**The Whaling in the Antarctic (Australia v. Japan) Decision:
Giving up the Spear or Refining the Scientific Design?**

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I. Introduction

After learning on 31 March 2014, that the International Court of Justice had voted twelve votes to four¹ to find that Japan was not in compliance with its international obligations under the International Convention to Regulate Whaling,² former Australian Green Party leader Bob Brown called the decision “a whale of win.”³ The Japanese delegation at The Hague tersely indicated that Japan could abide by the Judgment.⁴ Of course, sometimes victories are Pyrrhic and the rigors of commitment to honor an adverse judgment are dependent on what it requires. In this sense, the outcome in the *Whaling in the Antarctic* case is not so straight-forward. In assessing whether the decision was a victory of form over function one needs to consider that Japan can still continue its whaling operations in the North Pacific and has the opportunity to develop a new scientific research plan solicitous of the Court’s concerns in order to resume whaling in Southern Ocean waters.⁵

While the decision may not be as protective of whale populations as some had hoped, this article suggests that the ICJ’s *Whaling in the Antarctic* is a landmark case because it engages two important themes concerning the Court’s exercise of its interpretive powers in light of the object and purpose of a treaty and the appropriate deference to be given to States when a research

design appears unreasonable. This article suggests that the Court may have pioneered new standards and means by which to measure the reasonableness of a scientific research under Article VIII of the Whaling Convention. For countries such as Australia and New Zealand, who appear, based on their position in the Case, to desire a global prohibition on whaling, it may be time to consider a new treaty that is more exclusively protective of whale populations and their habitat. The 1949 Whaling Convention is stuck in another time. In particular, the ability of a State to opt out of the Schedule under Articles V and VIII is contrary to necessary non-consensus decision-making found in other contemporary multilateral environmental agreements. Even if whaling States initially remain outside a new legal order for whales, this may be preferable to a legal regime where national values conflict with international rights.

II. The Dispute Before the Court

Australia and Japan have been longstanding members of the Whaling Convention. In recent years, they have been engaged in a strident debate over whether it is scientifically reasonable for a government to operate whale research programs that lethally take large number of whales. For decades Australia has urged that Japan cease its whaling operations in the Southern Ocean because they were a “charade of scientific whaling” cloaked “in the labcoat of science.”⁶ In the eyes of Australia, Japan was in violation of both the general terms of the 1982 commercial whaling moratorium⁷ and the specific prohibition on whaling in the Southern Ocean Sanctuary⁸ both in place pursuant to the Whaling Convention.

When Japan failed to respond to diplomatic overtures, Australia, relying on Article 36(2) “optional clause” compulsory jurisdiction, requested that the International Court decide the dispute over whether the second phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) complied with the terms of the Whaling Convention.

Specifically, Australia challenged whether the permits issued by the Institute for Cetacean Research were “for the purposes of scientific research.”⁹

Australia was concerned that JARPA II, like JARPA I before, was a thinly disguised effort to commercially whale. Specifically, Australia observed that Japan took 8000 minke whales from 1987-2005 under JARPA I, which was close to a 900% increase in capture from the previous 30 years of whaling from 1957-1987 when there was no moratorium.¹⁰ As executed between 2005-2010, the JARPA II program permitted Japanese whalers to take proportionally more whales. Over the course of 5 years, 3101 minke whales were killed.¹¹ Australia asserted that the whale meat from all of Japan’s permit programs has been commercially sold.¹²

When it filed its application, Australia was particularly concerned about the viability of the whale stocks in the Southern Ocean region including minke, fin, and humpback whales. For minke whales, data seems to suggest that minke whale populations have declined in the last couple decades and further depletion was possible.¹³ Because little is known about the population of fin whales and Japan permitted a take of 50 fin whales annually, the Australian application proposed the need to apply the precautionary principle since these whales have been listed as endangered and remain severely depleted from their historic levels of abundance.¹⁴ The Australian application noted that Japan had assigned itself an annual quota of 50 humpback whales but had not taken any of these whales under the JARPA II program.¹⁵ Even though humpback whales appear to be recovering in some Antarctic areas, Australia was concerned that Japan continued to list humpback whales as a research species because research suggests that a population of highly depleted humpback whales from Oceania regularly migrate to the Antarctic regions to feed. It was viewed that any take of humpback whales found geographically in

Antarctic from the mixed highly depleted Oceania stocks and the less depleted Antarctic breeding stocks could be highly detrimental to the Oceania stocks.¹⁶

