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After *Whaling in the Antarctic*: Amending Article VIII to Fix a Broken Treaty Regime

*Anastasia Telesetsky and Seokwoo Lee**

Abstract: Since the global decline in commercial whaling, the International Whaling Commission (IWC) has been at the center of a long-standing debate between pro-whaling industry States and whale preservationist States that threatens to collapse the International Convention for the Regulation of Whaling (ICRW) as a treaty regime. This article describes the ongoing treaty regime disagreement that led to the International Court of Justice *Whaling in the Antarctic* case and suggests that the ICJ's decision highlights further weaknesses in the existing ICRW treaty regime. The fissures in the treaty regime have become even more apparent with the IWC Scientific Committee's request for more data from the Japanese government on the Proposed Research Plan for New Scientific Whale Research Program in the Antarctic Ocean (NEWREP-A) and Japan's diplomatic threat to unilaterally resume whaling. The paper concludes with a suggestion that States amend Article VIII in order to strengthen the existing ICRW framework.

Keywords: International Convention for the Regulation of Whaling, International Whaling Commission, *Whaling in the Antarctic*, IWC Scientific Committee, ICRW Article VII

In the shadow of the March 31, 2014 International Court of Justice (ICJ) opinion on *Whaling in the Antarctic*,¹ the International Whaling Commission (IWC) created by the International Convention for the Regulation of Whaling (ICRW) to adopt regulations “with respect to the conservation and utilization of whale resources” faces yet another trying period.² While this is not the first crisis of institutional legitimacy faced by the IWC, it raises deeper questions about the sustainability of the IWC as the international body that is not only responsible for imposing a commercial whaling moratorium but that is also required to “provide for the conservation, development, and optimum utilization of the whale resources.”³ When the ICJ decided that the design and implementation of Japan’s Antarctic Research Program whaling program (JARPA II) was not “reasonable in relation to achieving the programme’s stated research objective”, the ICJ ended up assuming a gatekeeper role that should have been internally managed within the ICRW regime.⁴ Part One examines recurring fissures in the ICRW regime between States who wish to resume commercial whaling and States who are committed to a moratorium. Part Two explains how the recent ICJ case and subsequent responses to the case by the IWC members highlight the ongoing rifts with the ICRW regime. Part Three offers brief comments on how Article VIII of the ICRW may need to be amended or risk institutional implosion.

Early Fissures in the ICRW Treaty Regime

In the 1930s and 1940s, it became clear to many States that whale populations had been severely overharvested to be processed into oil, soaps and other household products like margarine as well as being consumed as meat.⁵ Yet, the genesis of the ICRW regime as a

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¹ *Whaling in the Antarctic* (Australia v. Japan: New Zealand intervening) (31 March 2014). Judgment, Declarations, Separate Opinions, and Dissenting Opinions available at <http://www.icj-cij.org/docket/files/148/18136.pdf>; accessed 18 March 2015 [hereinafter ‘*Whaling in the Antarctic*’].

² International Convention for the Regulation of Whaling, Dec. 2, 1946, 161 U.N.T.S. 72, Article V(1) [hereinafter ‘ICRW’].

³ *Ibid.*, at Article V(2).

⁴ Judgment (n.1) at p. 65, para. 227.

⁵ J. Hannewijk, ‘Use of Fish Oils in Margarine and Shortening’ in M.E. Stansby (ed.), *Fish Oils* (Avi Publishing Company, Westport, 1967) 251-269, at p. 251. (“In Europe, Canada, Japan, and other countries hardened whale oil has been used in margarine and edible fats for over 50 years.”); P.J. Clapham and C.S. Baker, ‘Whaling,

management treaty was a struggle. Key states opted out of early versions of regulatory whaling regimes designed to restrain overharvesting. Even though Japan and the USSR were among the most active of the commercial whaling nations, neither Japan nor the USSR ratified the first Convention for the Regulation of Whaling negotiated in 1931 to protect right whales or the Second Convention for the Regulation of Whaling negotiated in 1937 to protect gray whales.⁶

As whale stocks continued to decline, States eventually reached a cooperative agreement in 1946 under the ICRW with membership from active whaling nations including Japan and the USSR. Yet the treaty regime lacked cooperative enforcement measures. Almost immediately after the treaty entered into force, States failed to comply with quotas set by the IWC and in some instances actively falsified their capture numbers.⁷ Patience with the incapacity of the ICRW regime to respond effectively to global overharvesting was fraying. In 1972 at the United Nations Conference on the Human Environment in Stockholm, the US requested a moratorium on all endangered whale species in part because of the perceived mismanagement of whales under the ICRW regime; the request received 53 supporting votes and 12 abstentions.⁸ Subsequently, a number of whaling industry States, arguing that there was a lack of scientific evidence to support a moratorium, blocked a vote in 1974 for the IWC to impose a moratorium.⁹ For a number of the ICRW's members such as the US who were

Modern' in W.F. Perrin, B. Wursig, and J. Thewissen (eds.), *Encyclopedia of Marine Mammals* (Academic Press, New York, 2002) 1328-1332, (Noting that even by World War I many whalers had commercially exhausted their original target species and were seeking new species in new hunting grounds.)

⁶ L. Kobayashi, 'Lifting the International Whaling Commission's Moratorium on Commercial Whaling as the Most Effective Global Regulation of Whaling' (2006) 29(2) *Environ: Environmental Law & Policy Journal* 177-219, at pp. 180-7.

⁷ P. Clapham, et al. "Catches of Humpback Whales, *Megaptera Novaeangliae*, by the Soviet Union and other Nations in the Southern Ocean, 1947-1973" (2009) 71(1) *Marine Fisheries Review*, 39-43 at p. 40 (Describing how the Soviet Union in its Southern Hemisphere reports to the IWC claimed to take 2,710 humpback whales but actually took 48,477 humpback whales.)

⁸ United Nations, Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, A/CONF.48/14/Rev.1 at p. 12, Recommendation 33 ("It is recommended that Governments agree to strengthen the International Whaling Commission, to increase international research efforts, and as a matter of urgency to call for an international agreement, under the auspices of the International Whaling Commission and involving all Governments concerned, for a 10-year moratorium on commercial whaling."); *Ibid.*, at p. 56, paras. 191-192. (Relabeling recommendation 33 as recommendation 86 for purposes of voting at the UN Convention on the Environment and Development. In response to the vote, Japan "explained that while it was favourable to a moratorium on commercial whaling, it had abstained in the vote because the whole question was to be considered by the International Whaling Commission on the basis of available scientific information.")

⁹ International Commission on Whaling, Twenty-Fourth Report of the Commission, Appendix III, "International Whaling Commission Chairman's Report of the Twenty-Fourth Meeting, Summary of Main Decisions Made at Meeting" (1974) 20-36 at pp. 24-25 (Observing that a global moratorium was opposed by

frustrated with the politics of the IWC, the IWC was regarded as an institution captured by minority interests until 1982 when a 10-year moratorium was adopted for all commercial whaling until additional studies could be undertaken to determine what level of commercial whaling might be sustainably revived. The moratorium vote reflected a new pattern of rift lines.¹⁰ The IWC that had been designed as an institution to protect the long-term interests of whaling industry through the conservation of whale populations for harvest had gradually become “preservationist.”¹¹ After the moratorium, the protection of certain whale species and the creation of whale sanctuaries under the ICRW were both deemed necessary by the majority of IWC parties to achieve global preservation objectives rather than resource management measures. With a prohibition on all commercial whaling in the Indian Ocean Sanctuary and the Southern Ocean Sanctuary, whaling industry States are now at constant odds with whale preservation States. Industry states such as Norway have largely defected from the regime by objecting to the moratorium and unilaterally deciding appropriate catch quotas on the basis of interpreting data from IWC’s Scientific Committee.¹² Since 1990, the Japanese government has regularly requested for the moratorium to be lifted for whale stocks such as minke whales that are no longer threatened or endangered.¹³ Given the limited global

IWC’s Technical Committee and Scientific Committee with the justification that stocks should be managed individually. Stating that the vote in the IWC plenary for a global moratorium was four delegations in favor, six delegations opposed, and four delegations abstaining; ICRW (n.1.) at Article III(2) (Votes to change the ICRW Schedule on whaling catch limits require a three-quarter majority.)

