 proposal made by Malta to the UNCED that the Rio Declaration on Environment and Development recognise the responsibility of each generation to provide access in national and international fora to guardians for future generations. Preparatory Committee for the United Nations Conference on Environment and Development, Working Group III, Principles on General Rights and Obligations, 4th sess, A/CONF.151/PC/WG.III/L.8/Rev.1/Add.2 (21 February 1992). The proposal was not adopted and Agenda 21 simply states that UNCED took note of but did not act upon other institutional initiatives, such as the appointment of a guardian for future generations. Agenda 21, UN Doc A/CONF.151/26/REV.1, [38.45].

1 Calls for a National Ombudsperson

The Major Group for Children and Youth,\textsuperscript{127} with support from a number of civil society organisations\textsuperscript{128} and Member States\textsuperscript{129} called for the establishment of national ombudspersons for future generations. Described as ‘independent institutions, working from the heart of government’ and in all areas of policy-making, proponents suggested that ombudspersons should provide ‘an assessment of the long-term impacts of public policies and legislative proposals [and] respond to citizen petitions, investigating claims of environmental crimes and offences and engaging in either conciliation or litigation’.\textsuperscript{130} More controversially, it was proposed that ombudspersons would hold governments accountable ‘if they do not deliver on sustainable development goals’.\textsuperscript{131}


\textsuperscript{129} In particular, support was provided by the EU negotiating group. See \textit{HC 172 Outcomes of the UN Rio+20 Earth Summit}, \textit{Written Evidence Submitted by Alliance for Future Generations to UK Parliament Commons Select Committee} (14 September 2012) <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmenvau/writev/172/m02.htm> The proposal was also supported by the European Economic and Social Committee, \textit{Opinion of the European Economic and Social Committee Rio+20: Towards the Green Economy and Better Governance} (21 September 2011) Rio+20 UNCSD <http://www.uncsd2012.org/comp_mgs.html>.

\textsuperscript{130} Major Group for Children and Youth, above n 127, 4.

\textsuperscript{131} World Future Council, above n 128, 3.
2 Calls for a High Commissioner for Future Generations

A second proposal, for a High Commissioner for Future Generations located within the UN system, was advanced by the Alliance for Future Generations. The proposal was supported by several stakeholders and reportedly received support from a number of states.

The proposal, the detail of which was set out in several discussion papers, contemplated an ambitious role for the High Commissioner, acting as a ‘mechanism to safeguard long-termism and the needs of future generations at the global level’. It was proposed that the High Commissioner would initially play an advisory and advocacy role, while developing...

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132 A number of options were proposed for the institutional location of the High Commissioner, which would be established through a General Assembly resolution: (i) as a subsidiary organ of the General Assembly; (ii) as an office of the Secretary-General; (iii) within the Economic and Social Council; or (iv) seated in the High-Level Political Forum. See Marcos Orellana, Catherine Pearce and Yulia Genin, Center for International Environmental Law and World Future Council, The High Commissioner for Future Generations: The Future We Want (4 June 2012) World Future Council, 5 <http://www.worldfuturecouncil.org/library.html>.


135 Including the EU negotiating group, with interest from Canada, Australia, Norway and Switzerland. See Stephen Leahy, Activists Call for Creation of a High Commissioner for Future Generations at Rio+20 (4 June 2012) 2 <http://www.ipsnews.net/2012/06/activists-call-for-creation-of-a-high-commissioner-for-future-generations-at-rio20/>. There was also considerable activity to promote the idea of a representative for future generations in the months leading up to Rio+20, including during the Economic Commission for Europe Regional Preparatory Meeting for UNCSD in which calls for an ombudsperson were favoured by a number of delegates. See Economic Commission for Europe, Report of the Regional Preparatory Meeting for the United Nations Conference on Sustainable Development, UN ESCOR, Agenda Item 8, UN Doc E/ECE/RPM/2011/2/Add.1 (7 December 2011). See also, the Declaration of the 64th Annual UN DPI/NGO Conference: Sustainable Societies; Responsive Citizens, Bonn, Germany, 3-5 September 2011 <http://www.uncsd2012.org/content/documents/634DPI.pdf>, calling for the establishment of an ombudsperson at global, national and local levels.


137 Alliance for Future Generations, above n 133.
the normative framework for his or her mission. In this capacity, the High Commissioner would engage in the following:

- International agenda setting and leadership, including advocating, engaging in dialogue, offering advice, and developing proposals for international legal frameworks for protecting future generations;
- Monitoring, early warning and review, including requesting UN agencies to report to the High Commissioner on how they are addressing future generations;
- Promoting public participation;
- Capacity building;
- Enhancing public understanding; and
- Reporting.  

It was proposed that, even at this initial stage, the High Commissioner should receive representations, have the ability to investigate complaints, and have the power to request ‘reasoned and public responses from states and international institutions’. The proponents stated that the responsibilities of the High Commissioner for Human Rights and the High Commissioner for Refugees offered ‘direct inspiration for the powers and responsibilities of a High Commissioner for Future Generations’.

Most importantly, however, certain proponents envisaged an important evolution in the function and powers of the High Commissioner, arguing that he or she should be charged with defining the rights and obligations to be enjoyed by future generations and imposed on states, initially through a ‘Peoples Charter’ and, ultimately, a ‘Framework Convention on Responsibilities Towards Future Generations’. This would allow the High Commissioner to perform an expanded role ‘building on the example of the human rights treaty bodies’, including providing a ‘fully-fledged complaints function’, playing a role in interstate dispute resolution, developing Special Procedures, and imposing obligations on states to cooperate with the High Commissioner.

3 Zero Draft: Express Reference to a Representative, Albeit Deferred

The zero draft of the outcome document that was circulated for negotiation in the lead-up to Rio+20 went some way towards meeting the demands for a representative for future

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138 Ward, above n 3, 15.
139 Ibid 18. See also, the submission of the Advisory Group on International Environmental Governance (The UNEP Major Groups and Stakeholders), which stated that a High Commissioner for Future Generations should have a ‘mechanism to respond to citizens’ petitions’. Advisory Group on International Environmental Governance (The UNEP Major Groups and Stakeholders), above n 128, para 6.
140 Including the extensive supervisory functions of the High Commissioner for Refugees. Ward, above n 3, 9.
141 ‘The High Commissioner could initiate a process to develop a People’s Charter for Future Generations … to set out the minimum safeguards that people … can expect the UN … to follow to ensure the realisation of the mission embodied in the High Commissioner for Future Generations. … A People’s Charter for Future Generations would provide a normative basis for the High Commissioner to investigate representations from individuals and civil society.’ Ward, above n 3, 18.
142 Ward, above n 3, 19. This reflects, in part, the proposal made by Brown Weiss in In Fairness to Future Generations for a Declaration of Planetary Obligations and Rights as a ‘first step in formulating soft law’ which ‘could lead to the conclusion of formal agreements or even transformation into customary international law’. Brown Weiss, above n 10, 105.
143 Ward, above n 3, 19. Special Procedures, with their thematic and country-specific mandates, are a feature of the UN Charter-based human rights system, not the treaty-based bodies. The inspiration for this element of the proposal appears to be the Human Rights Council. See Ward, above n 3, 9.
generations. It provided, in paragraph 57, that Member States would ‘agree to further consider the establishment of an ombudsperson, or High Commissioner for Future Generations, to promote sustainable development’. 144

The proposed text had two key shortcomings, however. Firstly, it did not call for the immediate establishment of such offices but only that they be further considered. This delay was resisted by a number of NGOs and stakeholders. 145 Secondly, concerns were expressed about the role of the office being framed in terms of the promotion of sustainable development. Stakeholders insisted that this was inappropriate and that the representatives should be charged with the promotion of future generations’ interests, 146 presumably fearing that such interests would be lost within the many controversies of the ‘notoriously vague’ 147 concept of sustainable development. 148


The Rio+20 outcome document, The Future We Want, did little to safeguard the interests of future generations. The zero draft’s proposed paragraph 57 did not appear in the final text. Instead there was a more subdued reference to the interests of future generations in paragraph 86, in which Member States agreed to ‘consider the need for promoting intergenerational solidarity for the achievement of sustainable development, taking into account the needs of future generations, including by inviting the Secretary-General to present a report on this issue’. 149 There was no mention of a representative for future generations.

Informal accounts suggest a number of reasons for the inability to secure agreement for an ombudsperson or High Commissioner for Future Generations. Reports suggested that the idea was struck from the document by the Brazilian government, who argued that ‘Cuba and Venezuela would never agree to it’. 150 Others suggested that ‘leaders of less industrialised


145. NGOs and Major Groups were invited to suggest amendments to the proposed zero draft. Comments were submitted on paragraph 57. The Women’s Major Group, for example, suggested deleting ‘agree to further consider’ and inserting in its place: ‘We call for an ombudsperson for future generations’. Similar amendments were suggested by the Workers and Trade Unions Major Group, and the NGOs group. See Secretariat United Nations Conference on Sustainable Development, Major Groups’ Comments on Section III Through V: The Future We Want (Received by 29 February 2012) Rio+20 UNCSD, 31 <http://www.unsd2012.org/resources_mgcomments.html>.


147. Collins, above n 6, 132.

148. As Horn notes, the implementation of sustainable development ‘has suffered for a lack of political will, financial resources and appropriate policies, methods and regulation’. Laura Horn, ‘Rio+20 United Nations Conference on Sustainable Development: Is This The Future We Want?’ (2013) 9.1 Macquarie Journal of International and Comparative Environmental Law 1, 26.


150. Tim Hall, ‘Future We (Don’t) Want’ on The Verb (22 June 2012) <http://www.theverb.org/future-we-dont-want/>. The World Future Council lamented the Brazilian ‘coup’ in which Brazil introduced a new text that removed any reference to intergenerational equity and to representatives of future generations (referring to text that was subsequently replaced by paragraph 86). World Future Council, ‘A Set Back in Rio: But a Seed is Planted’ on Future Justice Blog Post (22 June 2012) <http://www.futurejustice.org/blog/blog/a-set-back-in-rio-but-a-seed-is-planted/>.
nations opposed the proposal, saying it would disrupt their nations’ development’, with India expressing the concern that ‘such a proposal may open a Pandora’s box with similar demands for other thematic institutions’.

It is disappointing for advocates of future generations’ interests that the attempts to secure those interests and to pursue justice through the appointment of representatives failed. However, it is perhaps not surprising that the proposals were defeated, given the very broad powers contemplated, particularly for the High Commissioner. For states concerned to avoid incursions on sovereignty, the references in the discussion papers to the High Commissioner for Human Rights and the High Commissioner for Refugees and the suggested individual complaints mechanisms and state reporting would likely have been particularly unpalatable. It is arguable that a more measured strategy, that spoke only of the consultative and advisory role of the representatives, and that omitted references to the more adversarial aspects of the representatives’ missions, might have enjoyed greater support.

5 The Secretary-General’s Moderate Paragraph 86 Report

On 13 September 2013, the Secretary-General presented the report contemplated by paragraph 86 of The Future We Want (the ‘Report’). The Report outlines several options for advancing intergenerational solidarity, including appointing either a High Commissioner for Future Generations or a Special Envoy, agreeing an agenda item for the High-Level Political Forum, or introducing measures to ensure coordination. The Report recommends these options for Member State consideration, potentially at the second meeting of the newly established High-Level Political Forum (replacing the Commission on Sustainable Development). As outlined by the Secretary-General, a High Commissioner for Future Generations would advocate for intergenerational solidarity – ‘highlighting the moral imperative of leaving behind a healthy world in which future generations will live out their lives’, undertake research and foster expertise, and offer advice to the UN, its specialised agencies and to states upon request. The Report expressly provides that the

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153 Since Rio+20 there have been further calls for representatives for future generations including at the Budapest Conference of Model Institutions for a Sustainable Future, April 2014, which resulted in the signing of the *Budapest Memorandum* <http://www.kas.de/wf/doc/kas_12857-1442-1-30.pdf?140507135328>.

154 Report of the Secretary-General, UN Doc A/68/322. Prior to the publication of the report, the United Nations Division for Sustainable Development, Department of Economic and Social Affairs organised an Expert Panel on Intergenerational Solidarity on 9 May 2013 to provide an opportunity for stakeholders to exchange views on intergenerational solidarity and future generations, in order to inform continued consideration of the topic. See United Nations Sustainable Development Knowledge Platform ‘Expert Panel on Intergenerational Solidarity’ <http://www.sustainabledevelopment.un.org>.

155 Report of the Secretary-General, UN Doc A/68/322, [62]-[67].


157 Report of the Secretary-General, UN Doc A/68/322, [56].

158 Ibid [63].
office would not receive reports from states. Importantly, the Report acknowledges the challenges of defining rights for future generations, and its discussion of the possible role for a representative does not include those functions that would involve the enforcement of purported rights of future generations.