Accepting a degree of uncertainty in the numbers of various species of Antarctic whales, the majority of the International Whaling Commission (IWC) offered three resolutions to enhance the objectives and purposes of the Convention which included “safeguarding for future generations the great natural resources represented by the whale stocks.”¹⁷ In 2002, the majority of the Commission urged the application of the precautionary approach in establishing marine sanctuaries for conservation purposes.¹⁸ In 2005, the Commission adopted a resolution that “strongly urges the Government of Japan to withdraw its JARPA II proposal or to revise it so that any information needed to meet the stated objectives of the proposal is obtained using non-lethal means.”¹⁹ In 2007, the Commission adopted a second resolution to that “calls upon the Government of Japan to suspend indefinitely the lethal aspects of JARPA II conducted with the Southern Ocean Whale Sanctuary.”²⁰ In spite of these strongly worded resolutions, Japan defended its issuance of special permits for whaling research involving lethal methods. In 2006, the IWC by one vote reversed its approach to curtailing global commercial whaling and noted that “the position of some members that are opposed to the resumption of commercial whaling on a sustainable basis irrespective of the status of whale stocks is contrary to the object and purpose” of the Convention.²¹ The resolution stated that the Commission in upholding the multi-year moratorium that was intended to be only a temporary measure had “failed to meet its obligations under the terms of the ICRW” and called for “normalizing the functions of the IWC.”²² The scope of the pro- and anti-whaling resolutions reflects the political difficulties confronted by the IWC in implementing the Convention.

The remedies sought by Australia from the International Court included a declaration that Japanese whaling in the Southern Ocean was in breach of its international obligations and an order that Japan cease the implementation of JARPA II, revoke any permits allowing for activities under JARPA II, and provide assurances to the global community that it will not operate under JARPA II or any similar program until the program complies with international law.²³

III. The Decision

On 31 March 2014, the International Court issued its judgment. International Court decisions, of course, do not form precedents, but the *Whaling Case* decision provides several interesting insights into how the Court approaches its work, which may influence future decisions by the Court as well as reviews of scientific research programs by the IWC. The decision also raises questions about the continued relevancy of the Whaling Convention in 2014. This article will discuss two significant legal themes that are tied to the Court's interpretive approach to Article VIII of the Whaling Convention. The first is the application of a reasonableness test to decide whether JARPA II reflects a program designed "for purposes of scientific research" and the second is the relationship between the reasonableness test and State authority in implementing the Whaling Convention.

A. Court's Interpretive Approach - Introducing a Reasonableness Test

After accepting jurisdiction over the parties,²⁴ the International Court focused its attention on the narrow issue involving the interpretation of the phrase "for purposes of scientific research" under Article VIII of the Convention. Specifically, the Court needed to answer whether JARPA II is a special permit program "for purposes of scientific research"?

In spite of the moratorium on commercial whaling initiated in 1982 for “protection stocks” by the Schedule, the Convention provided a number of means by which Parties might continue to whale under specific circumstances.²⁵ The Convention contains a traditional “opt out” clause in Article V, which allows States to object to any amendments to regulatory provisions in the Schedule and thereby escape their application. Japan lodged an objection to the ban on commercial whaling within the Southern Ocean Sanctuary,²⁶ as it applied to Antarctic minke whale stocks.²⁷ In addition, Japan provided scientific whaling take permits to the Institute of Cetacean Research for the take of fin whales and humpback whales. Article VIII allows States to whale “for purposes of scientific research”. In particular, Article VIII provides 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.²⁸

While this language hardly qualifies as “plain language”, there has been a general understanding among States that parties to the Convention may pursue lethal marine scientific research. What has been less well understood by States are the precise parameters of the extent of state-sanctioned whaling that qualify as “for purposes of scientific research.”

The Court approached this central question as an interpretive issue. While the Court did not explicitly indicate that it was relying on Article 31 of the Vienna Convention on the Law of Treaties,²⁹ it is a fair assumption that it followed the interpretive guidance of the Vienna Convention to evaluate disputed language “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.”³⁰ On this basis, the Court dismisses the relevancy of various IWC resolutions in providing an interpretive

context for Article VIII as subsequent agreements or subsequent practice³¹ and thus limited itself to the Convention language itself.

What the Court does with the ordinary meaning of the text is a little more surprising. It takes the treaty phrase “for the purposes of scientific research” and explores separately the meanings of “scientific research” and “for the purposes of.” It is not initially clear why the Court chose this approach. One clue comes from what appears to be a nod to Australia, which separately analyzed the terms in its Memorial with the seeming agreement of Japan who “did not contest this approach.”³² While the Court agreed with Australia that it needed to read the two elements of “scientific research” and “for the purposes of” separately, the Court also understood that the two elements would ultimately need to be read together to make decisions about individual projects like JARPA II.

The Court’s decision initially to treat the phrase as two separate components seems to make a difference in terms of acknowledging that a project can involve “scientific research” but not be “for the purposes of scientific research.” Using the two-pronged approach, the Court ultimately declines to define “scientific research,” even though it finds that JARPA II “can broadly be characterized as ‘scientific research’”.³³ The Court simply finds that “the JARPA II activities involving the lethal sampling of whales can broadly be characterized as scientific research “and “[t]here is no need therefore, in the context of this case, to examine generally the concept of ‘scientific research.’”³⁴ This is a somewhat unsatisfactory result since the Court had been called upon to interpret these words within the Article VIII phrase in light of their ordinary meaning and context. Both Australia and Japan proffered theories about what constitutes scientific research. While the Australian definition is more comprehensive,³⁵ the Japanese understanding of the term shares a number of the same qualities.³⁶ The Court could have defined

scientific research in a *de minimis* manner as the testing of questions or hypotheses to further knowledge while avoiding adverse effects on whale populations. While the Court seems to have implicitly accepted this as the common definition of scientific research and characterized JARPA II as scientific research,³⁷ the identification of JARPA II as scientific research does not seem an obvious result based on the explanation of the program articulated by the government sponsored Institute for Cetacean Research.³⁸ One question that the might have asked is whether scientific research for the purposes of the Whaling Convention should actively avoid adverse effects on whale populations. The Institute in its publically available materials indicated it has four main objectives for JARPA II:

