

RIGHTING THE SHIP?: AUSTRALIA, NEW ZEALAND AND JAPAN AT THE ICJ AND THE BARBED ISSUE OF 'SCIENTIFIC WHALING'

GERRY NAGTZAAM*

I. INTRODUCTION

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

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

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

II. THE INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING 1946

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

* Senior Lecturer, Faculty of Law Monash University. My thanks to Kim Lye Tan and Jon Rubin for their editing and insights on this paper.

¹ Anthony D'amato and Sudhir K Chopra, 'Whales: Their Emerging Right to Life' (1991) 85 *The American Journal of International Law* 21, 32.

agreements in 1931 and 1937,² and came into force on November 10 1948.³ The Convention's most important achievement was creating a new global supra-authority that was tasked with regulating the global whaling industries' standards and activities.⁴ In particular, the IWC was authorised to issue binding regulations on its members in order to regulate and protect global whale stocks.⁵ The organisation was effectively granted the ability to:

fix protected and unprotected species; open and close seasons; open and close areas, including sanctuaries; limitations on the size of species taken; methods and intensity of whaling, including maximum catch; types of gear and equipment used; methods of measuring whales taken; the requirement that returns be made of catch; and statistical and other biological information.⁶

Since its inception the IWC has been labeled 'dysfunctional' due to the apparently irreconcilable competing philosophical and political values within its ranks that continues to this day. On the one hand members like Japan argue that a conservationist approach needs to be followed to allow whaling to be undertaken. On the other, a coalition of states are opposed to all forms of whaling except 'aboriginal/subsistence whaling.'⁷ The ICRW Preamble established that the fledgling IWC goals should be both the protection of whales against 'overfishing' but also required the IWC to manage their ongoing exploitation.⁸ A close reading of the negotiations shows that the convention's framers were primarily concerned with ensuring the ongoing orderly development of a global whaling industry. Protection of its new charges was at best a secondary goal and one that could not be allowed to interfere with the ongoing commercial whale hunt.⁹

The IWC to this day operates under a majority-voting system that requires a three-quarter majority of attending member-states to vote to authorize changes to the organisation's rules.¹⁰ To assure passage by the whaling states, the new convention allowed disagreeing states the right to opt out of any decision by merely filing an objection within ninety days. Not surprisingly, such a loophole, particularly in the IWC's nascent period, allowed dissenting members to effectively evade any IWC directive they disagreed with to the point that the organisation was rendered ineffective in achieving one of its goals: to protect whale stocks.¹¹

²See Ronald Mitchell, *International Environmental Agreements (IEAs) Database Project* (2014). Available at <http://iea.uoregon.edu/page.php?query=base_agreement_list&where=start&LineageEQ=International%20Whaling>

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

⁴ International Whaling Commission, *International Commission on Whaling: First Report of the Commission* (International Whaling Commission, 1950) Vol 1; Randall R Reeves, 'The Origins and Character of 'Aboriginal Subsistence' Whaling: A Global Review' (2002) 32 *Mammal Review* 71.

⁵ Gregory Rose and George Paleokrassis, 'Compliance with International Environmental Obligations: A Case Study of the International Whaling Commission' in James Cameron, Jacob Werksman and Peter Roderick (eds), *Improving Compliance with International Environmental Law* (Earthscan, 1996) 29.

⁶ D'amato and Chopra, above n 1, 32.

⁷ Dan Goodman, 'The 'Future of the IWC': Why the Initiative to Save the International Whaling Commission Failed' (2011) 14(1) *Journal of International Wildlife Law & Policy* 63, 64.

⁸ John Vogler, *The Global Commons: Environmental and Technological Governance*, (John Wiley and Sons, 2nd ed, 2000) 49.

⁹ Rose and Paleokrassis, above n 5, 29.

¹⁰ Vogler, above n 8, 51.