Although possibly politically acceptable and measured in its aspirations, such a representative for future generations bears few of the hallmarks of Brown Weiss’ intergenerational equity: there is no role for planetary rights and, to the extent that future generations are given a voice, it is to plead for consideration of their interests. It is a muted voice, unable to compel action and incapable of holding states to account for behaviours that imperil future generations. Importantly, the General Assembly has further developed the format and functions of the High-Level Political Forum. Its mandate includes no mention of future generations, and, while early days, there is little sign of a commitment to giving voice to the interests of future generations through the High-Level Political Forum.

159 Ibid. Described as a ‘related option, but with a lighter institutional footprint’, the ‘Special Envoy’ would be a global independent advocate for intergenerational equity; promote and facilitate the inclusion of best practices in policy-making; conduct public advocacy; and report annually to the General Assembly and on request to the High-Level Political Forum. Report of the Secretary-General, UN Doc A/68/322, [65]. This option has been criticised by representatives of the World Future Council as the ‘role risks being too weak, and since the appointment would be made by the SG, it risks not being legitimately recognised by all MS – it could be marginalised’. Alice Vincent, ‘Future Generations at the Decision-Making Table – The U.N. SG Report on Intergenerational Solidarity and Future Generations’ (17 December 2013) Think Climate <http://www.thinkclimate.org.uk>.

160 Report of the Secretary-General, UN Doc A/68/322, [19].

161 Format and Organizational Aspects of the High-Level Political Forum on Sustainable Development, GA Res 67/290, 67th sess, Agenda item 20(a), UN Doc A/RES/67/290 (23 August 2013, adopted 9 July 2013). The records of its inaugural meeting make passing reference only to future generations. The report of the High-Level Political Forum’s inaugural meeting says only that ‘leaders and other participants echoed that we have a responsibility to future generations’. The Summary of the First Meeting of the High-Level Political Forum on Sustainable Development, 68th sess, Agenda Item 19(1), UN Doc A/68/588 (13 November 2013) [15]. The closing statement by Dr John Ashe also contains an explicit reference to future generations: ‘This afternoon’s discussion illuminated the fact that we can help break out of poverty, achieve universal human development and entrust a healthy planet to future generations’. Dr John Ashe, Closing Remarks at the Inaugural Meeting of the High Level Political Forum on Sustainable Development, 24 September 2013 <http://sustainabledevelopment.un.org/content/documents/3818PGA%20closing%20statement%20FINAL.pdf>.

162 The Secretary-General’s Report recommends that states may wish to invite the High-Level Political Forum to consider the possible institutional arrangements and mechanisms for promoting intergenerational solidarity at its second meeting in June 2014. Report of the Secretary-General, UN Doc A/68/322, [68]. The theme of the second meeting, which took place from 30 June 2014 to 9 July 2014, was expressed as ‘achieving the Millennium Development Goals and charting the way for an ambitious post-2015 development agenda, including the Sustainable Development Goals’. The ‘Integrated Programme’ for the meeting did not include a session dedicated to considering the options outlined in the Secretary-General’s Report for promoting intergenerational solidarity. Instead there was a moderated dialogue on ‘Ideas and trends that can shape the lives of present and future generations’, asking ‘What critical new trends and ideas will affect future generations? How should they be reflected in the post-2015 development agenda?’ and ‘What are the new trends and emerging challenges on sustainable development the forum should address?’ ECOSOC Bureau, Integrated Programme, 26 June 2014, 3 <http://sustainabledevelopment.un.org/content/documents/Integrated%20Programme.pdf>. A number of panellists and other participants expressed support for institutional arrangements for intergenerational solidarity. See <http://www.un.org/News/Press/docs/2014/ecosoc6633.doc.html>. As at the date of publication, the High-Level Political Forum appears not to have formally considered the possible institutional arrangements and mechanisms for promoting intergenerational solidarity, as contemplated by the Secretary-General’s Report. Further, future generations have featured only briefly in the discussions of the Sustainable Development Goals.
IV WHAT FUTURE FOR FUTURE GENERATIONS?

A Concretising Future Generations’ Rights

Brown Weiss’ doctrine of intergenerational equity is predicated on the enjoyment by future generations of purported planetary rights, integrally linked with planetary obligations. In advocating at Rio+20 for the development of the normative framework for the mission of the High Commissioner — including through an international treaty — proponents of future generations recognised that Brown Weiss’ planetary rights and obligations must be crystallised in positive law. For so long as the international community is guided only by an inchoate or moral recognition of the interests of future generations and there are only a very small number of explicit references to future generations in binding international instruments, any representative of those generations will not be competent to perform many of the more adversarial functions contemplated by the Rio+20 proposals.

B The Difficult Transition to Legal Rights and Obligations

If future generations are to enjoy active representation at the international level, by representatives empowered to perform supervisory and complaints functions, it is necessary to translate the current, indeterminate regard for future generations into a binding normative framework. However, the challenges associated with such transformation are many. The following section identifies, at a high level, some of the most difficult issues that need to be confronted in converting this concern into legal rights. Arguably, these challenges are so great that such translation is unlikely to be realised, and a more modest set of aspirations in relation to the interests of future generations might be more appropriate.

1 The Problem with Rights

Brown Weiss’ vision of intergenerational equity is located in a human rights framework. In extending human rights to the environment, to groups, and to generations across time, her model presents a number of intractable problems.

(a) Future Generations Do Not Exist and Cannot Enjoy Rights

On one view, affording rights to individuals who do not exist deforms the very idea of human rights, as without identifiable individuals there can be no rights.163 While Brown Weiss counters this concern by characterising future generations’ rights as collective or group rights,164 it is still not clear how rights can be actualised without knowing who they...

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164 Brown Weiss, above n 10, 96.
are intended to protect. Whether granted to individuals or groups, it is arguably counterintuitive to conceive of rights — that demand protection now and which give rise to corresponding current duties — being enjoyed by an entity or group that does not yet exist. As Beckerman tersely notes, ‘unborn people cannot ‘have’ anything. They do not exist’.

A number of commentators have suggested that, given the difficulty of according rights to future generations, the focus of demands for intergenerational justice should shift to imposing legal obligations on present generations without correlative rights. As highlighted above, this was the approach ultimately taken by the drafters of the UNESCO Declaration on the Responsibilities of the Present Generations Towards Future Generations, which came out of a process intended to draft a bill of rights for future generations. Brown Weiss did not favour a duty paradigm in In Fairness to Future Generations, arguing that rights should be advanced given their greater normative force. It seems likely that many advocates of future generations will similarly find it difficult to resist the ‘radical, transformative power’ of rights when agitating for intergenerational justice.

(b) No Right to the Environment Exists for Present Generations

The extension of international human rights law to include a right to an environment of a certain quality is contested, with no such right yet appearing in a binding international

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165 In asserting that ‘there is no theoretical reason why legal systems cannot recognise future generations to have claims on the present that can be denominated rights’, Shelton argues that ‘legal systems recognise several types of legal persons that are societal fictions’, such as corporations, and affords them rights. While true, this says nothing of the unique intertemporal challenge of granting rights to future generations. Dinah L Shelton, ‘Intergenerational Equity’ in Rüdige Wolfrum and Chie Kojima (eds) Solidarity: A Structural Principle of International Law (GWU Law School Public Law Research Paper No. 2013-53) 127 n 12 <http://ssrn.com/abstract=2234144>.

166 See Supanich for a discussion of the asymmetry of power and influence among generations that do not overlap. Gary P Supanich, ‘The Legal Basis of Intergenerational Responsibility: An Alternative View – The Sense of Intergenerational Identity’ (1992) 3 Yearbook of International Environmental Law 94, 97. See also Lowe, above n 46, 27. There are scholars who contend that it is possible for future generations to be the holders of human rights. Partridge argues that ‘neither temporal remoteness, lack of direct claims, non-actuality, indeterminacy, nor non-reciprocity disqualify future persons from our moral community’ and that ‘we can be assured that the moral categories of rights and corresponding duties, which morally bind us to our contemporaries, can meaningfully be said to bind us to our successors as well’. Ernest Partridge, ‘On the Rights of Future Generations’ in D Scherer (ed) Upstream Downstream: Issues In Environmental Ethics (Temple University Press, 1990) 40. See also Joel Feinberg, who contends that to acknowledge the rights of animals and future generations ‘is the very least we can do for members of endangered species (including our own)’. Joel Feinberg, ‘The Rights of Animals and Unborn Generations’ in William T Blackstone (ed) Philosophy and Environmental Crisis (University of Georgia Press, 1974) 67. See also the discussion by Bell of human rights and future generations in the context of climate change. Derek Bell, ‘Does Anthropogenic Climate Change Violate Human Rights?’ (2011) 14(2) Critical Review of International Social and Political Philosophy 99, 104-10.

167 See, eg, Collins, above n 6, 111; Beckerman, above n 13, 61. But see Supanich who argues that, instead of appealing to the legal rights of future generations to ground intergenerational equity, the legal basis of generational responsibility ‘lies in the moral-psychological harm to our self-image as members of a species whose situation on this planet is unique’ that results from a failure to act on behalf of the interests of future generations. Supanich, above n 166, 95.

168 UNESCO Declaration, above n 55.

169 Brown Weiss, above n 10, 45.

instrument. While a number of national constitutions and regional agreements include a right to a clean environment there is no human right to the environment at international law and purporting to extend a human right to the environment across time and to grant it to all future generations is extremely problematic.

2 The Problem of Uncertainty

Contemplating justice for those living in the future requires such extensive speculation and involves so much uncertainty that the very premise of intergenerational equity may be difficult to justify. A representative charged with protecting the interests of future generations would be required to speculate in the performance of almost every aspect of his or her mission.

(a) What are the Preferences of Future Generations?

Beyond assuming the continued relevance of basic physiological needs, it is doubtful whether there exists the necessary capacity to gauge the needs of future generations so as to give content to planetary rights or assure their protection. It is impossible to claim any actual knowledge of what the future will demand of our descendants, including what they

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174 See discussion in Redgwell above n 49, 95-6. A number of commentators have argued that a right to a clean environment is capable of extension to future generations. See, eg, Symonides, who asserts that ‘the right to the environment assumes solidarity with other human beings and mankind’ and ‘[t]his solidarity extends to future generations’. Janusz Symonides, ‘The Human Right to a Clean, Balanced and Protected Environment’ (1992) 20 International Journal of Legal Information 24, 29. See also, Melissa Thorme, ‘Establishing Environment as Human Right’ (1991) 19(2) Denver Journal of International Law and Policy 301, 310. Depledge and Carlane acknowledge the complexities inherent in recognising collective rights for future generations but argue that ‘the trans-boundary, inter-generational and cross-sectoral nature of climate change creates a strong case for developing a new category of right(s) that recognises that individual human beings are intricately tied to the health of the global commons’. Michael Depledge and Cinnamon Carlane, ‘Sick of the Weather: Climate Change, Human Health and International Law’ (2007) 9(4) Environmental Law Review 231, 239.

175 Collins counters criticisms that a duty to future generations is impractical because we do not know what the future wants by claiming that this argument ignores the ‘biological bottom line of being human’ and that future generations will ‘most likely still need to breathe air, drink water and eat’. Collins, above n 6, 111. For an interesting discussion of our ability to identify critical resources and predict physiological needs, see Kristian Skagen Ekeli, ‘Green Constitutionalism: The Constitutional Protection of Future Generations’ (2007) 20(3) Ratio Juris 378, 388. Cf Supanich, above n 166, 98.
will need to survive and flourish. Any decisions about those needs become increasingly uncertain the further into the future any representative is required to look. The degree of speculation required is neatly captured by Gillespie who points out that ‘one hundred years ago, it would have been impossible to predict that petroleum or plutonium would be so important to this generation. Accordingly, this generation has no idea of what the essentials of the future will be’. 

(b) How are Differences in Future Generations’ Interests Accommodated?

Even if it were possible to discern the preferences of future generations, all generations across time do not form an undivided whole, and each generation is not itself homogenous. It is inevitable that conflicts will exist within generations and between generations. How are these to be resolved within a legal framework of binding rights and obligations?

Arguably, any attempt to ascertain future generations’ interests and to resolve these conflicts is misguided. It is contended by some commentators that attempting to do so is a form of ‘intertemporal imperialism’, with the vagueness of intergenerational equity being used ‘to import present values and impose them on the future’, ‘restrict[ing] the liberty of future generations by binding them to this concept’.

(c) How Many Generations Should be Considered?