¹⁰ The moratorium was decided by a 25 to 7 vote with 5 abstentions. Voting for the moratorium were Antigua, Australia, Belize, Costa Rica, Denmark, Egypt, France, Germany, India, Kenya, Mexico, New Zealand, Oman, St. Lucia, St. Vincent, Senegal, the Seychelles, Spain, Sweden, the United Kingdom and the United States. Voting against the moratorium were Brazil, Iceland, Japan, Norway, Peru, South Korea, and the USSR. Abstaining from the vote were Chile, China, the Philippines, South Africa, and Switzerland. International Whaling Commission, ‘Chairman’s Report of the 34th Annual Meeting’ (1983) 33 *Report of the International Whaling Commission* 20-42, at p. 21. See generally P. Birnie, *International Regulation of Whaling* (Oceana Publications, 1985).

¹¹ H.M. Babcock, ‘Why Changing Norms is a More Just Solution to the Failed International Regulatory Regime to Protect Whales than a Trading Program in Whale Shares’ (2013) 32(3) *Stanford Environmental Law Journal* 3-83, at p. 14.

¹² The Norwegian Ministry of Trade, Industry and Fisheries, Norwegian Whaling-Based on a Balanced Ecosystem (March 19, 2013). Available at http://www.fisheries.no/ecosystems-and-stocks/marine_stocks/mammals/whales/whaling/#.Vb_kGN597dk; accessed 1 August 2015. (Observing that “Even though the work of the [International Whaling] Commission has not been constructive, the work in the IWC’s Scientific Committee has been of considerable importance in respect of the resumption of Norwegian whaling operations.”)

¹³ R. Smith, *Japan's International Fisheries Policy: Law, Diplomacy and Politics Governing Resource Security* (Abingdon and New York, Routledge, 2014) 140; For a detailed explanation of the Japanese choice not to oppose the commercial moratorium, please refer to A. Ishii and A. Okubo, ‘An Alternative Explanation of Japan’s Whaling Diplomacy in the Post-Moratorium Era’ (2007) 10 *Journal of International Wildlife Law and Policy* 55-87, at pp. 58-61.

market for whaling products and the strong public sentiment against commercial whaling, there has been little inclination for the majority of the IWC States to resume discussions on commercial whaling management.

The divisions in the treaty regime have become particularly pronounced in the debates within the Scientific Committee to develop a Revised Management Scheme (RMS) to implement a 1994 Revised Management Procedure (RMP) to set future quotas for whale harvests. With respect to the RMS, whaling States argue that the existing practices within the IWC are sufficient to ensure that the RMP quotas will be respected.¹⁴ Whale preservation States argue for the need to have independent monitoring and inspection of whaling activities.¹⁵ Increasingly, the gaps have been widening between States that are willing to trust the existing institution of the IWC to protect sovereign interests and States that seek institutional reform.

Relations between whaling industry States and preservationist States became increasingly fractious when whale preservation nations repeatedly singled out Japan's scientific whaling program as problematic. In 2003, the IWC majority passed a recommendation for Japan's scientific whaling program JARPA to end unless it ceased using lethal methods for scientific research. The Scientific Committee was expected to review the existing JARPA programs and provide advice about the output of these efforts. In 2005, the IWC majority again passed a resolution to request Japan to "withdraw" its JARPA II proposal or revise it to eliminate the lethal take components. Finally, in 2007, the IWC majority called upon Japan to "suspend indefinitely the lethal aspects of JARPA II in the Southern Ocean Whale Sanctuary."¹⁶ All of this was to no avail as the Japanese government continued to justify its scientific whaling fleet efforts as essential for understanding how to set appropriate RMPs in order to eventually revive a sustainable commercial whale harvest.

The IWC itself has recognized that it faces core institutional legitimacy questions. In 2008, the IWC established a working group on "The Future of the IWC" to examine institutional reforms including the issuance of research permits under Article VIII of the ICRW. By 2010,

¹⁴ Clapham and Baker (n. 5).

¹⁵ IWC, 'Revised Management Scheme: Information on the Background and Progress of the Revised Management Scheme (RMS).' Available at <https://iwc.int/index.php?cID=rmp>; accessed 18 March 2015.

¹⁶ IWC, 'Annual Report of the International Whaling Commission 2003, 55th Annual Meeting, 2003, Resolution 2003-2, Resolution on Whaling under Special Permit'; IWC, 'Resolution 2005-1, Resolution on JARPA II'; IWC, 'Resolution 2007-1, Resolution on JARPA.' Available at <https://archive.iwc.int/pages/themes.php>; accessed 18 March 2015.

all that the group was able to agree to regarding scientific permits was that “Proposals will be developed to address these issues for consideration during the initial five years of the arrangement.”¹⁷ Ultimately, the working group failed to agree to any reforms for the future. Instead, the IWC appears to be trapped in an institutional limbo unable to assert itself as the international authoritative body to “ensure proper and effective conservation and development of whale stocks.”¹⁸

Whaling in the Antarctic: Further Fracturing of the ICRW Treaty Regime

While the IWC struggled to reform itself and improve its institutional legitimacy, Australia filed an application before the ICJ alleging that Japan was in violation of its ICRW obligations under Article VIII to conduct a program “for purposes of scientific research”, paragraph 10(e) of the Schedule to observe in good faith the zero catch limit for commercial whaling, and paragraph 7(b) of the Schedule to act in good faith to refrain from undertaking commercial whaling of humpback and fin whales in the Southern Ocean Sanctuary.¹⁹ Australia filed its application as a signal of its frustration with the failure of bilateral diplomacy to resolve the dispute and the inadequacy of the IWC to respond appropriately to what Australia claimed to be treaty violations.²⁰

The ICJ case is interesting because it involves interpretation not of the core principles of the ICRW but rather the secondary obligations of the treaty regarding scientific permits. Japan’s decision not to oppose the commercial whaling moratorium in 1982 is the origin of the ICJ conflict. After the moratorium was adopted as an amendment to the Schedule, States under Article V(3) of the ICRW had the option to object within 90 days to the moratorium; any objection would prevent the moratorium from going into effect for an additional 90 days for all States.. For those States that had not originally objected to the moratorium but chose to submit an objection during the second 90 day period, the moratorium would not become

¹⁷ IWC, ‘Chair’s Report to the Small Working Group on the Future of IWC’, IWC/M10/SWG 4. Available at <https://iwc.int/private/downloads/2kakj06ab44k88sk4c84wwkok/iwc-m10-swg4.pdf>; accessed 18 March 2015.

¹⁸ ICRW (n. 2).

¹⁹ Application Instituting Proceedings, *Whaling in the Antarctic* (Australia v. Japan: New Zealand intervening), 2010 I.C.J. 148, at paras. 36-37 (31 May 2010) Available at <http://www.icj-cij.org/docket/files/148/15951.pdf>; accessed 18 March 2015.

²⁰ Australia appointed a Special Envoy on Whale Conservation to work with the Japanese government on addressing Australia’s concerns about the Article VIII process in Japan. *Ibid.*, at para. 33.

effective. The U.S. threatened, however to apply the Pelly Amendment against States that intended to object to the moratorium. If the Secretary of Commerce took action under the Pelly Amendment, this might have prevented products from States such as Norway, Japan, and Iceland from being imported into the US.²¹ While Norway objected to the moratorium and announced that it would be resuming commercial whaling in 1993,²² Japan never entered an objection to the moratorium because of concerns over U.S. fisheries sanctions on Japanese exports.²³ Japan had the opportunity like Norway and Iceland to exercise its sovereign rights to refuse the moratorium under Article V(3) of the ICRW but instead sought to assert its sovereign interests in a lateral fashion under Article VIII.