- i) the estimation of biological parameters useful for the stock management of Antarctic minke whales; ii) elucidation of the role of whales in the Antarctic marine ecosystem; iii) elucidation of the effect of environmental changes on cetaceans and iv) elucidation of the stock structure of Antarctic minke whales.³⁹

For purposes of the Court, this articulation of research objectives fit within the categories of research identified by the IWC's Scientific Committee and thus was adequate for establishing JARPA II as a program of scientific research. Based on the Cetacean Institute's explanation, however, it is not clear that there was a well-defined scientific questions or hypotheses being tested except possibly the "krill surplus hypothesis" for explaining why minke whale populations expanded and are now potentially contracting.⁴⁰ This lack of hypotheses and questions embedded in JARPA II raises question about whether data collection alone should be deemed scientific research under Article VIII.⁴¹

Reading between the lines of the Cetacean Institute's materials, one potential scientific question in addition to the "krill hypothesis theory" appears to be why did the age of sexual maturity for minke whales increase through the 1970s and then decrease.⁴² If the Court viewed scientific research as requiring researchers to avoid adverse effects on whale population as

agreed to by Japan and Australia, the JARPA II project seems flawed as a scientific research project because it would permanently remove a portion of the potentially decreasing population of whales capable of reproduction in order to provide information on sexual maturity age and pregnancy rates.

The Court should have been more willing to define scientific research and decide whether JARPA II reflects the type of scientific research contemplated by the Whaling Convention.⁴³ Taking numerous whales of potential reproductive age from various species in order to answer questions about biological parameters and abundance arguably departs from the idea shared by both Australia and Japan that “scientific research” should ask research questions that “must avoid an adverse effect on whale stocks”.⁴⁴ The Court does not offer any opinion on whether JARPA II’s research plan has an adverse effect on whale stocks but instead repeats Japan’s assertion that it used conservative estimates on minke whale abundance and that “the planned take of each species is too small to have any negative effect.”⁴⁵ While, the Court did not need to provide an exegesis of scientific research that can be applied beyond the Convention, it seems to have been incumbent upon the Court to determine what scientific research means within the context of the Whaling Convention. Thus, the Court’s paraphrasing of the Japanese position regarding the “effect on whale stocks” without further analysis is disappointing.

The Court took a different approach by introducing a reasonableness test and focuses on the meaning of the phrase “for the purposes of” in Article VIII. The Court does not, however, seek a definition, rather, the Court takes a novel analytical approach in a case involving an international environmental dispute by indicating that it will decide whether “the elements of a programme’s design and implementation are reasonable in relation to its stated scientific objective.”⁴⁶ In order to determine reasonableness, the Court decided to examine

decisions regarding the use of lethal methods; 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 time frame associated with a programme; the programme's scientific output; and the degree to which a programme co-ordinates its activities with related research projects.⁴⁷

This is not the first case where the Court approaches its analysis on the basis of applying a court articulated “reasonableness” standard to specific facts. In 1982, the International Court indicated that whether a maritime boundary delimitation is reasonable depends on “its particular circumstance” which requires the Court to review specific facts.⁴⁸ Subsequent courts and tribunals have sought to identify special circumstances that would allow for a maritime boundary to be deemed equitable and reasonable.⁴⁹ In 1986, in *Nicaragua v. United States*, the International Court found it necessary to assess whether the risk run by “... ‘essential security interests’ is reasonable.”⁵⁰ In 2008, in a dispute between Singapore and Malaysia over the sovereignty of maritime features, the International Court concluded using a factual record identifying a specific rock as a well-known maritime feature within the boundaries of a particular historical Kingdom that “it is reasonable to assume that Johor discovered Pedra Branca/Pulau Batu Puteh before any other State did.”⁵¹ In a recent Case involving navigational rights between Costa Rica and Nicaragua, the Court refused to make a finding of the “unreasonableness” of disproportionate impacts of a Nicaraguan regulation on Costa Rican parties without “concrete and specific facts.”⁵²

On many levels, the idea of “reasonableness” as a fact-driven test makes sense as a tool of justice. Judge Shahabuddeen in his Separate Opinion in the 1982 *Jan Mayen Case*, suggested that the pursuit of “reasonableness” by the Court is about examining the “realities of a situation, as it affects all the Parties” through an “individualization of justice”⁵³ But, he also sent a cautionary message about “reasonableness” as a standard; citing Julius Stone, Judge