While Brown Weiss contends that intergenerational rights should belong to all generations, it is inconceivable that the same environmental conditions and natural resources can be guaranteed to all future generations without distinction and limit, particularly as populations continue to grow. Given the contemporary ‘pro-growth’ and development paradigm, it might simply be unrealistic to expect current generations to make

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176 See Ekeli, above n 175, 387.
177 Golding contends that it is possible only to know the wants of future generations when they are closer to the present generations in time. He argues that the present generation should therefore confine its attention to helping immediate posterity. M P Golding, ‘Obligations to Future Generations’ (1972) 56 Monist 85, 97-8.
178 Gillespie, above n 30, 120. Redgwell, however, argues that simply because decision-making with respect to remote future generations cannot be as precise or effective as decision-making that affects the next generation, this does not mean that no attempt should be made. Redgwell, above n 49, 97.
179 In considering the potential for conflicts between generations, Stone wonders ‘how many scenarios we can identify, with an appreciable degree of confidence, which potentially pit one future generation against another, more remote future generation’. Stone, above n 163, 68.
180 This term is used by Collins in describing the arguments of other commentators. Collins, above n 6, 112.
181 Graham Mayeda, ‘Where Should Johannesburg Take Us? Ethical and Legal Approaches to Sustainable Development in the Context of International Environmental Law’ (2004) 15(1) Colorado Journal of International Environmental Law and Policy 29, 61. Mayeda condemns the ‘essentialist’ position of intergenerational equity, arguing that it ‘ignores the fact that both individuals and states are located within a historically emergent context that has given rise to very unique relationships between particular states, and between individuals in those states’: at 54.
182 Brown Weiss, above n 10, 97.
183 As Kiss and Shelton question, how can the ‘same amount of space, wilderness, clean water, and biological diversity … be guaranteed to endless generations if they themselves consist of increasingly large numbers of individuals’? Alexandre Charles Kiss and Dinah Shelton, International Environmental Law (Transnational Publishers, 2004) 256. Gillespie notes that an obligation to distant future generations could result in the ‘near seizure of modern society due to the possibly limitless number of future generations and their needs’. Gillespie, above n 30, 121. He argues that realism may suggest that any one generation cannot attempt to share the resources the present generation possesses with the whole of posterity, and that the best that can be hoped for is to make some savings: at 122.
sacrifices in order to preserve the environment and its resources for all posterity.\textsuperscript{184} This would seem to suggest that intergenerational equity should be recast so as to limit duties to successive generations only, relying on personal and temporal proximity.\textsuperscript{185} Such an approach, however, would be unlikely to promote the material changes needed to address issues such as climate change, the effects of which will be felt for generations to come.\textsuperscript{186}

\textit{(d) What is the Extent of Sacrifice Required of Present Generations?}

In affording rights to future generations it is necessary to decide exactly how much of current interests should be sacrificed for the benefit of the future. Such decisions should presumably not be informed by the ‘preservationist model’, which dictates that the present generation does not consume anything but saves all resources for future generations, or the ‘opulent model’, which allows the present generation to consume all that it wants and generate as much wealth as it can.\textsuperscript{187} However, there is no consensus about where, between these two extreme positions, the duty to future generations should be fixed.\textsuperscript{188} Brown Weiss favours an ‘equality model’ that ‘requires that each generation pass the planet on in no worse condition than it received it and provide equitable access to its resources and benefits’.\textsuperscript{189} Arguably, this provides only limited guidance in determining, as a practical matter, what each generation must forgo and assists little in directing how a duty to future generations would be applied in practice, so as to inform contemporary decision-making.\textsuperscript{190}

Affording enforceable rights to future generations would also require speculation about the likely impacts of today’s actions on future generations and about the future state of the environment.\textsuperscript{191} To what extent will future generations be better equipped than present generations to respond to environmental problems? How can decision-makers be certain that the choices they make today do not turn out to be irrelevant or ill-conceived?\textsuperscript{192}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{184} As Passmore colourfully writes, ‘anything we can do would, over millions of years, be infinitesimal in its effects: not even by reducing our consumption of petrol to a thimbleful apiece could we ensure the availability of a similar quantity to our distant descendants’. John Arthur Passmore, \textit{Man’s Responsibility for Nature: Ecological Problems and Western Traditions} (Duckworth, 1974), 78.
\item \textsuperscript{185} See Gillespie, above n 30, 122.
\item \textsuperscript{186} Ibid.
\item \textsuperscript{187} Brown Weiss, above n 10, 22.
\item \textsuperscript{188} The Secretary-General’s Report offers a narrow conception of the needs of future generations, arguing that ‘rather than seeking to identify and promote what might be the good life for future generations, the focus for policy from a future generations perspective should be guided by avoiding and minimizing harm. Practically, this would mean avoiding irreversible impacts on the ecosystems that provide the basis for human life – today, as well as in the future’. \textit{Report of the Secretary-General}, UN Doc A/68/322, [25].
\item \textsuperscript{189} Brown Weiss, above n 10, 24.
\item \textsuperscript{190} Brown Weiss does set out a number of strategies for implementing the obligations she regards as owed to future generations including sustainable use of resources; maintenance of facilities and services; monitoring of natural and cultural resource diversity and environmental quality; impact assessments; scientific research and technological development; and global learning and education, Brown Weiss, above n 10, 119-20.
\item \textsuperscript{191} ‘Parfit’s Paradox’ goes further, positing that present policies will not just affect the wellbeing of generations in positive and negative ways, but they will also determine which persons are born. Derek Parfit, \textit{Reasons and Persons} (Oxford University Press, 1984). For an interesting discussion see Per Ariansen, ‘Beyond Parfit’s Paradox’ in Emmanuel Agius, et al, \textit{Future Generations and International Law} (Earthscan Publications Ltd, 1998) 13.
\end{itemize}
\end{footnotesize}
3 The Problem of Conflicting Imperatives

Not only is it impossibly demanding to discern and protect the needs of all future generations because of what is unknown (and unknowable), but the potential for conflicts between imperatives makes the grant of enforceable rights to future generations highly problematic.

(a) Silencing the Present Poor: Intrigenerational Concerns

It is arguably misguided and even unjust to voice deep concern and to require sacrifices for future generations when so many of the present generation live in poverty.\(^{193}\) As the Rio+20 outcome document states: ‘Poverty eradication is the greatest global challenge facing the world today’.\(^{194}\) The failure to achieve equity within the current generation must be, for many, an overriding concern, with the actual needs of ‘strangers in space’ taking precedence over the anticipated needs of ‘strangers in time’.\(^{195}\) While Brown Weiss’ doctrine of intergenerational equity includes an intrigenerational element, it is relatively under-theorised\(^{196}\) and positioning it as a component of intergenerational equity conceals the risk of conflict between generations.\(^{197}\) Most significantly, it risks treating present generations as an instrument for securing the well-being of future generations.\(^{198}\)

(b) Silencing the Environment: The Anthropocentrism of Intergenerational Equity

Intergenerational equity is resolutely anthropocentric and has been criticised for its ‘species chauvinism’.\(^{199}\) It positions the environment in instrumental terms, to be preserved and maintained for its enjoyment by present and future humans. Arguably, when considering justice in environmental issues, such an anthropocentric approach — that disavows justice for the non-human natural world and disregards the inherent value of nature — cannot be sustained.\(^{200}\) This has led Shelton to suggest that a third dimension of solidarity needs to be considered, in addition to intergenerational and intragenerational equity: ‘the solidarity of humans with others species, ecosystems and nature as a whole’.\(^{201}\)

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193 Ibid 47.
194 *The Future We Want*, UN Doc A/RES/66/288, para 2.
195 Christopher Stone asks ‘how do we balance the claims of strangers in space with those of strangers in time?’ Stone, above n 163, 76. Gündling argues that ‘the most difficult challenge to all efforts to define and achieve “intergenerational equity” will turn out to be that we have failed to achieve equity within our own generation’ and that ‘the inequities of the present imply that we simply cannot solve the problems of the future simply by postulating a global collective sacrifice’. Lothar Gündling, ‘Our Responsibility to Future Generations’ (1990) 84 *The American Journal of International Law* 207, 211.
196 Redgwell notes that there are only seven express references to intragenerational equity in *In Fairness to Future Generations*. Redgwell, above n 49, 109 n 208.
197 Sands and Peel regard intragenerational equity as forming one of the four recurring elements of sustainable development, together with intergenerational equity, the principle of sustainable use, and the principle of integration. Sands and Peel, above n 54.
198 See discussion in Collins, above n 6, 115.
199 Antony D’Amato, ‘Do We Owe a Duty to Future Generations to Preserve the Global Environment?’ (1990) 84 *American Journal of International Law* 190, 196. D’Amato characterises the theory of ‘fairness to future generations’ as an impoverished account of our sense of moral obligation, being too dependent on finding a link to the improvement of the human condition.
200 Redgwell, however, asks whether there may be potential for intergenerational equity to circumvent the ‘theoretical minefield of recognition of rights or interests for animals, plants, species and ecosystems by linking the exploitation of nature with the interests of future generations’. Redgwell, above n 49, 98.
201 Shelton, above n 165, 128.
(c) Conflict with Other Goals

It is also necessary to consider how a right to the environment enjoyed by future generations could be reconciled with countervailing cultural, economic and developmental concerns, as well as other fundamental human rights. What is the relative value of each and how are they to be balanced so as to assure justice to present and future generations? While there is a balancing required in assuring protection of current human rights and courts have developed tools to manage competing rights and to balance individuals’ rights with the public interest, the intertemporal nature of intergenerational equity presents a further dimension of likely conflict. A strategy for protecting purported rights of future generations may struggle to design effective mechanisms for taking into account these competing dimensions.

4 The Problem of Reality

Bosselmann has written of the ‘huge and ever-widening gap between the promise of environmental protection and ecological realities’. He concludes that, when measured ‘by their own intentions and purpose descriptions’, ‘environmental policies and laws … have not achieved much at all’. The international community seems incapable of reaching consensus on how best to tackle critical environmental problems, such as climate change, and material impediments arguably exist to individuals making the sacrifices needed to react effectively to the parlous state of the environment. It is important to acknowledge that a theory of intergenerational rights and obligations may simply be counter-intuitive and politically unrealistic.

(a) Making Sacrifices for the Future Does Not Reflect Human Nature

It is likely that many within present generations, at least in capitalist or Western societies with advanced economies, will be reluctant to sacrifice their current living standards in the name of indistinct future generations and expectations that current generations will be willing to forgo their own needs or desires are increasingly misplaced the more remote the generation. One commentator has dismissed the notion as ‘sheer hypocrisy’, insisting that ‘human nature will always prevent us from being completely impartial, cosmopolitan beings who rank the interests of distant people or generations equally with those near and dear to

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202 Of particular note is the concept of the margin of appreciation, derived from the practice of the European Court of Human Rights. See for eg Hatton v United Kingdom [2003] VIII Eur Court HR 189, 217 in which the Court explained that ‘regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and … the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention’. See discussion in Malgosia Fitzmaurice and Jill Marshall ‘The Human Right to a Clean Environment- Phantom or Reality? The European Court of Human Rights and English Court Perspective on Balancing Rights in Environmental Cases’ (2007) 76 Nordic Journal of International Law 103.

203 Bosselmann, above n 7.

204 Ibid.

205 See, eg, Beckman, above n 7.

206 In his study of public attitudes to climate change and how to influence those attitudes, Patchen notes that ‘a great many people seem to be little concerned about climate change and little inclined to take personal actions, or to support policies that can counter such change’. Martin Patchen, Public Attitudes and Behaviour about Climate Change: What Shapes Them and How to Influence Them (Purdue University Outreach Publication, 2006) 1.

207 Collins writes that ‘Western culture is arguably too busy enjoying its opulence to worry about the future. There is convincing evidence that American culture has adopted a largely present-oriented and individualistic perspective’. Collins, above n 6, 97. See also, Supanich, above n 166, 102.
us’. Without the potential for reciprocity between generations, it is questionable whether present generations will ever have the requisite motivation to safeguard the interests of future generations. Arguably, it is simply inconsistent with human nature to demand that sacrifices be made for distant generations.

(b) Expecting Sacrifices for the Future Does Not Reflect Political Realities

Intergenerational equity arguably ignores political reality and presupposes a political will that simply does not exist — as evidenced by the unsuccessful efforts that have been made at international levels to embed intergenerational equity into contemporary decision-making. It may be unrealistic to expect that governments, ‘increasingly distracted by 24/7 media pressures, election timetables and the “urgency of now”’ will permit the seizure of current interests for unknown future generations. Further, the political will needed to realise the vision of intergenerational equity at international law likely does not exist, given the challenge it presents to fundamental international law principles, such as sovereignty and international personality. A proposal for rights for future generations may be politically unmanageable in the current legal and political order.