Starting in 1987, Japan decided to operate a whaling fleet affiliated with The Institute for Cetacean Research using Article VIII scientific research exception permits obtained from the Japanese Government. Article VIII of the ICRW provided that:

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.²⁴

The original Article VIII language was negotiated at a time when it was not possible for States to conduct non-lethal scientific investigation in order to understand the life histories of whales. In the 1940s and 1950s with the introduction of the ICRW, the quality of global whale data was poor. The Article VIII language encouraged individual States to unilaterally collect research data for purposes of supporting their national whaling industry that could then be shared to assist the IWC in setting appropriate Maximum Sustainable Yield levels

²¹ 22 USC 1978 (“When the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President... the President may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of any products from the offending country for any duration as the President determines appropriate and to the extent that such prohibition is sanctioned by the World Trade Organization or the multilateral trade agreements.”)

²² D. Caron, ‘The International Whaling Commission and the North Atlantic Marine Mammal Commission: The Institutional Risks of Coercion in Consensual Structures’ (1995) 89 *American Journal of International Law* 154-174, at p. 161.

²³ Smith (n. 13), at p. 139.

²⁴ ICRW (n. 2) (emphasis added).

that would support a viable global industry. The language was never intended to allow for unilateral commercial whaling by ICRW parties.

After the 1982 moratorium, Japan initiated JARPA as its first large scientific whaling research program from 1987 until 2005. The research program was designed to understand what biological parameters impacted “stock management of the Southern Hemisphere minke whale” in order to understand the “stock structure”, what role whales played in the Antarctic ecosystem, and what effect environmental changes were having on the whales’ population.²⁵ A similar program was launched between 1994 and 1999 in the North Pacific to determine the feeding practices of minke whales as well as the “stock structures” of two groups of minke whales.²⁶ While the JARPA II program which was created in 2005 was designed to continue research on the questions posed in JARPA,²⁷ the JARPA II program was required to cease operations in 2014 in response to the ICJ’s decision in *Whaling in the Antarctic*. The Japanese Whale Research Program under Special Permit in the North Pacific, Phase II (JARPN II) program was not affected by the ICJ decision and continued with a focus on feeding ecology, bioaccumulation of pollutants in whales, and stock structure studies for the common minke whale, Bryde’s whale, sei whale, and sperm whales.²⁸ Under all of its research programs, Japan sold meat for consumption from the whales that it caught and used the profits to support the Institute for Cetacean Research.²⁹ Between its Antarctic and North Pacific programs, Japan has taken approximately 14,600 reported whales which is 7 times the number of whales taken by all other nations under Article VIII permits since 1952.³⁰

After Japan commenced JARPA II in 2005, many IWC countries, particularly Australia, the United States and New Zealand, filed repeated resolutions stating that JARPA II was either

²⁵ The Institute of Cetacean Research, ‘JARPA/JARPA II research results.’ Available at <http://www.icrwhale.org/JARPAResults.html>; accessed 18 March 2015.

²⁶ *Ibid.*

²⁷ Government of Japan, ‘Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) - Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources.’ Available at <http://www.icrwhale.org/eng/SC57O1.pdf>; accessed 18 March 2015 [hereinafter ‘JARPA II Plan’].

²⁸ *Ibid.*, at p. 6.

²⁹ M. Park, ‘Japanese Scientific Whaling in Antarctica: Is Australia Attempting the Impossible?’ (2011) 9 *New Zealand Journal of Public and International Law* 193-221, at p. 196; The Institute for Cetacean Research is a nonprofit research organization that is subsidized by the Japanese government.

³⁰ P.J. Clapham, ‘Japan’s Whaling Following the International Court of Justice Ruling: Brave New World - Or Business as Usual?’ (2015) 51 *Marine Policy* 238-241, at p. 239, fn. 2.

outside the scope of Article VIII or a bad faith use of the exception.³¹ In 2008, an Australian Federal Court ordered a Japanese whaling company to stop killing, injuring, or taking any Antarctic whales in the Australian Whale Sanctuary, but the judgment was unenforceable because Australia's maritime boundary claims in the Southern Ocean are contested.³² In 2010, Australian Prime Minister Kevin Rudd warned Japan to end whaling or face legal action.³³ In the 62nd meeting of the IWC, the Proposed Consensus Decision was presented which sought a compromise between Japan and States who questioned Japan's use of the scientific exception by allowing Japan to harvest a small number of whales while ending the scientific purpose exception and bringing all whaling under the IWC's regulatory authority.³⁴ The consensus was never adopted.³⁵

Australia questioned the increasing post-moratorium trends in Japanese whaling. If Japan was indeed pursuing the various research ends that it articulated in JARPA II, did Japan need to employ lethal methods to collect data on whaling stocks and marine ecosystems or was JARPA II essentially the equivalent of a commercial whaling program because it was not justified "for purposes of scientific research"? Could the pursuit of science explain why under JARPA II Japan assigned itself an annual quota of 850 minke whales, 50 humpback whales and 50 fin whales when Japan's previous research efforts had only taken 840 whales in the Antarctic over the course of almost three decades?³⁶ Was Japan hoodwinking all of the nations that had voted for the moratorium and exacerbating the institutional problems that already existed before the moratorium was approved? Or was Japan making a good faith effort to understand how to revive a commercial whaling industry in light of changed environmental conditions? The answers to these questions were politically charged.

In light of the known and active fissures between pro-preservation and pro-whaling States

³¹ IWC (n. 17).

³² *Humane Soc'y Int'l Inc. v. Kyodo Senpaku Kaisha Ltd.* (2008) FCR 3, para. 55 (Austl.).

³³ J. McCurry, 'Australia Threatens Legal Action over Japanese Whaling', *The Guardian*, 19 February 2010, at 27.

³⁴ IWC, 'Proposed Consensus Decision to Improve the Conservation of Whales from the Chair and Vice-Chair of the Commission', IWC/62/7rev (28 April 2010) Available at [http://opc.ca.gov/webmaster/ftp/pdf/agenda_items/20100616/IWC%20Proposal%20\(2\).pdf](http://opc.ca.gov/webmaster/ftp/pdf/agenda_items/20100616/IWC%20Proposal%20(2).pdf); accessed 18 March 2015.

³⁵ 'Flexibility Needed on Whaling Issue,' *The Japan Times*, 8 July 2010. Available at <http://www.japantimes.co.jp/opinion/2010/07/08/editorials/flexibility-needed-on-whaling-issue/#.UjPnUsbIZOw>; accessed 18 March 2015.

³⁶ JARPA II Plan (n. 27), at pp. 18-19.

and the inability to even reach a temporary consensus within the treaty bodies on how to move past the current impasse, the ICJ faced a difficult task. It could not wholesale end scientific whaling in spite of potential abuses such as conducting small-scale commercial whaling under the guise of scientific whaling permits. The ICJ, however, by rejecting JARPA II on the basis of several reasonableness factors assumed the role of a temporary proxy offering its decision-making in lieu of already fractured ICRW institutions. The ICJ judges were acutely aware of the fragile condition of the ICRW institutions at the time that they were deliberating. Judge Keith opened his declaration with a six paragraph description of the context of the case where he specifically pointed out that the membership of the ICRW has changed over the last 30 years leading to disagreements that have lead to the Commission becoming “deadlocked” and now meeting “only every second year.”³⁷

Beyond simply interpreting the meaning of the Article VIII disputed phrase “for the purposes of scientific research”, the ICJ chose to assume an active managerial role in the *Whaling in the Antarctic* case. Specifically, the ICJ indicated that it would “apply” its interpretation of Article VIII to “enquire into whether, based on the evidence, the design and implementation of JARPA II are reasonable in relation to achieving its stated objectives.”³⁸ The Court agreed with Japan that “JARPA II activities involving the lethal sampling of whales can broadly be characterized as ‘scientific research’.”³⁹

What happens next in the opinion is perhaps more surprising. The Court assigned itself the task to “examine whether the design and implementation of JARPA II are reasonable in relation to achieving the programme’s stated research objectives.”⁴⁰ The Court does not conclude its decisions after it has interpreted Article VIII and then request for the IWC or the Scientific Committee, in particular, to determine whether the elements of JARPA II could be considered reasonable “for purposes of scientific research.”

The ICJ seemed to mistrust on some level the objectiveness of the Scientific Committee’s work and was reluctant at least for the *Whaling in the Antarctic* case to yield decision-making

³⁷ *Whaling in the Antarctic* Declaration of Judge Keith (n.1) at para. 5, p. 2. Available at <http://www.icj-cij.org/docket/files/148/18142.pdf>; accessed 18 March 2015.