Shahabuddeen observed that reasonableness as a standard is “predicated on fact-value complexes, not on mere facts.”⁵⁴ This key observation is not always easily acknowledged by courts as part of their interpretive responsibilities.⁵⁵

While there is nothing new about applying reasonableness standards to resolve factual disputes, the Court’s choice in the *Whaling Case* to define the phrase “for purposes of” as a trigger for determining whether a given scientific research design is “reasonable” is curious. While the Court indicated that it would not offer “a general definition of ‘scientific research,’” under the Whaling Convention, it appears to be willing to decide how reasonable a State’s scientific design is for achieving a specific set of scientific objectives. It is not easy to reconcile a refusal to define scientific research in specific Convention language and a willingness to decide about a specific research design on the basis of reasonableness.

It is possible that the Court opted to take this approach so that it would not have to make any decisions about whether or not Japan had operated in good faith in designating its research objectives. Instead, the Court could decide whether specific verifiable aspects of the research plan would meet the proposed research plan objectives. Here the Court in its subsequent analysis, emphasizes in particular the difference between the “target sample sizes and the actual take,” which is a factor that is not open to multiple quantitative or qualitative interpretation. Japan indicated a need to lethally take between 800-1000 whales⁵⁶ because that number of whales was essential to meet Japan’s research objectives of monitoring the Antarctic ecosystem, modeling competition between whale species, understanding temporal and spatial changes in whale stocks, and improving management for Antarctic minke whale stocks.⁵⁷ In reality, the Japanese over the research period took on average 450 minke whales.⁵⁸ The discrepancy and the fact that Japan did not provide any reasons for the discrepancy may have suggested to the Court that JARPA II

may not have been primarily designed “for purposes of” conducting scientific research since 450 whales should be insufficient to arrive at research conclusions.⁵⁹

In examining JARPA II using a reasonableness approach, the Court indicated, at least implicitly, some of the parameters of what constitutes “reasonable” scientific research for the purposes of the Whaling Convention. Any State that intends to issue permits under Article VIII must justify that its program only uses the necessary amount of lethal sampling to achieve its scientific research objectives, that it has both a temporal and spatial rationale and methodology for creating a sampling size, that it actually uses the results from its lethal sampling, and that the lethal take permits are part of related research projects.⁶⁰ These specific factors reinforce what seems to be a leaning on the part of the court to restrict national discretion under Article VIII, which will be discussed below.

Judge Owada, a national of Japan, took issue with the majority on what he believed was a misapprehension of the object and purpose of the Whaling Convention and with the Court’s method of interpreting and applying the Convention. For Judge Owada, the object and purpose was to be gleaned from the “state of affairs” leading to the negotiation of the Whaling Convention. Citing statements of Chairman Kellogg in the *travaux préparatoires*, Judge Owada viewed it as clear that “the object and purpose ... is to pursue the goal of achieving the twin purposes of the sustainability of the maximum sustainable yield ... of the stocks ... and the viability of the whaling industry.”⁶¹ For Judge Owada, the “proper and effective conservation” mentioned in the Preamble to the Convention does not in anyway support “a total permanent ban on the catch of whales.”⁶² By failing to appreciate the object and purpose of the Whaling Convention “in its proper perspective”, Judge Owada believed the Court failed to appreciate and “to engage in analysing the essential characteristics of the regime”.⁶³ In turn, without a proper

appreciation of the essential characteristics of the regime, the Court failed to properly interpret and apply Article VIII.⁶⁴

The Court understood the object and purpose of the Convention to be the “conservation of all species of whales while allowing for their sustainable exploitation.”⁶⁵ The Court further understood that no matter what amendments or recommendations were made to prioritize conservation over exploitation, the Convention had a dual purpose.⁶⁶ Curiously, the Court noted that “programmes for purposes of scientific research...may pursue an aim other than either conservation or sustainable exploitation of whale stocks.”⁶⁷ Moreover, the Court does not follow this dual object and purposes approach to interpret Article VIII. Here the Court indicates that: “Guidelines issued by the IWC for the review of scientific permit proposals by the Scientific Committee” can be used to identify what qualifies as a “purpose” of scientific research under the Convention.⁶⁸

Even though the Court states that it will take neither a restrictive nor an expansive interpretation of Article VIII, the Judgment suggests that the Court has both expanded what qualifies as science by relying upon the IWC Scientific Committee documents and restricted the ability of States to make final decisions about whether a given proposed research activity qualifies or not as activities “for the purposes of scientific research.” The Court’s reading, which seems to acknowledge the possibility of a reasonable lethal take program, may still be antithetical for some States either for ecological reasons or ethical reasons. If certain States do not want to adhere to the existing scientific research standard based on the Convention’s dual object and purpose, then it may be time to negotiate a new treaty framework.

B. Court’s Limited Deference to States and a Shift in Burden of Proof

With the introduction of a reasonableness test for the design and implementation of a scientific research programme, the decision of the Court appears to curb the discretion of States to act under Article VIII. While States can decide the objectives of their research projects, they may find themselves limited in how they can achieve these objectives based on a test of reasonableness.