C Tempering Brown Weiss’ Vision: Embracing an Advisory Representative

The doctrine of intergenerational equity poses material challenges for international law, and the translation of Brown Weiss’ planetary rights and obligations into legally enforceable norms appears unlikely. It is difficult to foresee how the international community might transition from having regard to the interests of the future, and recognising a general responsibility to future generations, to giving legal expression to a relationship between

208 Beckerman, above n 13, 64.
209 Page writes that ‘if reciprocity determines the scope of justice, as writers such as Rawls and Gauthier believe, there seems to be no room for future persons having claims to resources from their ancestors – they get what they inherit, and should count themselves lucky to get it’. Edward A Page, Climate Change, Justice and Future Generations (Edward Elgar Publishing, 2006) 105.
210 As Gillespie notes, ‘the demands of the present more often than not cloud over any intentions of the long-term future’. Gillespie, above no 30, 122. Cf Feinberg, who assumes that ‘it is psychologically possible for us to care about our remote descendants, that many of us do in fact care, and indeed that we ought to care’. Feinberg, above n 167, 67.
212 Tremmel argues that it is ‘naïve to hope that politicians will act in the interests of future generations in the same way that they do for those citizens who are alive today’. Tremmel, above n 22, 189.
213 The legal principle of state sovereignty forms part of customary international law and is expressed, inter alia, in article 2 of the UN Charter. See Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) (Judgment) [1986] ICJ Rep 14, 111. Article 2(1) Charter of the United Nations states that ‘The Organization is based on the principle of the sovereign equality of all its Members’. The Charter of the United Nations also protects the reserved domain of sovereign States and prohibits intervention in the territory of sovereign States: arts 2(4) and (7).
214 See Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion) [1949] ICJ Rep 174, 178 in which the Court described the doctrine of international personality as sometimes giving rise to controversy, when it was asked whether the United Nations possessed international personality and was therefore capable of availing itself of obligations incumbent on its members. Portman writes that legal personality ‘is principally employed to distinguish between those social entities relevant to the international legal system and those excluded from it. There is almost universal agreement that states are international persons. But it is unresolved whether and according to what criteria entities other than states – individuals, international and non-governmental organizations, private corporations – can become international persons and what consequences such international legal status entails’. Roland Portmann, Legal Personality in International Law (Cambridge University Press, 2010) 1.
generations that entails legal rights and obligations.\textsuperscript{215} Instead, it might be appropriate for the proponents of future generations’ interests to emphasise the morality that Brown Weiss and others situate at the heart of intergenerational equity and to promote the objective of intertemporal equity in states’ decision-making.\textsuperscript{216}

States could be urged by advocates to embrace the advisory, consultative and educative role for future generations’ representatives contemplated by the Secretary-General’s Report, rejecting the more intrusive, inquisitorial aspects of the missions proposed at Rio+20.\textsuperscript{217} Such a representative could act as an international advocate and moral persuader, raising public awareness, generating debate, signalling the importance of considering the long term effects of actions, and working to enhance intergenerational solidarity.\textsuperscript{218} The lack of enforceable rights and obligations would, however, act as an important limit on the functions and powers of any representative for future generations. Absent legally enforceable rights and obligations, any continuing calls for enforcement by a representative, including through a complaints mechanism or state monitoring, would be specious. It must be conceded that the effectiveness of any such agitator may potentially be limited, with it all too easy for states to disregard those who attempt to influence through moral pressure and absent a legal mandate.

V CONCLUSION

The Brundtland Commission observed in 1987 that ‘we act as we do because we can get away with it: future generations do not vote; they have no political or financial power; they cannot challenge our decisions.’\textsuperscript{219} As the state of the environment continues to deteriorate, the moral injunction for present generations to reject such short-sighted self-interest and to be cognisant of the interests of future generations is significant. It is critical that the international community embrace intertemporal justice if the needs and interests of future generations are to be given expression. However, to date, the concept of intergenerational equity has not realised binding status at international law, and future generations do not enjoy legally enforceable rights. While this circumscribes the role that any global representative of future generations can play when seeking to irrupt the interests of the future

\textsuperscript{215} Boyle has dismissed Brown Weiss’ proposed extension of international environmental law to future generations as ‘wildly unrealistic’ and ‘misplaced utopianism’, arguing that ‘it is already an intractable task to reconcile the environmental interests of those here and now … without also embracing the interests of the future’. Alan E Boyle, ‘Book Review: In Fairness to Future Generations’ (1991) 40.1 The International and Comparative Law Quarterly 230, 230.

\textsuperscript{216} See Beckerman above n 13, 61 for an interesting discussion of the moral obligation owed to future generations.


\textsuperscript{218} In parallel, civil society may wish to continue to advocate for the appointment of representatives of future generations at the national level, empowered to play a more interventionist role, particularly in those countries where future generations enjoy protection through a right to a clean environment.

\textsuperscript{219} World Commission on Environment and Development, UN Doc A/42/25, [25].
into present decision-making, it does not defeat entirely the possibility of giving voice to those interests. Rather, a representative of future generations should act as agitator and advisor, emphasising the present generation’s relationship, grounded in morality, with future generations and urging policy-makers and governments to apprehend the interests of the future.
RIGHTING THE SHIP?: AUSTRALIA, NEW ZEALAND AND JAPAN AT THE ICJ AND THE BARBED ISSUE OF ‘SCIENTIFIC WHALING’

GERRY NAGTZAAM*

I. INTRODUCTION

On the 31st of March 2014, the International Court of Justice (ICJ) handed down the eagerly awaited decision of Whaling in Antarctica (Australia v Japan: New Zealand Intervening). Australia brought suit against Japan after several decades of failing to limit ongoing Japanese scientific whaling under special permit at the International Whaling Commission (IWC). The ICJ determined that the scope of the current Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) was too broad and that the programme should be terminated. The decision was greeted with joy by Australia, other anti-whaling states and Environmental Non-Governmental Organisations (ENGOs) which had sought an ending to an activity they believed allowed Japan to evade the 1986 global whaling moratorium.

However, such jubilation may be premature since a close reading of the decision shows a narrow interpretation, focusing only on the flaws inherent in the JARPA II programme. The judges refused to either provide a definition of ‘scientific whaling’ or engage with the issues inherent in commercial whaling that allows for the potential for further scientific research providing Japan abides by the strictures imposed by the decision. Thus, the decision does not end the battle over the legitimacy of scientific whaling but sends it back to the IWC for continued contestation.

This paper will critically examine the current extent of the International Convention for the Regulation of Whaling (1946), and the IWC structure. It will focus, in particular, on the IWC role in awarding special permits governing scientific whaling. It will outline the arguments presented by both Japan and Australia to the ICJ and critically analyze the major reasons for decision handed down by the court. Lastly it will critically interrogate the potential outcomes of the decision for both Japan and Australia; the possibility of continued scientific whaling in Antarctica; the impact on the future of special permits awarded by the IWC and lastly how the potential impact of the novel procedural ‘standard of review’ the judges advocated be potentially utilized in international environmental law disputes.

II. THE INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING 1946

As part of its desire to create a new world order post-World War II, and amidst concern over the revitalized and expanding global whaling industries’ reach and impact on whaling stocks, the U.S. convened a meeting of whaling states in 1946 with the goal of concluding a treaty to govern such activities.1 This process birthed a new ICRW, replacing two previously failed

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agreements in 1931 and 1937, and came into force on November 10 1948. The Convention’s most important achievement was creating a new global supra-authority that was tasked with regulating the global whaling industries’ standards and activities. In particular, the IWC was authorised to issue binding regulations on its members in order to regulate and protect global whale stocks. The organisation was effectively granted the ability to:

fix protected and unprotected species; open and close seasons; open and close areas, including sanctuaries; limitations on the size of species taken; methods and intensity of whaling, including maximum catch; types of gear and equipment used; methods of measuring whales taken; the requirement that returns be made of catch; and statistical and other biological information.

Since its inception the IWC has been labeled ‘dysfunctional’ due to the apparently irreconcilable competing philosophical and political values within its ranks that continues to this day. On the one hand members like Japan argue that a conservationist approach needs to be followed to allow whaling to be undertaken. On the other, a coalition of states are opposed to all forms of whaling except ‘aboriginal/subsistence whaling.’ The ICRW Preamble established that the fledgling IWC goals should be both the protection of whales against ‘overfishing’ but also required the IWC to manage their ongoing exploitation. A close reading of the negotiations shows that the convention’s framers were primarily concerned with ensuring the ongoing orderly development of a global whaling industry. Protection of its new charges was at best a secondary goal and one that could not be allowed to interfere with the ongoing commercial whale hunt.

The IWC to this day operates under a majority-voting system that requires a three-quarter majority of attending member-states to vote to authorize changes to the organisation’s rules. To assure passage by the whaling states, the new convention allowed disagreeing states the right to opt out of any decision by merely filing an objection within ninety days. Not surprisingly, such a loophole, particularly in the IWC’s nascent period, allowed dissenting members to effectively evade any IWC directive they disagreed with to the point that the organisation was rendered ineffective in achieving one of its goals: to protect whale stocks.

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3 The Convention was signed by the delegates of the whaling states of: Argentina, Australia, from the beginning Brazil, Canada, Chile, Denmark, France, the Netherlands, New Zealand, Norway, Peru, the United Kingdom including Northern Ireland, the United States of America and the Union of Soviet Socialist Republics on the 2nd December 1946. ‘First Report of the Commission,’ 3.


6 D’amato and Chopra, above n 1, 32.


9 Rose and Paleokrassis, above n 5, 29.

10 Vogler, above n 8, 51.

Even more problematically, enforcement of IWC edicts was left to individual whaling member-states to police even though their interests were to not do so.12

III. THE IWC AND THE ISSUANCE OF SPECIAL (SCIENTIFIC) PERMITS

Over the lifetime of the IWC few issues have proved more contentious, both between member-states and global civil society, than the IWC ‘granting’ of special (scientific) permits to hunt whales. What is not generally understood is that these permits are not issued by the central body, but rather are awarded by the whaling nations to themselves. There is no mechanism that currently exists, by neither the IWC nor other member-states, to prevent such an issuance no matter how spurious the pretext proffered.13 Article VIII of the ICRW explicitly states that:

Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention.14

Further and problematically, Article VIII does not provide any definition as to what ‘scientific research’ constitutes allowing a wide variation of what is acceptable, from lethal to non-lethal means of conducting research enquiries.15

In 1950, to help carry out its mission and guide it on increasingly complex scientific issues, the IWC member-states created a Scientific Committee comprised of scientists nominated by their states. Over time the Committee has allowed non-state sanctioned intergovernmental organisations and scientists to participate, but purely in a non-voting capacity. The Committee was tasked with assisting the IWC, with a particular emphasis on whale studies and investigations (Article IV). Since the mid-1980s the Committee has been guided in its appraisal of the scientific merits of special permits according to IWC issued ‘Guidelines’.16

By the 1970s, the IWC’s own scientific research revealed a precipitous drop in whale numbers leading to a global campaign by preservationist whale states and ENGOs to ‘save the whales’.17 When the global commercial whaling moratorium was put in place in 1982 Japan registered an objective to the action under Article V (3) that exempted it from the incipient ban.18 However,

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13 Rose and Paleokrasis, above n 5, 157.
18 At the 1982 IWC meeting in Brighton, U.K. the at the time thirty-seven members of the IWC were present voted twenty-five to seven with five abstentions to end commercial whaling. States were granted a grace period till 1986 to lessen the potential economic impact in line with the IWCR Preamble. D’Amato and Chopra, ‘Whales: Their Emerging Right to Life,’ p. 37. Paragraph 10 was amended to read: ‘Notwithstanding the other provisions of paragraph 10, catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a comprehensive assessment
the U.S. threatened to reduce the Japanese fishing quota within US waters if the objection was not withdrawn. Bowing to the economic threat, Japan withdrew its objection.  

To the fury of non-whaling states and ENGOs, Japan has continued whaling under the rubric of ‘scientific research’ that they have defined as utilizing lethal means. Since 1987, Japan has taken over 10,000 whales despite widespread condemnation that their actions were both illegal and undermining the global moratorium given the high number culled annually. Conversely, Japan argued that it awards itself special whaling permits which permit the killing of whales in order to better understand the whale life cycle and behaviors. The purported scientific program concentrated strongly on the stomach contents of whales, which are claimed to compete for fish with Japanese fishermen in the region. Critics of the program have continually countered this argument by raising that the meat from the slaughtered whales was sold commercially in Japan; essentially the scientific program constituted commercial whaling in disguise.