¹¹ Sebastian Oberthur, 'The International Convention for the Regulation of Whaling: From over-Exploitation to Total Preservation,' In *Yearbook on International Cooperation on Environment and Development 1998/99*, Bergesen, H. O.; Parmann, G.; Thommessen, O. B. (Eds), London, UK: Earthscan Publications Ltd, 30.

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

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

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

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

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

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

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

¹² M Adrienne Ruffle, 'Resurrecting the International Whaling Commission: Suggestions to Strengthen the Conservation Effort' (2002) 27 *Brooklyn Journal of International Law* 2.

¹³ Rose and Paleokrassis, above n 5, 157.

¹⁴ *International Convention for the Regulation of Whaling*, signed 2 December 1946, [1948] ATS 18, 10 November 1948) Article VIII(1). Available at: <<http://iwc.int/private/downloads/1r2jdhu5xtuswvs0ocw04wgcw/convention.pdf>>

¹⁵ Natalie Klein, ‘Whales and Tuna: The Past and Future of Litigation between Australia and Japan’ (2009) 21 *Georgetown International Environmental Law Review* 143, 175.

¹⁶ *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, Judgment, (31 March, 2014) (unreported) 24. Available at <<http://www.icj-cij.org/docket/files/148/18136.pdf>>.

¹⁷ Alana Preston, ‘Eco-terrorism in the Southern Ocean: A Dangerous Byproduct of the Tangled Web of International Whaling Conventions and Treaties’ (2012) 34 *Whittier Law Review* 117, 127.

¹⁸ At the 1982 IWC meeting in Brighton, U.K. the at the time thirty-seven members of the IWC were present voted twenty-five to seven with five abstentions to end commercial whaling. States were granted a grace period till 1986 to lessen the potential economic impact in line with the IWC Preamble. D'Amato and Chopra, ‘Whales: Their Emerging Right to Life,’ p. 37. Paragraph 10 was amended to read: ‘Notwithstanding the other provisions of paragraph 10, catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a comprehensive assessment

the U.S. threatened to reduce the Japanese fishing quota within US waters if the objection was not withdrawn. Bowing to the economic threat, Japan withdrew its objection.¹⁹

To the fury of non-whaling states and ENGOs, Japan has continued whaling under the rubric of 'scientific research' that they have defined as utilizing lethal means. Since 1987, Japan has taken over 10,000 whales despite widespread condemnation that their actions were both illegal and undermining the global moratorium given the high number culled annually.²⁰ Conversely, Japan argued that it awards itself special whaling permits which permit the killing of whales in order to better understand the whale life cycle and behaviors.²¹ The purported scientific program concentrated strongly on the stomach contents of whales, which are claimed to compete for fish with Japanese fishermen in the region.²² Critics of the program have continually countered this argument by raising that the meat from the slaughtered whales was sold commercially in Japan; essentially the scientific program constituted commercial whaling in disguise.²³

However Japan argued that under Article 8 (2) of the ICRW whales taken under special permits shall be, as so far as practicable, be processed and the proceeds dealt with according to the discretion of the initiating state.²⁴ To carry out its scientific research objectives Japan developed the Japan Whale Research Program under Special Permit in the Antarctic (JARPA I) in 1987 and then the JARPA II program that started in 2005.²⁵ Japan's JARPA program targeted the only remaining abundant Antarctic species, the minke whale (approximately 400 per annum). The second program, JARPA II, proposed taking up approximately 935 minke whales, 50 fin whales, and 50 humpbacks each year.²⁶

In response to Japan's increased use of special permits, anti-whaling member-states and ENGOs have fought for decades to strengthen the regulations governing the issuance of

of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits (Paragraph 10(e), IWC Schedule, Feb. 1983. 'Annual Report of the International Whaling Commission 33,' p. 40.

¹⁹ Petrice R Flowers, 'Shaping State Identity: International Law and Whaling in Japan' (2008) 23 *Pacific Focus* 103.