This approach to reading rights and obligations under Article VIII can be analogized to the introduction of the *Chevron* analysis for treaties. The *Chevron* doctrine is a U.S. administrative law doctrine that provides court-deference to regulatory agency interpretations of congressional enabling acts when language is ambiguous.⁶⁹ For purposes of analogy, if one replaces U.S. domestic regulatory agencies with the various implementation bodies of States (e.g., Ministry of Fisheries) and the congressional acts with treaties, then it is possible to follow a *Chevron*-like two step analysis. Under the first Step, the Court identifies some degree of ambiguity in the phrase “for the purpose of scientific research” and inquires whether States have the authority to interpret what constitutes appropriate projects under Article VIII. In the *Whaling Case* the International Court has indicated that States have broad discretion in deciding what research outcome they will be pursuing. As long as a particular programme will “foster scientific knowledge”, then the State can be considered under Article VIII to have the authority to issue a permit for a lethal take. According to the Judgment, there are many scientific research programmes that might trigger Article VIII powers ranging from conservation of whale stocks, sustainable exploitation of whale stocks, conservation of other living resources, conservation of the whale’s ecosystem, or other projects.⁷⁰ While there are reasons to take issue with this seemingly expansive interpretation of Article VIII, the approach of the Court at this step of the analysis is one of deference to State research objectives.

In the second step of the U.S. administrative law doctrine, after courts have determined that the regulatory agency has the authority to act under a particular statute, courts ask whether the given

interpretation of an agency is permissible or reasonable. By analogy, this is largely what the International Court did when it asked whether the “design and implementation of JARPA II [as a national interpretation of Article VIII] are reasonable in relation to achieving its stated objectives.”⁷¹ The Court evaluated whether to give deference to a scientific research plan by systematically examining a number of reasonableness factors.

In creating the reasonableness test, the International Court ultimately shifts the burden of proof from the applicant having to prove that the respondent acted in bad faith to the respondent having to demonstrate that its approach to the design and implementation of its research plan was reasonable. What this shift means is that the International Court has indicated a restricted degree of deference for States’ interpretation of what constitutes an appropriate research plan. The Court has identified some parameters for what might constitute arbitrary and capricious activities in future research plans under the Whaling Convention.

In practice, the reasonableness test may translate into increased activity for the IWC Scientific Committee. While the Scientific Committee is not empowered to revoke State permits, the Committee’s future advice on permits may become the standard for what is considered reasonable in terms of the scale of a programme’s use of lethal sampling, sample sizes and time-frame. Article VIII(3) of the Whaling Convention provides that States are expected to provide scientific information to the Committee at least annually when research involves the killing, taking and treating of whales. This has not been adhered to strictly. For example, Japan in the first research phase of JARPA II covering almost seven years of whaling only provided two peer-reviewed papers that did not relate to the research objectives and several other miscellaneous papers such as cruise reports and evaluation of feasibility studies.⁷² After the *Whaling Case*, the IWC Scientific

Committee may find itself both making more requests for scientific output and potentially even evaluating the quality of the output generated under a research plan.

IV. Conclusion

The *Whaling in the Southern Ocean Case* indicates the willingness of the International Court to test the implementation of State scientific programs with environmental impacts based on each program's reasonableness in meeting scientific research objectives. It sheds light on the approach that the International Court may take in future cases involving scientific research questions. It may have wider implications, however, because it would seem that all State programs, scientific or otherwise, might be subject to the same test. It is not clear why the approach of the Court should be limited exclusively to programs that involve scientific research.

The success of Australia and New Zealand was gratifying for anti-whaling champions that had pushed hard for a long time for a challenge under the Whaling Convention. But, just how conclusive or lasting this success will be is an open question. Media reports suggest that Australia and New Zealand under pressure from their citizens want Japan to cease whaling permanently, not because of legal reasons per se, but because it is their view that it is ethically right to protect these large marine mammals from any exploitation.⁷³ This was not a remedy that could have been ordered by the International Court. Indeed, Article VIII of the Whaling Convention allows, under the right scientific circumstances and justifications, scientific research whaling by permit. The Court, for its part, has signaled how a State may lawfully carry out scientific research whaling so as to comply with Article VIII.

If Australia and New Zealand have no intention of authorizing commercial whaling and remain ethically and morally opposed to all whaling, then it may be time for these States to leave the Whaling Convention. This would allow them, and other like-minded States, to develop a

legal framework that meets the perceived evolving needs of the international community to protect whales as keystone species in ocean ecosystems.

Already the Whaling Convention is evolving in ways that its founders never intended. For example, guidelines under the Convention indicate the possibility of the Convention being applied to support programs with the objective to “improve the conservation and management of other living marine resources” and “test[ing] hypotheses not directly related to the management of living marine resources.”⁷⁴ This seems to be a large departure from the object and purpose of the Whaling Convention as a collective effort to conserve and sustainably exploit whales.