However Japan argued that under Article 8 (2) of the ICRW whales taken under special permits shall be, as so far as practicable, be processed and the proceeds dealt with according to the discretion of the initiating state. To carry out its scientific research objectives Japan developed the Japan Whale Research Program under Special Permit in the Antarctic (JARPA I) in 1987 and then the JARPA II program that started in 2005. Japan’s JARPA program targeted the only remaining abundant Antarctic species, the minke whale (approximately 400 per annum). The second program, JARPA II, proposed taking up approximately 935 minke whales, 50 fin whales, and 50 humpbacks each year.

In response to Japan’s increased use of special permits, anti-whaling member-states and ENGOs have fought for decades to strengthen the regulations governing the issuance of of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits (Paragraph 10(e), IWC Schedule, Feb. 1983. ‘Annual Report of the International Whaling Commission 33,’ p. 40.


International Convention for the Regulation of Whaling, signed 2 December 1946, [1948] ATS 18, 10 November 1948 Article VIII. Available at: <http://iwc.int/private/downloads/1r2jdhu5xtuswws0ocw04wgcw/convention.pdf>.


Darby, above n 22.
individual states’ special permits with the view to make scientific whaling non-lethal.\textsuperscript{27} At the Fifty-fifth Annual Meeting the IWC members:

expressed deep concern that the provision permitting special permit whaling enables countries to conduct whaling for commercial purposes despite the moratorium on commercial whaling…[and that doing so was…contrary to the spirit of the moratorium on commercial whaling and the will of the Commission].\textsuperscript{28}

Pro-whaling states led by Japan have worked assiduously to prevent any amendments to the current situation and have been successful in preventing any mandatory changes to the special permit provisions beyond them being mere recommendations without legal weight.\textsuperscript{29}

However, the concerted antipathy by the non-whaling states towards lethal scientific whaling programmes left whaling nations increasingly isolated within the forum. At the Forty-first IWC Meeting, Iceland stated it would no longer issue special permits having lost faith in the organisation and would whale outside the formal parameters of the IWC.\textsuperscript{30} At the Forty-fifth IWC Meeting, Norway also did not seek a special permit leaving Japan as the only member-state utilizing a scientific rationale to continue whaling.\textsuperscript{31}

Since Australia ended its own whaling in the late 1970s it has become a staunch anti-whaling advocate, and has used the IWC as a forum to criticize the ongoing whale-hunt and has attempted to resolve the impasse between the anti-whaling states and Japan over the scientific whaling issue. It has focused in particular on promoting the use of non-lethal methods for scientific research and has called for the phasing out of lethal means.\textsuperscript{32}

The then Australian Environmental Minister, Peter Garrett, and a small group of IWC nations secretly attempted to negotiate a compromise that would have allowed Japan to phase out its Antarctic hunt however this failed due to Japanese intransigence. Following that setback Australia changed tactics and sought an outside legal solution to cut the Gordian knot of the ongoing whale cull.\textsuperscript{33} The U.S. IWC Commissioner, Monica Medina warned against what she

\textsuperscript{27} Rose, above n 21, 38; International Whaling Commission, \textit{Annual Report of the International Whaling Commission} (International Whaling Commission, 1987) Vol 37, 11–12. For example, at the 1985 IWC Meeting a new Resolution was adopted by consensus: The Resolution on Special Permits for Scientific Research recommended: That Contracting Governments when considering proposed research permits and the Scientific Committee when reviewing such permits…should take into account whether: (1) the objectives of the research are not practically and scientifically feasible through non-lethal research techniques; (2) the proposed research is intended, and structured accordingly to contribute information essential for rational management of stock. Ibid, 25.

\textsuperscript{28} Rose, above n 21, 38.


\textsuperscript{32} Darby, above n 22; Donald R. Rothwell, ‘The Antarctic Whaling case: Litigation in the International Court and the Role Played by NGOs’, (2013) 3(2) \textit{The Polar Journal} 399, 401.

\textsuperscript{33} Darby, above n 22. The concept of legally testing the validity of Japan’s scientific whaling programmes was not new. In 1998 the Humane Society of the United States had sought a legal opinion on the matter and in 2005 the International Fund for Animal Welfare had also sourced legal opinions. Despite these reports offering a potential avenue of success by citing an ‘abuse of right’ by the Japanese government the majority view of commentators was that the suit would likely fail. Shirley V. Scott, ‘Australia’s decision to initiate Whaling in the Antarctic: winning the case versus resolving the dispute’, (2013) 368(1) \textit{Australian Journal of International Affairs} 1, 5.
called a ‘bet the whales’ approach in which a legal loss would confirm and entrench the legality of Japan’s research whaling. However, given the ongoing deadlock at the IWC Australia, despite such concerns, was determined to tackle ending scientific whaling at another forum, one potentially more conducive to their arguments than the moribund IWC.

IV. THE INTERNATIONAL COURT OF JUSTICE PROCEEDINGS

Following a pre-election promise by the Australian Prime Minister Kevin Rudd to stop Japan’s 'scientific whaling' program, the Australian Government initiated legal proceedings before the ICJ in May 2010. The Australian application criticized:

Japan’s continued pursuit of a large-scale program of whaling under the Second Phase of its Japanese Whale Research Program under Special Permit in the Antarctic (‘JARPA II’), in breach of obligations assumed by Japan under the International Convention for the Regulation of Whaling…. as well as its other international obligations for the preservation of marine mammals and the marine environment.

Australia (and New Zealand) requested the ICJ to determine that Japan, in operating its JARPA II scientific programme, was in breach of its international obligations and order Japan to:

(a) cease implementation of JARPA II;
(b) revoke any authorizations, permits or licenses allowing the activities which are the subject of this application to be undertaken; and
(c) provide assurances and guarantees that it will not take any further action under the JARPA II or any similar program until such program has been brought into conformity with its obligations under international law.

Specifically Australia argued in its Memorial that Japan, by carrying out JARPA II in the Southern Ocean, was in breach of its international obligations in that it had not adhered to the zero catch limit imposed by the global moratorium. Further that Japan should not kill fin whales in the IWC mandated Southern Ocean Sanctuary and should not utilize factory ships to hunt certain species of whales (except minke whales). Australia requested the ICJ determine that JARPA II should not be considered scientific whaling as per Article VIII and that the program should be concluded and any authorizations allowing the program should be terminated.

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34 Ibid.
37 On 20 November 2012, New Zealand, pursuant to Article 63, paragraph 2, of the Statute, sought to be allowed the right to intervene as a non-party to the proceedings. Since there were no objections the Court did not deem it necessary to hold hearings on the question of their admissibility. Ibid 10.
38 Ibid 13.
On the 31st of March 2014, the International Court of Justice handed down its decision on the matter. Below is a critical analysis of the key reasons for decision that focuses on the judgment’s potential impacts in the further issuance of special permits, the IWC and future international environmental litigation before the ICJ.

A. The Application of a ‘Standard of Review’ Procedural Approach

Once the initial question of whether the ICJ had jurisdiction over the matter was dispensed with, the Court considered Japan’s argument that it was entitled to a ‘margin of appreciation’ when issuing special permits since that particular state was best placed to evaluate any proposal proffered. Japan in its counter-memorial had argued that Article VIII(1) of the ICRW gave it the authority to issue special permits (and the conditions applied) and both the JARPA I and JARPA II programmes were within this ‘margin of appreciation’. Thus the Japanese government maintained it had an unalloyed ability to grant itself special permits subject to the procedural requirements of Article VIII of the ICRW. The Japanese claimed that simply diverging from global standards is not, in itself, evidence of bad faith nor an improper exercise of discretion.42

Australia’s response to that argument was to contend that the margin of appreciation was not an international law rule but rather had been developed to allow the European Union Courts to allow for cultural and societal differences.43 Australia, supported by New Zealand, maintained that while the state of the requesting entity can authorize scientific whaling under Article VIII an inference cannot be drawn that the state in question has: ‘discretion to determine whether a special permit for the killing, taking and treating of whales falls within the scope of Article

40 Both Australia and Japan in their submissions did not dispute that the matter was not one of maritime delimitation. Rather the issue was whether JARPA II activities were exploiting resources that could be the subject of a delimitation of area dispute. The carrying out of JARPA II allegedly takes place in the Australian claimed Australian Antarctic Territory (or adjacent to it). The Court pointed out that the taking of whales in the numbers envisaged by Japan could be perceived as exploitation of that area, even if for ostensibly scientific purposes. Further, while Japan has disputed Australia’s claim to that area, it has not claimed sovereign rights to the area for itself. The judges also considered it significant that Australia’s claim that JARPA II was unlawful was not due to it occurring in the disputed zone, but rather breached Japan’s obligations under the ICRW. The ICJ held that the issue before it of claimed maritime zones was not relevant to this dispute that rather the dispute focuses on whether Japan’s actions are to be considered compatible with its ICRW obligations. Consequently, the judges dismissed Japan’s objection to the ICJ’s jurisdiction to hear the matter and the matter could proceed to more substantive matters. Ibid 21-22.

41 The notion of the margin of appreciation is predicated on the idea that societies are allowed latitude when courts are attempting to determine the interaction between individual rights; state’s interests and moral relativity. Eval Benvenisti, ‘Margin of Appreciation, Consensus, and Universal Standards’, (1999) 31 International Law and Politics 843, 843. The doctrine has now been extended to include the distribution and supervision of state resources. Ibid. 846. Generally it has been limited to a European state being allowed discretion, subject to judicial review, when it takes action in the area of human rights (Handyside v UK, A24 (1976); 1EHRR 737 para [48-9]). Courts will general not interfere with state action within this margin of appreciation deeming states are in a better position to decide on actions (Brannigan and McBride v United Kingdom, (1994) 17 EHRR 539 - deciding on an emergency situation threatening the state and the appropriate actions to undertake). It varies according to circumstances inherent in the issue and the lack of ‘common ground’ among the Convention states (Rasmussen v Denmark, (1985), 7 EHRR, para [372]). The doctrine has been promoted as being applicable to general international law but has not been accepted as such yet. Ignacio de la Rasilla del Moral, ‘The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine’ (2006) 7(6) German Law Journal 611, 622.


VIII, paragraph 1.\textsuperscript{44} Granting a special permit should however, adhere to an ‘objective’ standard which, according to New Zealand, should not be decided by that state.\textsuperscript{45}

Further, Australia and New Zealand argued that various IWC Resolutions\textsuperscript{46} demonstrated subsequent acceptance of these provisions as per Article 31 Vienna Convention on the Law of Treaties.\textsuperscript{47} Neither party ultimately prevailed but rather the Court adopted a ‘wisdom of Solomon’ approach to the issue. The ICJ held that Article VIII does give latitude for member-states to reject special permit requests or determine the settings under which a permit is given. However, ‘whether the killing, taking and treating of whales pursuant to a requested special permit is for purposes of scientific research cannot depend simply on that State’s perception’.\textsuperscript{48} The Court determined that ICW members have a fundamental duty to cooperate with the IWC and give ‘due regard’ to its recommendations. Thus while non-lethal scientific approach resolutions did not affect the requirements of Article VIII, Japan needed to adduce evidence of significant consideration of the relevant recommendations.\textsuperscript{49}

As Palmer observes, the ICJ adopted an objective ‘standard of review’ approach to determine the reasonableness of any authorized whaling programme under Article VIII in achieving its stated objectives.\textsuperscript{50} Such a test applied here needed to take into ‘elements of the programme’s design and implementation such as the scale of lethal sampling, the timeframe of the programme, and its scientific output’.\textsuperscript{51} The ICJ stated that it would require the issuing state to ‘explain the objective basis for its determination’ thus placing the onus on Japan in any future programmes to explain their reasoning for undertaking such an approach.\textsuperscript{52} Thus the test to be ascribed to the JARPA II programme was whether it was ‘for purposes of’ scientific research as per Article VIII and whether Japan’s use of lethal methods meant, ‘…the programme’s design and implementation are reasonable in relation to achieving its stated objectives’.\textsuperscript{53} Utilizing the standard of review methodology allowed the court to rely on an inferential approach in determining that the JARPA II programme was ‘not for purpose’ of scientific research.\textsuperscript{54}

\textsuperscript{45} Ibid.
\textsuperscript{46} For example, Resolution 1995-9 which recommends that the taking of whales: ‘should only be permitted in exceptional circumstances where the questions address critically important issues which cannot be answered by the analysis of existing data and/or use of non-lethal research techniques.’ International Whaling Commission, http://iwc.int/private/downloads/d51hufqw6s08ow8kw80kwg4wc/IWCRES47_1995.pdf
\textsuperscript{52} Palmer, above n 50.
\textsuperscript{53} Caroline W. Foster. ‘Motivations and Methodologies: Was Japan’s Whaling Programme for Purposes of Scientific Research?’ Whaling in the Antarctic: The ICJ Judgment and its Implications Symposium at Kobe University (31 May 2014) 1. 5.
\textsuperscript{54} Ibid 8.
However, the Court noted that ‘in applying the above standard of review, it is not called upon to resolve matters of scientific or whaling policy’. Rather the Court observed that there were differing views within global society as to the appropriateness of whaling and it was not for the Court to resolve these issues here. The ICJ limited itself here, ‘only to ascertain whether the special permits granted in relation to JARPA II fall within the scope of Article VIII, paragraph 1, of the ICRW’ rather than investigate and determine the broader issues raised. Thus by utilizing a standard of review approach the Court did not deem it necessary to directly determine Japan’s motivations in creating and operating the JARPA II programme under the ‘for purposes of’ requirement.