³⁸ *Whaling in the Antarctic*, Judgment (n.1) at para. 98, p. 35.

³⁹ *Ibid.*, at para. 127, p. 41.

⁴⁰ *Ibid.*, at para. 127, p. 42.

back to institutions that it might consider functionally problematic. When the Court described its review process as including steps to determine “whether, in the use of lethal methods the programme’s design and implementation are reasonable in relation to achieving its stated objective”, the Court also emphasized “this standard of review is an objective one.”⁴¹ In describing the Scientific Committee’s work in connection to the JARPA II plan, the court tersely observed “Following review of the JARPA II Research Plan by the Scientific Committee, Japan granted the first set of annual special permit for JARPA II in November 2005, after which JARPA II became operational.” It is a curious that there is no further commentary or reference at this point in the opinion to any of the content of the Scientific Committee’s review work on JARPA II in 2005. This purely descriptive sentence when read in light of the Court’s emphasis on underscoring its objective review might be interpreted to reflect an effort by the Court to indirectly comment on the current capacity of the Scientific Committee to conduct objective review.

This reading is further reinforced when the Court does discuss the role of the Scientific Committee within the treaty regime. The ICJ understood the existing challenges of a fractured Scientific Committee and directly addressed these challenges in the portion of the opinion regarding whether Japan had complied with certain procedural aspects of providing permits under Article VIII. Australia alleged that Japan failed to provide the Scientific Committee with copies of the Article VIII permits prior to the commencement of JARPA II and that the permits that were provided did not contain necessary information. While the ICJ was persuaded that Japan had complied with these procedural components, the ICJ provided two additional comments hinting at discord within the Scientific Committee. First, they observed that the procedural requirements in the Schedule and Guidelines “must be appreciated in light of the duty of co-operation with the IWC and its Scientific Committee that is incumbent upon all States parties to the Convention.”⁴² Second, the ICJ suggested that cooperation may not be as forthcoming as desired since “63 Scientific Committee participants” of approximately 200 members “declined to take part in the 2005 review of the JARPA II Research Plan” but instead “submitted a separate set of comments on the JARPA II

⁴¹ *Ibid.*, at para. 67, p. 29.

⁴² *Ibid.*, at para. 240, p. 69.

Research Plan, which were critical of its stated objectives and methodology.”⁴³

Even though the majority of the ICJ did not remand the questions of review of JARPA II back to the ICRW institutions and decided instead to examine the design and implementation of JARPA II itself, at least one dissenter aptly suggests the majority may have taken on more than simply treaty interpretation. Judge Yusuf commented that it is not “the task of the ICJ to review and evaluate the design and implementation of a research plan for scientific whaling” because “[t]hat is the function of the Scientific Committee.”⁴⁴

Ultimately, the ICJ decided that JARPA II’s design and implementation was not reasonable in relation to the scientific program. Specifically regarding the design of JARPA II, the ICJ questioned whether Japan had given sufficient consideration to incorporating non-lethal methods of research when there had been substantial developments in non-lethal research techniques.⁴⁵ In relation to the implementation of JARPA II, the ICJ expressed concern that the annual lethal sample sizes were not re-evaluated in light of the gap between the research plan’s proposed target sample size and the actual take.⁴⁶ The ICJ ultimately concluded that JARPA II lacked sufficient evidence to support a nexus between its articulated research objectives and the numbers of whales that might be taken under the Japanese issued research permits.⁴⁷

While the ICJ appropriately did not weigh in on matters of scientific dispute, it did assume an active role in deciding questions regarding the “reasonableness” of JARPA II under the ICRW. Reflecting the current level of institutional dysfunction within the ICRW framework, the ICJ majority chose to assert its judicial authority as a temporary trucemaker between Japan as a pro-whaling State and Australia and New Zealand as pro-preservation States by making

⁴³ *Ibid.*, at para. 241, p. 69.

⁴⁴ *Whaling in the Antarctic*, Dissenting Opinion of Judge Yusuf (n.1) at para. 4. p. 1; *see also ibid.*, at para. 17, p. 4 and at para. 61, p. 16 (“It is a pity that... the Court has engaged in an evaluation of the design and implementation of the programme [JARPA II] and their reasonableness in relation to its objectives, a task that normally falls within the competence of the Scientific Committee of the IWC ... As a matter of fact, when the Scientific Committee took the view in the past that a permit proposal submitted by a State did not meet its criteria, it specifically recommended that the permits sought should not be issued. This has not been the case with regard to JARPA II, but it shows at least that the Committee’s practice is adequate to the task of evaluating the design and implementation of scientific research programmes under the ICRW and accordingly advising the IWC on that matter.”)

⁴⁵ *Whaling in the Antarctic*, Judgment (n. 1) at para. 137, p. 43.

⁴⁶ *Id.*, at para. 156, p. 48.

⁴⁷ *Id.*, at paras. 195-198, pp. 57-58.

relatively specific decisions about the “reasonableness” of JARPA II as a scientific research program. On many levels, this should have been the work of the Scientific Committee working in close cooperation with the Commission. Judge Sebutinde, Judge Cancado Trindade, Judge Bhandari, and Judge *ad hoc* Charlesworth recognized in their separate opinions the need for the Committee to review and comment on special permits and for States to carefully consider the input of the Committee.⁴⁸

A number of the ICJ judges opined that the Scientific Committee needed to play a significant role in legitimizing the activities of the ICRW regime as part of a larger conversation between science and law. These Judges disagreed with the majority’s analysis of Paragraph 30 of the Schedule because the majority limited Paragraph 30 to a purely formal procedural obligation.⁴⁹ Judge Bhandari argued that the requirement to submit special permits for review and comment by the Scientific Committee obliged Japan to engage in a “proper dialogue with the Committee concerning the scientific output of JARPA with the aim of possibly revising JARPA II prior to its launch.”⁵⁰ Judge Bhandari’s views are echoed by Judge *ad hoc* Charlesworth who indicated that there is an affirmative obligation “on the proposing State to co-operate with the Committee” which means providing the IWC with permits before issuance so that the Scientific Committee can review and comment on them, providing “specified information” about the permits, engaging the participation of the international scientific community in the research, and giving “consideration in good faith to the views of the IWC and the Scientific Committee.”⁵¹ While the findings of the Committee do not need to be accepted by the State requesting scientific permit review, the State “must show genuine willingness to reconsider its position in light of [the Committee’s] views.”⁵² Particularly troubling for several of the judges was the lack of assessment of JARPA before Japan issued permits under JARPA II that were “virtual replicas” of the JARPA permits.⁵³ The judges expressed concern that the review process before the Committee which they

⁴⁸ *Whaling in the Antarctic*, Separate Opinion of Judge Sebutinde (n.1) at para. 19, p. 5; *Whaling in the Antarctic*, Separate Opinion of Judge Cancado Trindade (n.1) at para. 17, p. 6.; *Whaling in the Antarctic*, Separate Opinion of Judge Bhandari (n.1) at para. 10, p. 3.; *Whaling in the Antarctic*, Separate Opinion of Judge *Ad Hoc* Charlesworth (n.1) at para. 5, pp. 1-2.

⁴⁹ See e.g., *Whaling in the Antarctic*, Separate Opinion of Judge Sebutinde (n.1) at para. 15, pp. 3-4.

⁵⁰ *Whaling in the Antarctic*, Separate Opinion of Judge Bhandari (n.1) at para. 10, p. 3.

⁵¹ *Whaling in the Antarctic*, Separate Opinion of Judge *ad hoc* Charlesworth (n.1) at paras. 14-15, pp. 4-5.

⁵² *Ibid.*, at paras. 15, pp. 4-5.

⁵³ *Whaling in the Antarctic*, Separate Opinion of Judge Sebutinde (n.1), at para. 17, p. 4; *Whaling in the Antarctic*, Separate Opinion of Judge Bhandari (n.1), at para. 18, p. 5.

understood as being integral to the operation of the ICRW was being treated as an “unacceptable ‘rubber stamp’ mechanism” in violation of a duty to co-operate that is “a broad and purposive obligation that entails an on-going dialogue with the Scientific Committee.”⁵⁴ The question after *Whaling in the Antarctic* is whether the Committee will be able to contribute meaningfully to discussions regarding the future of whales and whaling or whether the efforts of the Committee to promote scientific methodology will be hijacked by national politics.