Some might argue that leaving one treaty regime to create another is counter-productive. Would exiting the Whaling Convention result in Japan pursuing full-scale commercial whaling? With the global decline in marine fish stocks, would food-insecure States begin to ply the ocean in search of protein? These are possible outcomes. Yet, it is somewhat disingenuous for States that have no intention of reviving commercial whaling to continue to participate in an international regime that is about both conservation and sustainable exploitation. If most nations value whales as fellow planet travelers, then the most effective means of ending activities that seem to be commercial whaling is not to shame a nation for exercising powers under a historic treaty but to create a new regime focused on the conservation and restoration of whale populations and their habitat.

If times have changed as much as they appear to have changed with the shift from Moby Dick, a whale to be feared, to Shamu, a whale to be adored by generations of children, then it may be time to abandon the 1946 Whaling Convention and create a treaty that works with current international environmental and social norms. If the Whaling Convention is an outdated treaty with its narrow efforts to conserve whale stocks and manage whaling, then it may be time

to draft something new that focuses on the larger issues of ocean governance and management that pose a far greater threat to the long-term survival of whales than the Japanese whaling fleet does.

¹ *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, International Court of Justice (31 March 2014) available at <www.icj-cij.org/docket/files/148/18136.pdf>.

² International Convention for the Regulation of Whaling, 2 December 1946, 161 *U.N.T.S.* 74. Australia ratified the Whaling Convention on 1 December 1947, and it entered into force for Australia on 10 November 1948. Japan accepted the Treaty on 21 April 1951, and it entered into force for Japan on the same day. According to Article 1 of the Convention, the Schedule is incorporated as amended into the Convention. Both the Convention and Schedule are available at <iwc.int/convention>.

³ “Australia Wins Whaling Case against Japan in The Hague,” (April 1, 2014) at <www.news.com.au/national/australia-wins-whaling-case-against-japan-in-the-hague/story-fncynjr2-1226870210553>.

⁴ *Id.*

⁵ Terrence McCoy, “Japan Plans to Resume Controversial Whale Hunt Next Year,” *The Washington Post* (April 15, 2014) at <www.washingtonpost.com/news/morning-mix/wp/2014/04/15/japan-plans-to-resume-controversial-whale-hunt-next-year/>.

⁶ “Australia wins whaling case,” *supra* note 3, citing former Environmental Minister Peter Garrett who helped to organize the case and Australian officials in Canberra. See also: *Application Instituting Proceedings, Whaling in the Antarctic (Australia v. Japan)*, 31 May 2010, para. 30-34, at <www.icj-cij.org/docket/files/148/15951.pdf>.

⁷ Schedule to the Whaling Convention, *supra* note 2, para. 10(e): “catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985-1986 pelagic seasons and thereafter shall be zero.”

⁸ *Ibid.*, para. 6(b): “commercial whaling, whether by pelagic operations or from land stations, is prohibited in a region designated as the Southern Ocean Sanctuary ... prohibition applies irrespective of the conservation status of baleen and toothed whale stocks in this Sanctuary, as may from time to time be determined by the Commission.”

In 2008 the Federal Court of Australia issued an injunction against Japanese whalers operating in the Australian Whale Sanctuary within a purported Exclusive Economic Zone (EEZ) off the Australian Antarctic Territory. *Humane Society International, Inc. v. Kyodo Senpaku Kaisha, Ltd.* [2008] FCA 3 (15 January 2008). The Australian government, however, took no action to compel compliance with the injunction because of the contentious nature of its Antarctic EEZ.

⁹ *Application Instituting Proceedings*, supra note 6, para. 9.

¹⁰ *Ibid.*, para. 10.

¹¹ *Ibid.*, para 12.

¹² *Ibid.*, para 10. Japan’s position has been that the sale is provided for by the Whaling Convention, supra note 2, Art. VIII(2) concerning the avoidance of waste.

¹³ *Ibid.*, para. 14. The Third Circumpolar Survey suggested lower population numbers of minke whales than previous reports. Chair's Report of the 57th Annual International Whaling Commission Meeting, (2005) Section 10.2.1.3 Commission Discussions and Action Arising, Resolution JARPA II available at http://luna.pos.to/whale/iwc_chair05_10.html

¹⁴ *Ibid.*, para. 15.

¹⁵ *Ibid.*, para. 12.

¹⁶ *Ibid.*, para. 16.

¹⁷ Whaling Convention, supra note 2, Preamble.

¹⁸ International Whaling Commission, (IWC) Resolution 2002-1: “Guidelines to the Scientific Committee on the Sanctuary Review Process,” at

<archive.iwc.int/pages/search.php?search=!collection72&k=>.

¹⁹ IWC Resolution 2005-1, “Resolution on JARPA II,” at

<archive.iwc.int/pages/search.php?search=!collection72&k=>.

²⁰ IWC Res. 2007-1, “Resolution on JARPA,” at

<archive.iwc.int/pages/search.php?search=!collection72&k=>.