As Foster points out utilizing a standard of review approach had never before been undertaken by the ICJ. Palmer argues that the standard of review approach adopted by the ICJ is both ‘demanding and rigorous’. Traditionally international courts have struggled with the complexities of scientific disputes and undertaking a ‘standard of review’ approach could potentially allow a method for future courts to determine a state’s reasons for its actions. If the ICJ is willing to adopt such a test when examining other multi-lateral international environmental conventions, states may find their capacity for globally acknowledged anti-environmental action curtailed more than they had thought. It will require states to demonstrate in a concrete way that they have given sufficient weight to the majority stance even if they are ultimately not required to adhere to that position. As regards the whaling regime, such a stance will require Japan to give due consideration to IWC resolutions (even if not bound by them) and also will reinforce the important role scientific review should have within the IWC. Caddell thus maintains that the court has successfully balanced: ‘robust procedural obligations…and a clearer requirement to objectively justify such a programme where it conflicts with recommended international standards’.

**B. Are JARPA I and II Scientific Research Programs?**

The opponents of Japan’s scientific whaling programme have always viewed it as merely a pretext to either gather information to restart commercial whaling or to continue commercial whaling via other methods and that it should not be considered a legitimate scientific endeavor. Critics point out that the number of whales killed mirror closely Japan’s pre-moratorium figures and that the vessels utilized by the JARPA programmes are those that hunted them in the commercial era. The scientific validity of the scientific whaling programme has been repeatedly challenged by preservationist states like Australia at the IWC to no avail. Over the lifetime of the IWC, the organization has passed over thirty resolution

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56 Ibid.
57 Foster, above n 53, 11.
58 Ibid 5.
59 Palmer, above n 50, 125.
60 Foster, above n 53, 3.
61 Palmer, above n 50, 125.
62 Caddell, above n 49, 9.
63 Ibid.
64 Rothwell, above n 32, 436.
maintaining that it should only be carried out in exceptional circumstances; to meet vital research needs, be consistent with both the Scientific Committee criteria and the IWC states conservation policies, and be carried out non-lethally.\textsuperscript{67}

Here the Court adopted the position outlined by Australia and not opposed by Japan, that the two elements of the phrase, ‘for purposes of scientific research’ should be considered cumulative combining both ‘scientific research’ and ‘for purposes of’. Consequent of such an interpretation, even if whaling operations involve an element of scientific research, ‘the killing, taking and treating of whales pursuant to such a programme does not fall within Article VIII unless these activities are ‘for purposes of’ scientific research’.\textsuperscript{68}

Problematically the ICRW provides no working definition of ‘scientific research’ leaving it open to continued debate. Australia, relying on one of its scientific experts Mr. Mangel of the University of California with expertise in applied ecology, postulated that scientific research has four vital components: ‘defined and achievable objectives (questions or hypotheses) that aim to contribute to knowledge important to the conservation and management of stocks; ‘appropriate methods’, including the use of lethal methods only where the objectives of the research cannot be achieved by any other means; peer review; and the avoidance of adverse effects on stock’\textsuperscript{69}. Japan chose not to proffer an alternative interpretation of the term preferring to argue that the views of experts have no bearing on the interpretation of a convention section.\textsuperscript{70}

The Court was not convinced that scientific research needed to be reflected in the four criteria test outlined by Australia (this should be considered ‘well-conceived scientific research’ rather than as an aid to interpreting the ICRW they declared).\textsuperscript{71} More importantly, the ICJ was not willing to either formulate differing criteria as a test nor were they willing to define the term ‘scientific research’ at all, not seeing it as necessary to determine the matter before them.\textsuperscript{72}

C. The Use of Lethal Methods

The IWC Scientific Committee has continuously stated that lethal research is not necessary for any whale or whaling management purposes and that any kind of scientific assessment of the whale population can be carried out without killing them.\textsuperscript{73} The IWC has promulgated a number of resolutions making it clear that as an organization it considers lethal research methods as conflicting with the spirit of the moratorium.\textsuperscript{74} Australia argued that Article VIII, paragraph 1, should be read as allowing lethal options only when non-lethal options are not a possibility. They relied on this position quoting various experts, IWC Guidelines and Resolutions, for


\textsuperscript{69} Ibid 30. The ICJ noted that, as per the question of whether a defined hypothesis is key, both state’s experts concurred that scientific research starts with particular questions which may proceed as a hypothesis although the experts differed as to the ‘level of specificity’ needed. Ibid.

\textsuperscript{70} Ibid.

\textsuperscript{71} Ibid 32.

\textsuperscript{72} Ibid 32–33.

\textsuperscript{73} Voigt, above n 66, 565.

\textsuperscript{74} Ibid.
example Resolution 1986-2 which recommended when issuing special permits states need to allow whether, ‘the objectives of the research are not practically and scientifically feasible through non-lethal research techniques.’ Australia further maintained that such resolutions should inform how the ICJ interprets Article VIII since they should be considered, ‘subsequent agreement between the parties regarding the interpretation of the treaty’ and ‘subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’, as per subparagraphs (a) and (b), of paragraph 3 of Article 31 of the Vienna Convention on the Law of Treaties.

Japan disagreed with the Australian position that lethal means can only be utilized if non-lethal options are not possible arguing that Article VIII expressly grants permits for the killing of whales which must thus contemplate utilizing lethal means. Japan contended that it only uses lethal options when necessary and in line with scientific policy (not from legal limitations inherent in the Article). In regards to IWC Recommendations, Japan accepted that the IWC can make such recommendations, but due to them not being of a binding nature, need only give them due consideration.

The ICJ observed that both side’s experts conceded that, as a matter of scientific opinion, lethal means can be a part of scientific research. However, the task of the ICJ here was not, in their view to review the scientific conclusions posed, but to interpret the IWC provisions. In the ICJ’s opinion both Australia and New Zealand had exaggerated the legal importance of the recommendatory resolutions and Guidelines on which they sought to rely.

Critics like Helen Clarke, New Zealand’s onetime Prime Minister, point to the selling of whale meat in Japan to bolster their case that it is a commercial activity. Proponents of the programme maintain that whether the whale byproduct is sold to defray costs is nothing to do with whether JARPA I and JARPA II are justifiable forms of scientific research. Australia’s argued before the court that selling whale meat was causing the special permit issued to fall outside of the relevant section. However, the ICJ held that the fact that JARPA II has a component of selling whale meat to fund the programme does not, taken alone, cause a special permit to fall outside of the ambit of the relevant section. Thus the sale of whale meat, as part of the Japanese scientific whaling programmes, was allowed and the monies could be utilized to fund ongoing research since such activities were not outside the ambit of Article VIII. However, the court noted that other factors to could be scrutinized to determine if the whales being taken were for other than scientific research, such as the scale of the killing being greater than that needed to achieve the programme’s stated aims.

The ICJ noted that states can have more than one goal when accomplishing a policy. Objectively, whether a particular program is scientific research is not, an issue of individual state officials’ intentions, but rather whether, ‘the design and implementation of a programme

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76 Ibid.
77 Ibid.
78 Ibid.
79 Ibid 32.
80 Lee, above n 64, 50.
81 Ibid 32.
are reasonable in relation to achieving the stated research objectives’. The Court argued that the individual actor’s motivations, which may include a desire to exceed the stated scientific research parameters, does not prevent a finding that the programme meets the purposes of Article VIII. However, such intentions cannot be used to justify a larger than needed lethal programme. The ICJ determined that, ‘[T]he research objectives alone must be sufficient to justify the programme as designed and implemented.’ Utilizing this approach the ICJ held that JARPA II, despite involving whale killing, can be determined ‘scientific research’. However, the ICJ outlined that the test to be applied in this case was an:

Examination of the evidence with respect to JARPA II will focus on whether the killing, taking and treating of whales in pursuance of JARPA II is for purposes of scientific research and thus may be authorized by special permits granted under Article VIII, paragraph 1, of the Convention.

Japan maintained it only uses lethality to meet the programs objectives and that lethal options are integral to JARPA II since the two first objectives of the programmes can only be met by information derived from the whales’ internal organs and stomach contents. Australia argued that Japan has demonstrated an ‘unbending commitment to lethal take’ and that the programme ‘JARPA II is premised on the killing of whales’. Both Japanese whaling programmes, it maintained, were a pretext to continue commercial whaling. Australia contended that there are more effective ways to obtain desired scientific information, premised on non-lethal means (for example, biopsy tagging) using improved technology.

The ICJ Judges determined that lethal means are not unreasonable given the research aims of JARPA II. However, that programme has become more widespread regarding lethal sampling of Antarctic minke whales and now includes two new whale species. Japan argues this expansion is necessary to fulfill the research aims of JARPA II. The Court was not convinced by this position, believing that: ‘the target sample sizes in JARPA II are not reasonable in relation to achieving the programme’s objectives.’

The design flaws inherent in the JARPA II programme needed to be contemplated in view of its application. Firstly, humpback whales have been culled but Japan cited only non-scientific reasons for this. Secondly, the hunting of fin whales was only a small part of the annual number that the JARPA II Research Plan recommended. Thirdly, the actual number of minke whales killed has been far lower than the annual target established except for one whaling season. Further, Japan did not adequately explain to the Court’s satisfaction how these research aims should be considered suitable given the choice to use six-year and 12-year research periods for differing whale species combined with Japan’s apparent decision to abandon the lethal sampling of humpback whales entirely and to take only minimal numbers of fin whales. Several of JARPA II’s other characteristics such as its open-ended time frame, its minimal scientific output and the absence of meaningful co-operation between JARPA II and other related research projects signified that the programme should not be considered ‘scientific research’ under Article VIII, paragraph 1.

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83 Ibid 35.
84 Ibid.
85 Ibid 41–42.
86 Ibid 42.
87 Ibid.
88 Ibid 64.
89 Ibid 65. The Court noted that during the first research phase of the JARPA II (2005–2006 to 2010–2011) Japan could only reference two peer-reviewed papers that have arisen from the programme. Unfortunately for the Japanese position, the papers in question did not relate to the JARPA II programme’s outlined aims, but rather
The ICJ stated that the Parties had conceded that non-lethal means could not be utilized to inspect internal organs and stomach contents and the Court accepted that therefore, for at least part of the information desired by Japanese scientists, non-lethal means were not suitable. The use of lethal options by JARPA II personnel was not unreasonable but it was still required to look carefully at why Japan uses deadly options as part of the programme. Thus, the ICJ felt compelled to ask whether Japan could meet the stated aims of JARPA II by utilizing non-lethal means.

D. JARPA II and the feasibility of non-lethal methods

The ICJ determined that there are three reasons why JARPA II should have examined the potential of non-lethal means to reduce the planned scale of the programme. Firstly, IWC resolutions and guidelines request member-states to determine whether research aims can be realized using non-lethal options and Japan has acknowledged that it is under an obligation to give ‘due regard’ to such proclamations. Secondly, Japan has also conceded that, on scientific grounds, it does not utilize lethal options more than it considers necessary and further, non-lethal options are not possible in all situations. The Court pointed out that this implies that some form of examination of lethal options needs to be carried out to determine if they are being utilized to a larger extent than needed to fulfill the programme’s goals. Lastly, Australia’s experts had alluded to major progress in the scope of non-lethal research methods over the past two decades and that any whaling programme considering utilizing lethal means should critically analyze such advances when designing a programme.