Renegotiating Faultlines: Proposals for Annex VIII Reform

At the IWC’s meeting in September 2014 after the ICJ decision, Parties adopted a resolution on whaling under special permit which included the request that States not issue further permits until (1) the Scientific Committee had an opportunity to provide advice on “reasonableness” and (2) the Commission could review an Scientific Committee report to make such recommendations “as it sees fit.”⁵⁵ The resolution identified the ICJ opinion and noted that the opinion presented an authoritative interpretation of Article VIII. Specifically, the resolution recalled that the “Court established several parameters for a programme for purposes of scientific research” that the IWC should consider when reviewing special permits.⁵⁶ The IWC made note of certain elements that it might review including “the scale of the programme’s use of lethal sampling, the methodology used to select sample sizes, a comparison of the target sample sizes and the actual take, the timeframe associated with a programme, the programme’s scientific output, and the degree to which a programme coordinates its activities with related research projects.”⁵⁷ Significantly, the vote on the resolution was not a consensus vote but ended with 35 parties in favor, 25 against, and 5 abstentions.⁵⁸ The vote on the resolution reflected the differences between whaling industry

⁵⁴ *Whaling in the Antarctic*, Separate Opinion of Judge Cancado Trindade (n.1) at para. 19, p. 6; *Whaling in the Antarctic*, Separate Opinion of Judge Bhandari (n.1) at para. 9, pp. 2-3 and at para. 11, p. 3.

⁵⁵ IWC, ‘Resolutions Adopted at the 65th Meeting: Resolution 2014-5, Resolution on Whaling under Special Permits, Sec. 3. Available at <https://archive.iwc.int/pages/search.php?search=%21collection72&k=>; accessed 1 June 2015.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ IWC, Chair’s Report of the 65th Meeting (2014), p. 17, para. 151. Available at https://archive.iwc.int/pages/search.php?search=!collection49&bc_from=themes; accessed 1 June 2015

revival States and preservation states.

In light of both the ICJ's decision and the Resolution, it is clear that a subset of ICRW members expect both more objective engagement by the Scientific Committee as it reviews scientific permits and programs and more "meaningful" on-going cooperation between States and the Scientific Committee. Existing ICRW documents contemplate an active Scientific Committee. For example, the IWC Rules of Procedure provide that "The Scientific Committee shall review the current scientific and statistical information with respect to whales and whaling, shall review current scientific research programmes of Governments, other international organisations or of private organisations, shall review the scientific permits and scientific programmes for which Contracting Governments plan to issue scientific permits, shall review current and potential threats and methods to mitigate them in order to maintain cetacean populations at viable levels, shall provide conservation and management advice where appropriate, shall consider such additional matters as may be referred to it by the Commission or by the Chair of the Commission, and shall submit reports and recommendations to the Commission."⁵⁹ This is an active and full agenda for a body that is underfunded and relies on voluntary scientific advice from either national delegates who are funded by their State or invited participants who may or may not receive funding from a State or from the IWC.⁶⁰

Existing ICRW documents contemplate a deeper level of cooperation with the Scientific Committee from those States seeking to take whales for purposes of scientific research. The IWC's Rules of the Procedures provide that countries intending to operate research programs requiring permitting under Article VIII should provide to the Scientific Committee "specifics as to the objectives of the research, number, sex, size, and stock of the animals to be taken, opportunities for participation in the research by scientists of other nations, and the possible effect on conservation of the stock resulting from granting the permits."⁶¹ The Committee

⁵⁹ IWC, Rules of Procedure of the International Whaling Commission 2014, Section M.4(a), p. 7. Available at <https://archive.iwc.int/pages/view.php?ref=3605&k=>; accessed 18 March 2015.

⁶⁰ IWC, Scientific Committee Handbook. Available at <https://iwc.int/scientific-committee-handbook>; accessed 18 March 2015 (Noting that "funding for invited participants will be provided *if available*" (emphasis in original); Noting further that the research budget approved by the Commission to support the efforts of the Scientific Committee for 2012-2013 was £314,984).

⁶¹ IWC, Rules of Procedure of the Scientific Committee, Section F, p. 24. Available at <https://archive.iwc.int/pages/view.php?ref=3605&k=>; accessed 18 March 2015.

should review and comment on this data in light of existing biological and ecological knowledge.

But can the Scientific Committee as an institution satisfy the competing interests of sufficient member States to be considered an effective treaty institution? In practice, the Scientific Committee reports since the inception of JARPA II have reflected repeated problems in reviewing ICRW Article VIII permit proposals.⁶² In 2005, for example, during the review process of JARPA II permits, the Committee commented that “the Committee recognises the chronic difficulties it faces in separating purely scientific issues from those issues that are more appropriate for discussion in other fora and notably the Commission.”⁶³ In 2006, the Committee noted that “it has difficulties in reviewing scientific permit proposals” because it was not possible for “a large Working Group of the Committee ...to efficiently review complex documents such as the recent special permit proposals.”⁶⁴ In 2007, the Committee commented again that “the process for reviewing the special permits is less than satisfactory.”⁶⁵ The Committee opined that scientists who were participating in special permit review from a Government who was requesting review of a special permit should not participate in the drafting of the “findings and recommendations” which should “only reflect the opinions of the independent experts.”⁶⁶

Institutional problems were flagged again in 2010 when the Scientific Committee observed that an expert panel responsible for reviewing proposed scientific research permits to be issued under JARPA II may have had conflicts of interest. According to the report, five members, representing about half of the members of the expert panel, had either published using data obtained under JARPA or were a scientist directly associated with the program.⁶⁷

⁶² For purposes of this article, each Summary Report of the Scientific Committee from the start of JARPA II in 2005 to its conclusion in 2014 was reviewed for observations about the review of proposed special permits to be issued under Article VIII.

⁶³ IWC, ‘2005 Report of the Scientific Committee’ (2006) 8 (SUPPL.) *Journal of Cetacean Research and Management* 1-65, at p. 52 (Sec. 16.2. Review of new or continuing proposals, 16.2.1. JARPA II).

⁶⁴ IWC, ‘2006 Report of the Scientific Committee’ (2007) 9 (SUPPL.) *Journal of Cetacean Research and Management* 1-73, at pp. 57-58 (Sec. 16.1. Improving the Committee’s procedure for reviewing scientific permit proposals).

⁶⁵ IWC, ‘2007 Report of the Scientific Committee’ (2008) 10 (SUPPL.) *Journal of Cetacean Research and Management* 1-74, at p. 60 (Sec. 17.4. Improving the Committee’s procedures for reviewing scientific permit proposals and research results).

⁶⁶ *Id.*, at pp. 60-61.

⁶⁷ IWC, ‘2009 Report of the Scientific Committee’ (2010) 11 (SUPPL. 2) *Journal of Cetacean Research and Management* 1-98, at pp. 78-79 (Sec. 17.6. Evaluate the performance of the agreed procedure for reviewing

Four of the ten members apparently had played important roles in earlier reviews of special permits for Japan.⁶⁸ Members of the Scientific Committee were split about the need for members of an expert panel to submit conflict of interest statements before reviewing proposals to issue scientific permits.⁶⁹ Adding to the challenges of creating an independent panel, the 2010 Scientific Committee report also suggested that Parties such as Japan seeking review of special permits are not providing review panels with sufficient information before the requested review.⁷⁰

In 2012 and 2013, it was unclear whether any special permits that Japan intended to issue under JARPA II were ever reviewed by the Scientific Committee. In 2013, the only note in the Scientific Committee report under review of new “proposals” indicated that “Japan reported that there was no plan to change the JARPA II programme.”⁷¹ While reviews of any special permits for these seasons may appear in subsidiary documentation, it is surprising that there is no mention of permits given that the Scientific Committee is expected to review proposals for scientific permits before they are issued by a ICRW party and permits were presumably issued for the 2013-2014 whaling season.