²¹ IWC Res. 2006-1, “St. Kitts and Nevis Declaration,” at

<archive.iwc.int/pages/search.php?search=!collection72&k=>

²² *Id.*

²³ *Application Instituting Proceedings*, supra note 6, para. 40.

²⁴ *Decision*, supra note 1, p. 22, para. 41.

²⁵ Schedule to the Whaling Convention, supra note 2, para. 10(c). Japan initially objected to this paragraph but subsequently withdrew their objection and agreed to be bound starting on: May 1, 1987 with respect to commercial pelagic whaling; October 1, 1987 with respect to commercial coastal whaling for minke and Bryde’s whales; and April 1, 1988 with respect to commercial coastal sperm whaling.

²⁶ *Ibid.*, para. 7(b).

²⁷ *Ibid.*, footnote to paragraph 7(b).

Japan has argued, through the state-sponsored Institute for Cetacean Research (ICR), that the creation of the Southern Ocean Sanctuary does not comply with the Whaling Convention. In response to questions about their program, the Institute stated:

The IWC Scientific Committee has not recommended any necessity for the Southern Ocean Sanctuary and there are no scientific grounds for its establishment. In 1992, the

IWC completed a new way to calculate safe catch quotas (Revised Management Procedure), so that it became theoretically possible to resume commercial whaling. The fact of the matter is that the Sanctuary was set up as the result of the anti-whaling nations' (they consisted a majority in the IWC) determination to oppose commercial whaling come what may. The Convention clearly stipulates that whale management measures must be based on scientific findings, which in fact makes the Sanctuary against the law.

Institute for Cetacean Research, Question and Answers, “The Second Phase of Japan’s Whale Research Program Under Specific Permit in the Antarctic,” answer to question 28, at <www.icswhale.org/QandA2.html>.

²⁸ Whaling Convention, *supra* note 2, Article VIII(1).

²⁹ Vienna Convention on Law of the Treaties, 1155 *U.N.T.S.* 331, Article 31. As part of its analysis, the Court assumes correctly that Article 31 is customary international law. See: *Case Concerning Kasikili Sedudu Island (Botswana/Namibia)*, [1999] *I.C.J. Rep.* 1999, p. 1059 para. 18.

³⁰ The context refers a treaty’s text, preamble, and annexes as well as any additional agreement concluded between parties in connection with the treaty.

³¹ *Decision*, *supra* note 1, p. 32, para. 83.

³² *Ibid.*, p. 29, para. 70 and see: *Whaling in the Antarctic (Australia v. Japan)*, Memorial of Australia, Volume 1, pp. 155-156, para. 4.38 , at <www.icj-cij.org/docket/files/148/17382.pdf>.

³³ *Ibid.*, p. 41, para. 127.

³⁴ *Ibid.*

³⁵ See: *ibid.*, p. 30, para. 74, scientific research has “defined and achievable objectives... that contribute to knowledge”, “appropriate methods”, “peer review” and “avoidance of adverse effects on stock.”

³⁶ *Ibid.*, p. 30, para. 77: “[B]oth Parties agreed that scientific research should proceed on the basis of particular questions, which could take the form of a hypothesis...” and p. 32, para. 85 “Japan and New Zealand agree with Australia that scientific research must avoid an adverse effect on whale stocks.”

³⁷ *Ibid.*, p. 65, para. 227.

³⁸ See: Institute of Cetacean Research, *supra* note 27

³⁹ *Ibid.* See also: *Decision* *supra* note 1, p. 38, para. 113.

⁴⁰ *Decision* *supra* note 1, p. 41, para. 116.

⁴¹ Australia Memorial, *supra* note 32, p. 242, para. 5.106.

⁴² Institute of Cetacean Research, *supra* note 27.

⁴³ One reason for the Court’s hesitation may have been the difficulty the definition of marine scientific research has posed under the U.N. Convention on the Law of the Sea, 1833 *U.N.T.S.* 397, and the live issue that has occurred between China and the United States. See: Moritaka Hayashi, “Military Activities in The Exclusive Economic Zones of Foreign States,” 27 *International Journal of Marine and Coastal Law* 795, 796-99 (2012).

⁴⁴ *Decision* *supra* note 1, p. 32, para. 85.

⁴⁵ *Ibid.*, p. 41, para. 126. Arguably, the Court did not engage the “adverse effect” issue further because it observed that: “Australia does not maintain that meeting the target sample sizes would have an adverse effect on the relevant stocks, so this criterion does not appear to be of particular significance in this case.” *Ibid.*, at p. 32, para. 85.

The Australian Memorial does not directly address the target sample sizes as part of its adversity argument but makes a different argument suggesting that a take of whales either because of whaling or research may have potential adverse effects of the whale population

because of the Allee effect on population dynamics. This argument is not addressed by the Court.

Australian Memorial, *supra* note 32, p. 241, para. 5.103.

⁴⁶ *Ibid.*, p. 33, para. 88.