Problematically for Japan, there is no evidence of Japan carrying out feasibility studies of non-lethal methods, either in setting the parameters of the JARPA II sample sizes or, latterly, in setting the same annual quotas. Any use of lethal options by JARPA II the ICJ thought needed to be evaluated within the context of the court believing that lethal options should only be used on a scale to achieve the required aims. Japan had not explained to the Court why the minke whale take during the ‘feasibility’ phase (first two years) of JARPA II was not set to 440 minke whales taken (the number taken during the final year of the first JARPA programme), but rather was increased to 853 minke whales and ten fin whales. Thus the JARPA II programme started with increased numbers of whales killed yet with a comparable research methodology (e.g. studying ear plugs to determine age at death) but without receiving any feedback from the IWC Scientific Committee about the efficacy of JARPA. Such an oversight (and the launch date of JARPA II) the Court believed demonstrated that the programme was not driven by ‘strictly scientific considerations’ but rather lent weight to Australia’s contention that Japan’s actions were based on the data collected from the initial two-year feasibility study and comprise only seven and two minke whales caught. Japan attempted to bolster its case by citing three scientific conference presentations and eight papers presented to the Scientific Committee. The scientific validity of this material was assessed by the Court as being of, at best, questionable value. Six of the papers were merely JARPA II cruise reports, one of the two remaining papers was an assessment of the JARPA II feasibility study and the other was part of the programme’s non-lethal photo identification of blue whales. Given that JARPA II has been in operation since 2005 and 3,600 minke whales have been culled, the scientific validity of the output remains minimal. Ibid 63.
in creating JARPA and JARPA II could be better explained as an attempt to merely continue whaling.\textsuperscript{95}

The ICJ saw its role in this matter as to determine whether the evidence adduced supported the contention that the sample sizes obtained were sufficient to achieve the programme’s goals.\textsuperscript{96} However, the evidence provided to the court is that the JARPA II Research Plan lacked transparency in the reasons provided for setting quota sizes.\textsuperscript{97} The ICJ judges took particular notice of the evidence provided by the Australian expert Mr. Mangel, who stated that approximately the same accuracy could be obtained with a smaller cull and that a smaller number taken and a higher degree of uncertainty might well be satisfactory depending on the hypothesis tested. Japan’s evidence did not in any way refute the expert opinion adduced.\textsuperscript{98}

Given the evidence before it, the judges determined it had no basis to decide that a six-year programme timeframe for minke whales is not reasonable to achieve the stated aims. However, it found it problematic that the programme does not explain the reason for choosing a six-year period for the minke whale only and that Japan failed to proffer a consistent account as to how the decision to use that time frame to determine whale sample size was arrived at.\textsuperscript{99}

Taken as a whole, the evidence relating to minke, fin and humpback sample sizes provide little analysis or justification relating to how the sample sizes were determined by the authors. The ICJ was concerned this raised further questions about the design of the programme as regards its stated aims.\textsuperscript{100} Thus, the judges believed that no one reason could explain the disparity between the set sample sizes and the actual cull.\textsuperscript{101}

The ICJ stated that there had been years where the application of JARPA II had differed from its stated objectives, Japan made no changes when afforded the option annually to change its aims or cull size. The judges drew two conclusions from this. Firstly, Japan has argued that the actual number of minke whales taken does not compromise JARPA II since a smaller catch can provide valuable information because the research timeline can be extended or less determinative results can be accepted. The Court noted that the minke whale cull was based on a six-year research timeframe and accuracy levels not a part of the JARPA II Research Plan nor adduced as evidence here. In the Court’s opinion, Japan’s concession that JARPA II can achieve valuable results with a longer research time period or a lower level of accuracy raises doubts as to whether the 850 minke whale limit is reasonable to achieve the programme’s aims. Again, this bolsters Australia’s argument that the minke whale numbers are set for other than scientific reasons.\textsuperscript{102}

The ICJ commented that Japan had conceded that when studying humpback and fin whales, it could utilize an ecosystemic approach that incorporated non-lethal means. The judges pointed out that if this JARPA II research goal could be achieved non-lethally than there was, ‘no strict scientific necessity to use lethal methods in respect of this objective.’\textsuperscript{103}

\textsuperscript{95} Ibid 47–48.
\textsuperscript{96} Ibid 51–52.
\textsuperscript{97} Ibid 56.
\textsuperscript{98} Ibid.
\textsuperscript{99} Ibid 57.
\textsuperscript{100} Ibid 58.
\textsuperscript{101} Ibid 60.
\textsuperscript{102} Ibid 61.
\textsuperscript{103} Ibid 62.
Japan’s ongoing reliance on the first two JARPA II objectives to justify its cull numbers, despite the incongruity between the actual numbers taken and set, combined with the admission Japan can render significant scientific results from killing less whales also undermined casting JARPA II as a scientific endeavor. The Court concluded that the target cull rates are ‘larger than are reasonable’ to achieve the programme’s stated aims. It noted that the actual numbers of fin and humpback whales taken appears to be a question more suited to an interpretation of political and logistical considerations being paramount. Such a conclusion the Court believed further weakened the supposed connection between JARPA II’s research aims and its sample cull numbers, particularly the Japanese decision to utilize lethal methods on minke whales in relatively large numbers.  

E. Is Scientific whaling commercial whaling in disguise?

Anti-whaling states have long charged that Japan’s scientific research programme is ‘commercial whaling in disguise’ or being carried out with a view for providing evidence of rebounding whale stocks to justify overturning the commercial moratorium. The Court here proceeded on the assumption that the current Japanese whaling programme fell outside of Article VIII, paragraph 1, (excepting the issue of aboriginal subsistence whaling), and was subject to the three Schedule provisions raised by Australia. This conclusion derived from the Court’s interpretation of the ICRW and thus should be applied to any special permit issued under Article VIII, paragraph 1. Consequently, the Court deemed it unnecessary to consider whether JARPA II could potentially be considered commercial whaling.

From 2005-14 Japan set catch limits above zero for three species (850 for minke whales, 50 for fin whales and 50 for humpback whales). Since the Court ruled that all whaling carried out, with the exception of aboriginal subsistence whaling) is subject to paragraph 10(e) of the Schedule, it logically flows that Japan has not adhered to its obligations under paragraph 10(e) in each of the years JARPA II has operated, ‘because those permits have set catch limits higher than zero’.

As to the issue of factory ships, the ICRW defines such ships as one, ‘in which or on which whales are treated either wholly or in part’ and defines a ‘whale catcher’ a ship, ‘used for the purpose of hunting, taking, towing, holding on to, or scouting for whales’ (Article II, paragraphs, 1 and 3). Again given the Courts position that all whaling carried out that cannot fit under Article VIII (other than aboriginal subsistence whaling) is subject to paragraph 10(d) of the Schedule and thus Japan has not adhered to its obligations under paragraph 10(d) in each whaling season JARPA II was active.

104 Ibid They further noted that, given the open-ended time frame of JARPA II and noted that, as regards scientific research a, ‘time frame with intermediary targets’ would be more suitable. Ibid. 63.
105 Lee, above n 64, 436.
107 Ibid 67.
108 Ibid; The factory ship moratorium, paragraph 10 (d) provides: ‘Notwithstanding the other provisions of paragraph 10, there shall be a moratorium on the taking, killing and treating of whales, except minke whales, by factory ships or whale catchers attached to factory ships. This moratorium applies to sperm whales, killer whales and baleen whales, except minke whales.’ International Convention for the Regulation of Whaling 1946 (62 Stat. 1716) 7.
Since JARPA II had operated within the Southern Ocean Sanctuary borders, paragraph 7(b) did not apply to minke whales in relation to Japan since Japan objected to the paragraph. However, since Japan had killed fin whales under the JARPA II rubric in some whaling seasons and the Judges had decreed that all whaling that did not fit within Article VIII (other than aboriginal subsistence whaling), it was subject to paragraph 7(b) of the Schedule with Japan not adhering to its obligations under paragraph 7(b).  

The ICJ issued an order that: ‘Japan shall revoke any extant authorization, permit or licence to kill, take or treat whales in relation to JARPA II, and refrain from granting any further permits under Article VIII, paragraph 1, of the Convention, in pursuance of that programme’. The Judges did not issue the additional remedy sought by Australia to refrain from special permit whaling not for scientific research since all IWC member-states are already under such an obligation.

F. Responses to the Ruling

International Court of Justice rulings are binding and are not subject to appeal. Although sovereign states can and have ignored them previously, both Japan and Australia had pledged prior to the proceedings to abide by the Court’s decision. After the decision was handed down Japan stated it respected international law and would abide by the Hague’s decision. However, Japan also added it, ‘regrets and is deeply disappointed by the decision.’

In Australia, the reaction to the verdict by the government and conservationist groups was to proclaim that a great victory had been achieved. The former Environment Minister Peter Garrett, who helped launch the initial legal action stated he was ‘overjoyed’ by the finding stating: ‘…It means we won’t see harpoons in the southern Ocean - we certainly shouldn’t see them down there any longer.’ The Shadow Attorney-General Mark Dreyfus, who while in government led Australia’s legal challenge in the Hague, said he was ‘thrilled’ at the decision arguing that: ‘[T]his decision…can’t but have some effect on whaling in other parts of the world,’ he said…”It will add to pressure on … [the] small number of countries who continue

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110 Ibid 70; The Court saw no need to order the additional remedy requested by Australia, which would require Japan to refrain from authorizing or implementing any special permit whaling which is not for purposes of scientific research within the meaning of Article VIII. That obligation already applies to all States parties. Ibid.
112 Ibid.
113 Nic MacBean, 'Japanese Whaling: What Next?' ABC News (online), 31 March 2014. Available at <http://www.abc.net.au/news/2014-03-31/japanese-whaling-international-court-justice-what-next/5357472>; Tokyo’s agent at the court, Koji Tsuruoka, said: ‘As a state that respects the rule of law, the order of international law and as a responsible member of the global community, Japan will abide by the decision of the court.’ Ibid.
115 Holligan, above n 23.
to engage in whaling.” Mr Garrett proclaimed that, ‘[T]his is the end of so-called scientific whaling, surely.’

V. OUTCOME AND SIGNIFICANCE OF THE DECISION

Despite the outpouring of elation in Australia by the media and politicians that this was a significant setback to global whaling, a critical analysis of the decision indicates that the decision is problematic for those who foretold it would mean the end of scientific whaling. The decision gives considerable room for Japan to continue whaling under special permit if it chooses to and for other states to continue to ignore IWC proclamations.

On the surface the decision does look like a victory for the anti-whaling forces that risked a potentially devastating defeat if the ICJ had ruled against Australia. The Court was concerned that JARPA II’s quotas were not driven by strictly scientific considerations but rather political considerations. They were dubious about the scientific output of both JARPA programmes. They further maintained that the adduced Japanese evidence did not demonstrate that JARPA II’s design and implementation were reasonable for achieving its stated aims.

For the ICJ the scale and the transparency of the programme being undertaken was the problem. It could only be of a scale to meet the requisite research goals and had to be transparent as to how certain mechanisms were chosen e.g. the timeframe for the proposed programme. The cull rates of whales taken the ICJ determined were larger than reasonable given the programme’s aims and pointed to political and logistical reasons being why the programme is the size and type it is. Japan was also forced to concede that it did utilize lethal means more than was necessary to carry out its scientific research programme. The Court held that Japan had violated the commercial whaling ban through its actions (including using factory ships and taking whales in the Southern Ocean Sanctuary) and ordered the JARPA II programme to be discontinued.

However the decision is a long way away from an unalloyed victory for anti-whaling forces and indeed states may be wary of using the ICJ to achieve environmental outcomes in the future. Firstly, the ICJ was asked only to address the JARPA II programme’s validity, but not JARPNI II, a mirror ‘research whaling’ program in the North Pacific with current quotas of 340 minke, 50 Bryde’s whales, 100 sei whales and 100 sperm whales. The fears of many environmentalists were realized when Japan continued whaling in the North Pacific after the IWC decision was handed down taking 90 sei whales and 25 Brydes whales in the 2014 hunt. Further, despite its initial public pronouncements after the ICJ decision was published Japan has now stated publicly that it wishes to recommence whaling in the Southern Ocean in late 2015. To that end it intends to submit a proposal to the IWC Scientific Committee in November 2014 with the final decision as to by the Commission mid-2015.

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118 Kenny and Darby, above n 98.
119 Ibid.
120 Darby, above n 22.
122 Ibid.
Further, Iceland and Norway do not claim to be carrying out scientific research thus the ICJ’s ruling has no immediate consequences for them.\(^{123}\) Iceland has also resumed killing fin whales, taking 134 of them, as well as 38 minke whales primarily for export to Japan.\(^{124}\) Thus the ICJ decision can only be considered of limited value, confined as it is to only one geographical area allowing Japan and other whaling states to continue their activities virtually unimpeded except for a one year grace period while Japan seeks the approval of the Scientific Committee for its newly reconfigured scientific whaling programme.

Secondly, the judges held that scientific whaling programmes could have goals other than the conservation of whales stocks. Consequently the sale of whale meat alone did not necessarily cause the issued special permit to fall outside the ambit of the relevant section (it was necessary to examine other factors in conjunction with the sale of meat such as the scale of the programme). This undercut one of the key arguments Australia and other anti-whaling states and ENGOs had publicly made that the open sale of such meat indicated that Japan was carrying on whaling to avoid the whaling moratorium to cater to domestic interests. The ICJ decision allows Japan to continue to subsidize its whaling fleet with the sale of whale meat potentially enlarging the domestic appetite for whale meat as it is offered for sale and expanding demand for whale hunts.