In 2014, Japan prepared a new proposal for Antarctic whaling to be vetted under a process that included review “by a small specialist workshop with a limited but adequate number of invited experts” followed by a submission of a report to the Scientific Committee as a whole.⁷² According to the 2014 Scientific Committee report, the Government of Japan would underwrite the costs of the specialist workshop to be held in Tokyo, Japan. These comments by the Scientific Committee regarding this Japan-based review process were not endorsed by “scientists from countries that made a statement at plenary that it was inappropriate for the SC (scientific committee) to continue the review of the JARPA II programme” and therefore “did not participate in the discussion related to JARPA II agenda items.”⁷³

scientific permit proposals, and periodic and final review of results from scientific permit research)

⁶⁸ *Ibid.*, at p. 79.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ IWC, ‘2013 Report of the Scientific Committee’ (2014) 15 (SUPPL.) *Journal of Cetacean Research and Management* 1-75, at p. 61 (Sec. 17.5. Review of new or continuing proposals, 17.5.1. JARPA II).

⁷² IWC, ‘2014 Report of the Scientific Committee’, IWC/65/Rep01(2014), 09/06/2014, at p. 74 (Sec. 17.4.2. Planning for review of future Japanese Special Permit research in Antarctic).

⁷³ *Ibid.*, at p. 68 (Sec. 17.1. Expert Panel Review of the results from JARPA II).

The new Proposed Research Plan for New Scientific Whale Research Program in the Antarctic Ocean (NEWREP-A) is a relatively short proposal of 42 pages accompanied by 13 annexes.⁷⁴ In NEWREP-A, the Japanese government took the opportunity to highlight the portions of the ICJ decision that it deemed significant including the conclusion that (1) whales taken under Article VIII are not subject to the IWC Schedule; (2) the object and purpose of the treaty includes “sustainable exploitation”; (3) the Guidelines for research include not just research on whales but also research on “hypotheses not directly related to the management of living marine resources”; (4) the State authorizing special permits has an obligation to offer an “objective basis” for the lethal takes; and (5) lethal sampling “per se” was “not unreasonable in relation to the research objectives of JARPA II.” The NEWREP-A document set out to address the specific inadequacies of the JARPA II program identified by the ICJ with a particular focus on providing a justification for lethal methods and evidence for the size of the lethal sampling set.⁷⁵ On the issue of lethal takes, Japan investigated the feasibility of using other methods besides lethal methods including biopsy sampling, satellite tagging, data-logger use, and biomarkers.⁷⁶ Japan concludes that these alternatives are not feasible for measuring “age at sexual maturity” which Japan asserts is necessary for setting a maximum sustainable yield ratio and for measuring prey consumption; therefore lethal take methods are necessitated in order to obtain earplugs and dissect of internal organs.⁷⁷ Regarding lethal sample sizes, Japan indicates in its proposed research plan that the numbers it has picked are largely based on collective “age at sexual maturity” data but that these sizes may need to be revised.⁷⁸

To address squarely the issue that Japan *de facto* is participating in commercial whaling through its distribution of special permits under the research proposal, Japan notes that “Japan has therefore announced that it confirmed its basic policy of pursuing the resumption of commercial whaling, and collecting and analyzing necessary data through special permit

⁷⁴ Proposed Research Plan for New Scientific Whale Research Program in the Antarctic Ocean, available at maff.go.jp/j/whale/pdf/newrep--a.pdf, accessed 10 September 2015.

⁷⁵ *Ibid.*, at pp. 6-7. The Japanese government also identified other issues raised by the ICJ decision including methodology for selecting whales that would be taken, the open-ended time frame of the scientific programme, the limited scientific output of the programme to date, and the lack of cooperation with other whale research efforts.

⁷⁶ *Ibid.*, at p. 8.

⁷⁷ *Ibid.*, at p. 9.

⁷⁸ *Ibid.*

whaling for this purpose, in full accordance with legal requirements including the ICRW, its paragraph 10 (e) of the Schedule which establishes the moratorium on commercial whaling, as well as in light of the ICJ Judgment.”⁷⁹ Japan is unequivocal that results from NEWREP-A’s are intended to end the twenty-year moratorium.⁸⁰ With Japan’s intention to issue special permits as an initial step towards resuming whaling, Japan identifies NEWREP-A as offering “an objective basis” for justifying lethal research under Article VIII.⁸¹ In keeping with its conciliatory stance on following institutional process, the document further indicated that Japan is amenable to feedback from other States and institutions about the proposal.⁸² Japan specifically indicated that “After the IWC SC will ‘review and comment’ on this proposed plan, those comments will be given due regard and the proposed plan will be revised, if necessary, taking account of them.”⁸³

What happened next reveals the increasing fragility of the IWC as an institution capable of handling both the conservation of whales and the sustainable use of whales as commercial resources. In April 2015, Japan submitted NEWREP-A for the review of a ten person expert panel. Some members of the IWC’s expert panel questioned to what degree the NEWREP-A differed in its objectives from JARPA/JARPA II and requested additional data be supplied to determine whether lethal sampling was necessary for whale stock management and conservation.⁸⁴ The panel further recommended that a series of panel recommendation many of which included collecting additional information over the course of 1-3 field seasons “should be completed and the results evaluated before there is a final conclusion on lethal techniques and sample sizes.”⁸⁵ Additional questions were raised by scientists observing the expert panel.⁸⁶ There were dissenting voices among scientists observing the panel.⁸⁷ Japan

⁷⁹ *Ibid.*, at p. 11.

⁸⁰ The moratorium was adopted in 1982 but applied to the 1985/1986 season.

⁸¹ NEWREP-A (n. 74), at p. 7.

⁸² *Ibid.* (“Japan always welcomes comments from outside that are based upon scientific consideration to which it will give due regard.”)

⁸³ *Ibid.*, at 11.

⁸⁴ Report of the expert panel to review the proposal by Japan for NEWREP-A, 7-10 February, 2015, Tokyo, Japan, SC/66a/Rep6 (2015): 2 (“In summary, with the information presented in the proposal, the Panel noted that it was not able to determine whether lethal sampling is necessary to achieve the two major objectives; therefore, it concluded that the current proposal did not demonstrate the need for lethal sampling to achieve those objectives.”)

⁸⁵ *Ibid.*

⁸⁶ P. Wade, Brief Review of Whether Lethal Methods are Required for NEWREP-A, SC/F15/SP06 (2015); P. Wade, What is the Best Way to Age Antarctic Minke Whales?, SC/F13/SP05 (2015).

submitted some additional data.⁸⁸

But in June 2015, the IWC Scientific Committee indicated based on the Expert Panel report that it still did not have adequate information to determine whether lethal sampling was necessary.⁸⁹ They requested Japan to reply to the Panel's recommendations and progress would be reviewed in 2016.⁹⁰ The Scientific Committee did endorse the deployment by Japan of vessels for biopsy sampling and satellite tagging of whales.⁹¹ The report and the scientific committee meeting itself continued to reflect the fissure lines within the IWC that seem to be becoming increasingly more entrenched.⁹²

As of September 2015, Japan and its pro-utilization allies are in a stand off with pro-preservation States. Japan has stated that it may unilaterally resume whaling under NEWREP-A in spite of the lack of consensus from the Committee that the NEWREP-A program offers a reasonable scientific research design.⁹³ This is perhaps not surprising given pressure from certain domestic constituencies. In spite of Japan's acknowledgment of the binding nature of the IWC moratorium on commercial whaling, Japan's media has been given undue emphasis to the stockpiling of whale meat in Japan for what seem to be commercial

⁸⁷ See e.g. T. Gunnlaugsson and G.A. Víkingsson, Comments on the Proposed Research Plan for New Scientific Whale Research Program in the Antarctic Ocean (NEWREP-A) submitted to the Scientific Committee of the IWC by The Government of Japan, SC/F15/SP04 (2015) (Finding that "the new research program, together with the data collected during JARPA and JARPAII, will constitute a unique data series on the Antarctic ecosystem that will have a great value for the future, e.g. for studies on climate change); L. Pastene et al., A Response to "SC/F15/SP03", SC/F15/SP11 (2015); T. Kitakado, A Response to "SC/F15/SP02", SC-F15-SP09 (2015); T. Tamura and K. Konishi, A Response to Document SC/F15/SP01 'Comments on proposed research plan for new scientific whale research program in the Antarctic Ocean (NEWREP-A) with regard to feeding ecology objectives' by R. Leaper and B.A. Roel, SC-F15-SP08 (2015)

⁸⁸ Government of Japan, Addendum to the Proposed Research Plan for New Scientific Whale Research Program in the Antarctic Ocean (NEWREP-A), SC/66a/SP2 (2015).