⁴⁷ *Ibid.*

⁴⁸ *Case Concerning the Continental Shelf (Tunisia / Libyan Arab Jamahiriya)* [1982] *I.C.J. Rep.*, p. 18 para. 72: “It is clear that what is reasonable and equitable in any given case must depend on its particular circumstance”. This reasonableness balancing is also common in international human rights jurisprudence, especially in applying the European system’s margin of appreciation. See, e.g., *Case of Brežec v. Croatia* (Application no. 7177/10, Judgment), Eur.Ct.H.R. (First Section)(18 July 2013), para. 45. See further: Luzius Wildhaber, “A Constitutional Future for the European Court of Human Rights,” 23 *Human Rights Law Journal* 161, 162 (2002).

⁴⁹ See generally: *Maritime Delimitation in the Black Sea (Romania/Ukraine)*, [2009] *I.C.J. Rep.* p. 61. The Court adopts a three-step delimitation analysis to determine whether the provisional delimitation lines are reasonable by asking questions of whether there are specific geographical circumstances that need to be taken into account or whether a given line is inequitably disproportionate because of particular geographical considerations.

⁵⁰ *Nicaragua v. United States*, Merits, [1986] *I.C.J. Rep.*, p. 117, para. 224.

⁵¹ *Case Concerning Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, [2008] *I.C.J. Rep.*, p. 14, para. 28.

⁵² *Dispute Regarding Navigational and Related Rights (Costa Rica. v. Nicaragua)*, [2009] *I.C.J. Rep.*, p. 214, para. 101.

⁵³ *Maritime Delimitation in the Area Between Greenland and Jan Mayen*, (Denmark v. Norway) [1993] *I.C.J. Rep.*, p.195 Separate Opinion of Judge Shahabuddeen.

⁵⁴ *Ibid.*

⁵⁵ See also: *Case Concerning the Barcelona Traction, Light and Power Company*, (Belgium v. Spain), Preliminary Objections [1964] *I.C.J. Rep.*, p. 152, Dissenting Opinion of Judge Armand-Ugon who commented on how to distinguish between a reasonable and unreasonable outcome on suspension of international obligations.

When does such a suspension cease to be reasonable? The difficulty lies in the choice of units of measurement. What is the unit for what is reasonable? To what bases for comparison or judgment must resort be made? The frontier between what is reasonable and what is not reasonable must always remain arbitrary for the reason that between the one situation and the other there is no abrupt transition.

⁵⁶ *Decision*, supra note 1, p. 54, para. 182. Such activities would appear to fall within the broad concept of scientific research. *Ibid.*, pp. 30-32, at paras. 73-86.

⁵⁷ *Ibid.*, p. 38, para. 113.

⁵⁸ *Ibid.*, p. 59, para. 202.

⁵⁹ It is possible that the discrepancy between proposed takes and actual takes does not reflect an inherent flaws in the JARPA II research plan. One possible source of the discrepancy may have been the impact of the Sea Shepherd organization's ongoing physical interventions direct against Japan's efforts to implement JARPA II. Assuming for purposes of this footnote that Sea Shepherd did diminish the actual take, this suggests that the "reasonableness" test can be problematic in application.

The Court may have been better served, as suggested in this article, by first answering the question of what scientific research means in the Convention. If some of the proposed research under JARPA II failed to qualify as scientific research, then the Court may have arrived at

different conclusions regarding whether JARPA II was properly executed. The lethal take of 450 whales in total may have been sufficient for testing the “krill surplus hypothesis.” To make this decision, the Court could have relied upon expert testimony.

⁶⁰ *Decision*, supra note 1, p. 33, para. 88.

⁶¹ Dissenting Opinion of Judge Owada, p. 3, para. 9.

⁶² *Ibid.*

⁶³ *Ibid.*, p. 3, paras. 9-12.

⁶⁴ *Ibid.*, pp. 6-8, at paras. 19-25.

⁶⁵ *Decision*, supra note 1, p. 26, para. 56.

⁶⁶ *Ibid.*, p. 27, para. 56.

⁶⁷ *Ibid.*, p. 27, para. 58.

⁶⁸ *Ibid.*, p. 27, para. 58

⁶⁹ *Chevron v. NRDC*, 467 U.S. 837 (1984). The *Chevron* analysis conducted by U.S. Federal courts involves a two step process. At step one, where the statutory language is “plain”, the court will interpret the language. When the statutory language is not “plain”, the court asks whether an agency is empowered to interpret statutory language. If so, the court will proceed to step two and ask whether the agency’s construction of the statute is reasonable enough to be permissible.

⁷⁰ *Decision*, supra note 1, p. 27, para. 58.

⁷¹ *Ibid.*, p. 35, para. 98.

⁷² *Ibid.*, p. 63, para. 219.

⁷³ See e.g., Justin McCurry, Australia Censures Japan for “Scientific Whaling”, *The Guardian*, (June 26, 2013) at <http://www.theguardian.com/environment/2013/jun/26/australia-japan->

[whaling](#) (Quoting William Campbell, Australia's Agent to the ICJ "You don't kill 935 whales in a year to conduct scientific research. You don't even need to kill one whale to conduct scientific research.")

⁷⁴ *Decision*, supra note 1, p. 27, para. 58.