Thirdly, Australia had argued before the Court that the issuing of special permits should be held to an objective standard. However, the ICJ refused to allow this to be the test leaving states free to continue to issue themselves the special permits as the only entity competent to do so under the ICRW. This prevents the ICW from being able to thwart the issuing of special permits by individual nations, something preservationist states like Australia have long called for, and leaves the power firmly in the hands of states.

Fourthly and more problematically the Judges stated explicitly there was nothing in international law that forbids the killing of whales as part of a scientific research programme. Australia was forced to concede in open court that lethal means could constitute part of a valid scientific whaling programme. This determination was a enormous setback to preservationist states which would prefer that no killing be undertaken for scientific purposes but now have been forced to concede that it could be a part of future scientific whaling programmes.

The key test the court determined was whether the design and implementation of a programme was *reasonable* to achieve the stated research objectives. Thus lethal means in this case were not unreasonable given the research aims of the JARPA II programme. The decision also did not ban the use of factory ships in the future to help facilitate scientific research, something preservationist states had long opposed arguing such ships were facilitating commercial activities.

Lastly, the ICJ limited itself only to an examination of the JARPA II programme refusing to concern itself with the broader issues of whaling. The Court refused to define what ‘scientific

\(^{124}\) Norway, one of the other whaling nation, in 1993 shifted away from scientific whaling to ‘commercial’ catches, where the meat is sold directly to consumers. Norway set a quota of 1,289 minke whales in the north Atlantic in last year’s summer hunt, saying stocks were plentiful in the region ibid; Last season, Norwegian fishermen, took 590 minke whales in nearby waters, according to the Norwegian Whalers’ Association. This was less than half the Norwegian government’s 1286 whale limit. Darby, above n 22.

\(^{124}\) Darby, above n 22.
research’ was. Providing a working definition could have helped resolve future disputes before they occurred which will almost certainly occur now. The Court also refused to consider the broader ramifications of the commerciality of current Japanese whaling practices, a lost opportunity to provide guidance to the global community as to the suitability of these programmes. These wider issues are in need of further clarification but the only entity that can do so is the IWC, which has proved historically to be singularly unsuited to the task.

What will be the long-term impact of the ICJ decision? To determine the potential influence of the decision four questions need to be asked. Firstly, what impact has the decision had on the future special permit process? Secondly will the decision force Japan, as it has threatened to do in recent years, to leave the IWC? Thirdly, will the decision be the catalyst for Japan to stop whaling? Lastly, what will be its impact on the ICJ and future international environmental disputes?

As regards any future special permit granted the Court determined that Japan is under an obligation to give due regard to IWC Guidelines and Recommendations when designing any future special permit programme. No state the court stated was entitled to its own subjective view of its actions, undercutting Japan’s ‘margin of appreciation’ argument, and ensuring that an objective test would be applied. Thus any future special permit programme Japan tries to implement will be potentially be held accountable to a new ‘standard of review’ approach to determine the reasonableness of the whaling programme. The decision means that the focus will shift from the potential policy outcomes of a scientific whaling programme to an intense global scrutiny of the methodologies a state employs when designing a new scientific whaling programme.

At the very least Japan will have to show that it has taken into account advances in non-lethal approaches; considered the scientific appropriateness of the catch numbers proposed; given greater weight to the Scientific Committees work; and it also might need to demonstrate that feasibility studies have been undertaken as to the suitability of the research aims, methodology and scope as well as demonstrating that the process undertaken was a transparent one. Japan will also need to show that any research programme has scientific validity as demonstrated by the publication of peer-reviewed scientific publications. These tests, if adopted by the IWC Scientific Committee, will provide plenty of ammunition for anti-whaling states to attack any proposed JARPA III whaling programme.

However, there are now real questions as to what any future Japanese scientific whaling programme would look like. Japan was forced to concede that it does not utilize lethal means more than is necessary in its programme. In any new programme Japan would now be forced to examine the potential of non-lethal means to achieve its goals. It is arguable now that the test that should be applied to any scientific research whaling programme is that if the goals can be achieved via non-lethal means, there is no strict scientific necessity to use lethal methods. Steven Freeland argues Japan now finds itself in a difficult position because the ICJ has taken away its justification for whaling. As demonstrated in this paper this is not strictly true. Whilst it has taken away the legal underpinnings of the JARPA II programme, it specifically leaves the door ajar for Japan to continue scientific whaling if the programme is redesigned with the Court’s caveats in mind.

125 Darby, above n 22.
126 MacBean, above n 96.
In their final submission to the ICJ in 2013, Japan alluded to its concern with the West’s ongoing ‘cultural imperialism’ that could lead it to reconsider its membership of the IWC.\textsuperscript{127} If it withdrew from the 1986 moratorium or the 1946 treaty Japan would be free to continue whaling like Norway or Canada and it has often threatened to leave the IWC if it continues to be thwarted.\textsuperscript{128} While this option is still a possibility a delegation spokesman, Noriyuki Shikata, recently insisted Tokyo was not about to quit the IWC.\textsuperscript{129} This statement should be taken at face value since it appears unlikely that Japan would choose to withdraw from the IWC at this stage when it appears likely it will still be able to take whales in the future under the scientific research rubric.

An intriguing question is how will the Japanese populace respond to this decision? Given that a large percentage of its populace no longer eats whale meat and the Japanese whaling industry is heavily subsidized by the government due to the lack of a market for whale meat, this would be an ideal time to reduce its whaling programme. Freeland argues that the Court’s decision will not sway Japanese domestic opinion ruling will do little to persuade a Japan that generally favours continuing the whaling tradition.\textsuperscript{130} However, there is some evidence to suggest that the Japanese public no longer supports whaling.\textsuperscript{131} Many young Japanese would not consider whaling to be a Japanese cultural tradition and are unaware of the scale of the JARPA programmes. For example, in a 2006 survey asking about Japanese whale hunts, over 90 per cent were unaware that Japan hunted whales in Antarctica.\textsuperscript{132} Porter and Brown’s research has shown that that many Japanese now oppose the taking of whales and would rather observe whales in their natural habitats through whale-watching vacations.\textsuperscript{133} Despite little public appetite for whale products, the Japanese government as note earlier intends to continue scientific whaling in 2015.\textsuperscript{134}

However, in a surprise development and under pressure from international ENGOs and the furor over the ICJ ruling, Japan’s largest online shopping mall Rakutan Inc has stopped selling whale and dolphin meat and added these items to its list of prohibited goods. The decision has cost whale wholesalers and retailers dearly forcing some to cease operations. Some Japanese restaurants have also taken whale meat off the menu following the ICJ decision fearing the loss of a stable source of the item.\textsuperscript{135} For preservationist states and ENGOs wishing to end Japanese whaling such approaches, utilizing economic pressure and social media, perhaps demonstrates a better way to influence Japanese businesses and consumers to end ongoing whaling than legal action or bringing about policy or normative change at the IWC.

While the fact that neither side can claim total victory may mean that states are reluctant to accede to the jurisdiction of the ICJ to resolve future international environmental issues before the court. However if a case is brought then the new ‘standard of review’ template may well have a lasting impact. Such an approach has never been utilized by the ICJ but whether such an procedural approach will become a standard part of the ICJ’s approach to international

\textsuperscript{127} Magnay, above n 35.
\textsuperscript{128} Ibid.
\textsuperscript{129} Darby, above n 22.
\textsuperscript{130} MacBean, above n 96.
\textsuperscript{131} Darby, above n 22.
\textsuperscript{132} Scott, above n 33, 6.
\textsuperscript{134} Darby above n 120.
disputes remains to be seen but Foster argues that, ‘the door seems to have been opened’. The new test is exacting and would allow international tribunals to unpack a state’s actions, better understanding its reasoning on issues. If the ICJ is willing to embrace such a groundbreaking approach to critically examine global environmental conventions, states may find their capacity for anti-environmental action limited since they will have to demonstrate in a meaningful way, that they have taken sufficient account of the majorities’ views on a particular matter.

While Foster remains optimistic that the approach may provide an important procedural option for the Court in future endeavors she rightly counsels that there remain many unanswered questions as to how such a procedural approach would function in practice? Would such an approach replace the legal text in determining how conduct should be measured? Is this approach another form of judicial interpretation? Is the standard to be applied an objective one and what criteria should states be judged against? Is the use of such a standard an exercise of powers inherent to the international judiciary? Only time will tell if this is an exciting new development in international environmental or merely an outlier.

The issue of scientific whaling now returns to the IWC and the battle lines are already being drawn. In an opening salvo New Zealand has recently announced that it will attempt to have the IWC impose stricter control approvals of special permits. The draft proposal would require the Scientific Committee and the IWC to assess any submitted hunt plans in the light of the ICJ decision to ensure they are fully compliant with the ruling. Japan, not surprisingly, has indicated it will fight the draft proposal.

VI. CONCLUSION

Despite the hopes of preservationist states and ENGOs the ICJ ruling permits Japan to continue whaling under the ‘scientific’ appellation. As Rothwell points out: ‘It needs to be remembered that Article Eight of the whaling convention remains in place and Japan has the opportunity to interpret that consistently with international law’. He goes on to argue correctly that, ‘It would be premature to say it is the final nail in the coffin for the Antarctic whaling’.

Based on public pronouncements by government officials and Japan’s previous determination not to be seen to be capitulating to outside pressure, it appears increasingly likely Japan will return to the Antarctic region with a newly redesigned JARPA III scientific research programme. However, it would, for the first time, be subject to new scientific strictures that would require the Japanese whalers to justify the scientific merits, use of lethal means and scope of any new programme.

The ICJ decision imposed an obligation to give due regard to IWC Guidelines and Recommendations when designing any future special permit programme. In any future

136 Foster, above n 53, 5, 13.
137 Palmer above n 50, 3.
138 Ibid 125.
139 Foster, above n 53, 13.
140 Darby, above n 102.
141 MacBean, above n 96.
142 International Court Orders Japan to Immediately Stop Whaling in Antarctic, above n 105.
143 Darby, above n 22.
programme Japan will have to show that it has considered advances in non-lethal approaches and might need to demonstrate that feasibility studies have been undertaken as to the suitability of the research aims, methodology and scope as well as being a transparent process. Failure to do any of the above would open up any new research programme to potential ICJ (and global) scrutiny. Japan will also need to show that any research programme undertaken has scientific validity. Such conditions to demonstrate validity give options for anti-whaling states to continue to seek to limit scientific whaling in the future, for example the current New Zealand proposal before the IWC Scientific Committee to impose stricter controls on special permits.

The ICJ decision, despite banning the JARPA II programme from proceeding was in no way the 'knockout blow' anti-whaling forces were hoping for. Japan can still grant itself special permits; kill whales as part of its programme; it can continue to sell whale meat, utilize factory ships as part of any research programme and even if prevented in the future from taking whales in Antarctic waters, can continue killing whales in the Pacific. Further, the ICJ refused to clarify the meaning of contested terms such as ‘scientific whaling’ and ‘commercial activities’ that had been sought by Australia.

Given the narrowness of the decision and the general difficulty to get states to agree to be bound by an ICJ determination, it may be unlikely that Australia or other states will utilize the ICJ in the future to resolve international environmental disputes. However, this may well be a mistake given that the ICJ decision to implement a novel procedural ‘standard of review’ approach for the court, may enable new avenues of attack for those seeking to curtail whaling and other exploitationist environmental behaviors. By forcing states to give due weight to majority environmental positions and reinforcing the importance of scientific endeavors may well bring about better environmental outcomes. If anti-whaling states and ENGOs are unwilling to risk any further ICJ action, another way forward is for environmentalists seeking to effect positive change would be to increase economic pressure on distributors and design social media campaigns with the aim of altering societal behavior. Given the younger Japanese attitudes to whaling, they may be amenable to changing course but not if it is perceived to be something inflicted on them by Western cultural imperialism.

Now the contentious issue will move from the legal arena back to the political one, with the IWC meeting in Slovenia in September 2014. The world will be watching avidly to see how Japan responds to the ICJ decision in that forum. While anti-whaling forces might have hoped that going to the ICJ would resolve the contentious issue of scientific whaling once and for all, the decision may just be the latest skirmish in the decades old battle to end global whaling.

The ICJ, by limiting itself only to determining the efficacy of the JARPA II programme rather than grappling with the broader meaning and consequences of scientific whaling and commercial whaling, will not end the ongoing acrimony between the pro-whaling and anti-whaling forces. The war to determine the future of the world’s whales will continue for the foreseeable future.