⁸⁹ IWC, '2015 Report of the Scientific Committee', IWC/66/Rep01(2015) (June 9, 2015): 96.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*, at p. 52.

⁹² *Ibid.*, at 93. "After initial general discussion of this item, a number of comments both supporting NEWREP-A and opposing it were made, some addressing particular issues and others offering broad comments on the general merits or otherwise of the lethal aspects of the proposal, ecosystem management, interpretations of the Resolution from a procedural perspective, a letter¹⁹ from a group of 500 scientists from 30 countries opposing the proposal and various comments on the judgment of the International Court of Justice. From this discussion, it was clear that it would not be possible to develop a consensus Committee view of NEWREP-A."

⁹³ Whale Hunt to be Resumed this Year, The Japan Times (June 23, 2015) (Citing Joji Morishita, Japan's representative to the IWC, who claims that pro-preservation states are engaging in "environmental imperialism" and regretting that "There is no definite conclusion in the report itself . . . which is not so surprising in the IWC, because as we know very well the IWC is a divided organization.")

ventures.⁹⁴

In spite of some changes with the introduction of new review procedures that the Committee is trying to implement,⁹⁵ the status quo does not appear to have shifted much from how scientific whaling permits have been previously reviewed under JARPA II.⁹⁶ The only existing obligation associated with Article VIII is for a Contracting Government to provide the IWC with “proposed scientific permits before they are issued in sufficient time to allow the Scientific Committee to review and comment on them.”⁹⁷ There is nothing specific in either Article VIII or in the Schedule to prevent a State from ultimately issuing a special permit that the Scientific Committee may have reservations over as long as the Committee has been given adequate opportunity to “review and comment”. This gap between procedure and substance has proven problematic in the review of NEWREP-A. Japan seems to be taking the position that the Scientific Committee has had its opportunity to review and comment on the permit and that there is no obligation for Japan to submit any additional data since as the IWC’s webpage states “the IWC does not regulate special permit whaling.”⁹⁸ Japan appears in June 2015 to have conceded to provide additional data but not because it is obliged to do so.⁹⁹ But should submitting proposals for scientific whaling such as NEWREP-A to the IWC institutions simply be a matter of diplomatic courtesy or can the IWC institutions help to create a more rationale framework for exercising sovereign rights over natural resources?

The same institutional problems highlighted in the 2005-2014 scientific committee reports that raise questions about the ICRW’s legitimacy are likely to continue to reoccur in the future. If there is a general consensus with the exception of a few persistent objectors that substantive independent scientific review should be the foundation for the approval of these

⁹⁴ Japan’s Whaling Hiatus Sees Meat Stocks Hit 15-year Low, *The Japan Times* (July 19, 2015) (indicating that “inventories at whale meat distributors with large-scale refrigeration or freezer facilities stood at 3,027 tons at the end of August and have since continued falling”, that “Japan plans to import about 1,800 tons of whale meat from Iceland via the Arctic Sea to cope with the declining inventories”, and that there will be “tough conditions in the near-term for wholesalers of whale meat and restaurants serving it.”)

⁹⁵ IWC, ‘2015 Report of the Scientific Committee’ (n. 88).

⁹⁶ IWC, ‘2014 Report of the Scientific Committee, Annex P: Process for the Review of Special Permit Proposals and Research Results from Existing and Completed Permits’, IWC/65/Rep01(2014): Annex P, 09/06/2014.

⁹⁷ ICRW (n. 2) at Schedule, Article 30.

⁹⁸ IWC, Special Permit Whaling, <https://iwc.int/permits>; accessed 15 September 2015.

⁹⁹ Whale Hunt to be Resumed this Year, *The Japan Times* (n. 92).

permits as several of the committee reports have suggested, then it may be time to amend both Article VIII and the IWC Schedule Paragraph 30 to empower the Scientific Committee to issue Article VIII permits on a season by season basis to any State sponsored scientific research entity that requests a permit.

Even though it may take time to achieve this substantial revision to both the treaty and its schedule due to political concerns over ceding sovereign interests to international institutions, these amendments are politically possible. When the ICRW was concluded in 1949, no one would have predicted a multi-year moratorium on commercial whaling imposed under the ICRW. Today, the ICRW has 88 Member States.¹⁰⁰ A decision by the Commission to amend the treaty only requires a simple majority; a decision to change the schedule would require a three-quarters majority vote.¹⁰¹ As previously noted, the vote on the 2014 Resolution on whaling under special permits was a split vote with 35 favorable votes, 25 opposed votes, and 5 abstentions.¹⁰² While it is unclear how 23 other states who did not participate in the vote would have voted on this matter, the existing voting ratio from the 2014 Resolution would be sufficient for a Commission decision to pursue an amendment to the treaty. Based on the discussion involving the 2014 Resolution, at least one block of States, the Buenos Aires Group, might even become the champions for an amendment process for the treaty.¹⁰³

Understandably, a decision to amend the treaty alone may not be a game changer for States such as Japan because Japan would be entitled to reject any amendments to the multilateral treaty and instead continue to comply with the original unamended treaty language.¹⁰⁴ This is a fair critique and a realistic potential outcome. Proceeding to amend the treaty, however, would accurately reflect the existing intent of the majority of ICRW Parties to manage whale resources on the basis of data obtained from scientific research that has been vetted with the support of an international scientific community. The existence of an amended treaty ratified by States who support reform of Article VIII could serve as a strategic tool for some States to persuade other States of the merits of rebuilding a long-term commercial whaling industry

¹⁰⁰ IWC, <https://iwc.int/home>; accessed 1 August 2015.

¹⁰¹ ICRW (n. 2) at Article III(2).

¹⁰² IWC 2014-5 Resolution (n.55).

¹⁰³ *Ibid.*, at p. 16, para. 146 (Argentina, Brazil, Chile, Costa Rica, Ecuador, Mexico, Nicaragua, Panama, Peru and Uruguay opposed scientific whaling and recommended amendments to the treaty so that “special permits cannot be issued unilaterally.”)

¹⁰⁴ Vienna Convention on Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force 1980), Part IV.

based on shared data that is deemed to be highly reliable data.

These amendment proposals are practical from an institutional perspective and should be regarded by States as achieving “good faith” implementation of the object and purpose of the ICRW that was negotiated “to provide for the conservation, development, and optimum utilization of the whale resources.”¹⁰⁵ The purpose of the scientific research permit available under Article VIII is to allow ICRW Parties to collectively consider information about whale stocks so that the Parties will collectively make rational management decisions regarding future harvest allowances for different species in different locations. This is why individual States have an affirmative obligation to “transmit to such body as may be designated by the Commission, in so far as practicable, and at intervals of not more than one year, scientific information available to that Government with respect to whales and whaling.”¹⁰⁶

Judge Sebutinde aptly points out in her separate opinion that because “the scientific research to be conducted under such [Article VIII] permits is intended for the benefit of not only the State issuing the permits but also the International Whaling Commission and the international whaling community as a whole...[t]he discretion afforded by Article VIII...is necessarily limited in scope and character.”¹⁰⁷ What this suggests is that permits for scientific research presently issued by individual States under Article VIII must function to generate credible, high-quality data that can become the basis for collectively defining international commercial harvest limits. Whether data will be ultimately deemed credible and high-quality by the IWC and the international whaling community depends in part on the underlying substantive design of any given research framework. The credibility of the design of a research framework is a decision best left to whale researchers and not politicians.

Article VIII(1) permits are exceptional permits to improve collective knowledge about whale resources in order to make institutionally educated decisions about management. These permits are not issued as part of the system for regulating commercial whaling where States have a direct interest in exercising jurisdictional control over their nationals. Because the information collected from scientific research permits is intended to be shared with the

¹⁰⁵ ICRW, (n. 2) Article V(2).

¹⁰⁶ *Ibid.*, Article VIII(3).

¹⁰⁷ *Whaling in the Antarctic*, Separate Opinion of Judge Sebutinde, (n.1) at para. 4, p. 1.

Commission or a body designated by the Commission, it would be beneficial for the Scientific Committee, the entity most likely to be working with the data to propose catch limits, to take a more active role in the issuance of the final research permits. A proposal to amend the administration of Article VIII permits by giving permitting authority to the Scientific Committee attempts to both honor the object and purpose of the original treaty while simultaneously reflecting existing concerns of a number of ICRW Parties that Article VIII permits have not always been fully vetted by independent experts for scientific rigor.

While the existing language in Article VIII is highly deferential to the power of individual States to issue permits “subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit”, this deferential position does not reflect the viewpoints of at least 35 members of the IWC who have voted more recently for a greater degree of involvement of the Scientific Committee and the Commission in the special permit process.¹⁰⁸ While there is no precedent for permits issued by an international body to an individual state as part of a global administrative state, the whaling regime is an appropriate framework for experimenting with such practices given the negotiated and widely supported moratorium impacting a highly migratory species.¹⁰⁹ One question is whether the existing treaty mechanism of authorizing individual States to unilaterally issue scientific permits should be considered increasingly obsolete in lights of socio-political changes driven by the expansion of globalized communications and fishing fleets.

A number of global conditions have changed since 1946 when States agreed to allow individual States to issue and revoke scientific permits for “any of its nationals” that might favor a new approach beyond the current status quo based on States issuing special permits with limited review and comment from the Scientific Committee. While after World War II, it may have made sense for each State to issues its own scientific permits because of the physical difficulty of coordinating information through post or wire between an intergovernmental organization like the IWC based in England and a State member such as

¹⁰⁸ IWC 2014-5 Resolution (n. 55).

¹⁰⁹ This type of international permitting supported by scientific verification may also be appropriate for other species. *See generally*, A. Telesetsky, ‘Going Once, Going Twice--Sold to the Highest Bidder: Restoring Equity on the High Seas through Centralized High Seas Fish Auctions’, in H. Scheiber and M.S. Kwon (eds.), *Securing the Ocean for the Next Generation* (Law of the Sea Institute Publication, 2013). (Describing the possibility of an internationally centralized mechanism of global auctions for allocating increasingly rare tuna.)

Japan, in 2015, these barrier no longer exist. Decisions on permits can be rapidly disseminated. Reporting can be done easily through electronic means.

In addition, the current approach under Article VIII that favors the nation-state is ripe for potential abuse that would not have been as great of a concern in 1946. The language in Article VIII allows for permits to be issued to “any of its nationals.” Ships have the nationality of the State whose flag they are entitled to fly and are therefore nationals of their flag state.¹¹⁰ Under Article VIII, a permit could be issued to any research vessel that is entitled to fly the flag of the State issuing the permit or to a corporate entity claiming to do “research and development”. Since World War II, “flags of convenience” (FOC) from open registries have become prevalent and these FOC States may unilaterally issue research permits to “nationals” as long as they otherwise comply with the ICRW Schedule. Requesting permits from a FOC State might be strategically pursued by private entities who wish to commercially whale but are located primarily in a State supporting the existing commercial whaling moratorium. FOC States in the context of illegal, unreported, and unregulated fishing (IUU fishing) have notoriously poor enforcement records. It is worth noting that a number of the more recent parties to the ICRW who joined after the moratorium include States that are associated with offering “flags of convenience” including Belize, Cambodia, Panama, and Mongolia who have been implicated in IUU fishing.¹¹¹ These States could authorize research permits that would feed a market for whale meat particularly in States with increasingly limited access to protein resources.

If States are willing to support amendments to Article VIII, the Scientific Committee could be authorized to administer a process for the issuance of scientific permits. This process would be available for any scientific entities requesting permits to take whales. There is no rational reason that a scientific entity engaged in whaling research must be sponsored by a single State as the current system provides. If the Scientific Committee through a panel of independent experts is empowered to issue permits rather than individual States, this

¹¹⁰ United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994) 1833 *UNTS* 396, Article 91.

¹¹¹ IWC, ‘Membership and Contracting Governments’. Available at <https://iwc.int/members>; accessed 18 March 2015; See generally, M. Gianni and W. Simpson, *The Changing Nature of High Seas Fishing: How Flags of Convenience Provide Cover for Illegal, Unreported and Unregulated Fishing* (Australian Department of Agriculture, Fisheries and Forestry, International Transport Workers’ Federation, and WWF International, 2005).

administrative process might improve the transparency and accountability currently associated with whaling research permits. This shift in the issuance of permits from national offices to international organizations may avoid the recurring diplomatic disputes that States such as Japan are engaging in commercial whaling under the guise of a scientific permit.¹¹²

In order to prevent politics from undermining decision-making on the basis of scientific findings by the Scientific Committee, States may also agree to articulate in any amendment a legal standard whereby a scientific permit issued by the Committee will be deemed to be valid unless the Commission can show by a preponderance of the evidence that the Scientific Committee is exercising its authority arbitrarily and capriciously.

While this proposed reform may depoliticize some aspects of Article VIII permits and provide a better framework for determining whether a given scientific program has been reasonably designed and implemented as mandated by the ICJ, it will not be enough to simply reform the practices associated with the issuance of special permits to close the existing faultlines between pro-whaling industry and pro-preservation States. As distasteful as it may be for pro-preservation States, the ICRW is a treaty “for the conservation, development, and optimum utilization of the whale resources.” While there may be different ideas about what constitutes “optimum utilization of the whale resources” particularly in light of ecosystem service discussions over protecting complex marine food chains and top predators, the ICRW was negotiated in 1946 to support the “orderly development of the whaling industry.” Because it is not a preservation treaty *per se* but reflects instead an early effort at sustainable development, the IWC must revisit the stalled Revised Management Schemes to determine how some level of commercial whaling might be resumed that would also address national food security concerns.¹¹³ If it is simply a question of when the

¹¹² See e.g., *Whaling in the Antarctic*, Separate Opinion of Judge Bhandari (n.1) at para. 22, p. 6 and para. 23, p. 6 (“[A] proper reading of the Convention envisages only three exhaustive and mutually exclusive purposes of whaling: (i) scientific research; (ii) commercial enterprise; and (iii) aboriginal subsistence. It is uncontested that aboriginal subsistence whaling is not a live issue in this case. It therefore stands to reason that a finding by this Court that JARPA II is not a programme for purposes of scientific research necessarily leads to the corollary that it is a commercial whaling programme.”)

¹¹³ See generally, IWC, ‘Report of the Revised Management Scheme Expert Drafting Group’, IWC/54/RMS 1, 28/08/08; IWC/65/10 Rev 4 Resolution on Food Security (Submitted by Ghana, Côte d’Ivoire, Mali, Republic of Guinea, Benin), 18/09/14 (Resolving for “Member States to take into account the need for *inter alia*, food and nutrition security, preservation of cultural identity and security of livelihoods when making proposed amendments to the Schedule.”); In 2014, the resolution did not receive consensus at the 2014 meeting but will be revisited in 2015.

moratorium will be lifted rather than whether the moratorium will be lifted, then pro-preservation States may need to endorse an approach that does not rely on a zero sum strategy but perhaps focuses instead on protecting certain key breeding or feeding areas.¹¹⁴

Whaling in the Antarctic puts in sharp relief the conflicts between State parties over the current operation and the future capacity of the ICRW treaty regime to address whales and whaling. While States may not be able to quickly reconcile their divergent interests, something will need to change institutionally at the Commission for the ICRW to be an effective conservation and sustainable development treaty for the 21st century. A key focus for States should be on empowering the Committee to substantively inform decision-making to support the objectives of the ICRW. Otherwise, States can find better uses for their limited resources than propping up a broken treaty regime that neither contributes to long-term conservation of whales nor potential food security.

¹¹⁴ Clapham (n. 30), at p. 241 (Arguing that Japan is likely to pursue a strategy of convincing additional developing countries and small island nations to vote to lift the IWC moratorium and reinstate commercial whaling).