²⁰ Phillip J Clapham et al, 'The Whaling Issue: Conservation, Confusion, and Casuistry' (2007) 31 *Marine Policy* 314, 315. For example, in the 2012 whaling season Japan caught 103 pelagic whales under scientific permit: International Whaling Commission, *Catches Taken: Special Permit* (IWC, 2014). Available at <http://iwc.int/table_permit>.

²¹ Gregory Rose, 'International Law and the Status of Cetaceans' in Mark P Simmonds and Judith D Hutchinson (eds), *The Conservation of Whales and Dolphins: Science and Practice* (Wiley and Sons, 1996) 23, 38–39.

²² Andrew Darby, 'International Court of Justice Orders Japan to End Antarctic Whaling' *The Age*, (online) 2 April 2014 <<http://www.theage.com.au/federal-politics/political-news/international-court-of-justice-orders-japan-to-end-antarctic-whaling-20140401-35wb0.html>>.

²³ Anna Holligan, 'Japan Accepts Antarctic Whaling Ban', *BBC News* (online) 31 March 2014 <<http://www.bbc.com/news/world-asia-26825216>>.

²⁴ *International Convention for the Regulation of Whaling*, signed 2 December 1946, [1948] ATS 18, 10 November 1948) Article VIII. Available at: <<http://iwc.int/private/downloads/1r2jdhu5xtuswsw0ocw04wgcw/convention.pdf>>

²⁵ Government of Japan, *Plan for the Second Phase of the Japanese Whale Research Programme Under Special Permit in the Antarctic (JARPA II)-Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources* (Government of Japan, 2005) Available at <<http://www.icrwhale.org/eng/SC57O1.pdf>>; *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, Judgment, (31 March, 2014) (unreported) 24. Available at <<http://www.icj-cij.org/docket/files/148/18136.pdf>>.

²⁶ Darby, above n 22.

individual states' special permits with the view to make scientific whaling non-lethal.²⁷ At the Fifty-fifth Annual Meeting the IWC members:

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

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

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

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

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

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

²⁸ International Whaling Commission, *Annual Report of the International Whaling Commission* (International Whaling Commission, Volume 54, 2002) Summary of Decisions.

²⁹ Rose, above n 21, 38.

³⁰ International Whaling Commission, *Annual Report of the International Whaling Commission* (International Whaling Commission, Volume 40, 1990) 36.

³¹ International Whaling Commission, *Annual Report of the International Whaling Commission* (International Whaling Commission, Volume 45, 1995) 29.

³² Darby, above n 22; Donald R. Rothwell, 'The Antarctic Whaling case: Litigation in the International Court and the Role Played by NGOs', (2013) 3(2) *The Polar Journal* 399, 401.

³³ Darby, above n 22. The concept of legally testing the validity of Japan's scientific whaling programmes was not new. In 1998 the Humane Society of the United States had sought a legal opinion on the matter and in 2005 the International Fund for Animal Welfare had also sourced legal opinions. Despite these reports offering a potential avenue of success by citing an 'abuse of right' by the Japanese government the majority view of commentators was that the suit would likely fail. Shirley V. Scott, 'Australia's decision to initiate Whaling in the Antarctic: winning the case versus resolving the dispute', (2013) 368(1) *Australian Journal of International Affairs* 1, 5.

called a 'bet the whales' approach in which a legal loss would confirm and entrench the legality of Japan's research whaling.³⁴ However, given the ongoing deadlock at the IWC Australia, despite such concerns, was determined to tackle ending scientific whaling at another forum, one potentially more conducive to their arguments than the moribund IWC.

IV. THE INTERNATIONAL COURT OF JUSTICE PROCEEDINGS

Following a pre-election promise by the Australian Prime Minister Kevin Rudd to stop Japan's 'scientific whaling' program, the Australian Government initiated legal proceedings before the ICJ in May 2010.³⁵ The Australian application criticized:

Japan's continued pursuit of a large-scale program of whaling under the Second Phase of its Japanese Whale Research Program under Special Permit in the Antarctic ('JARPA II'), in breach of obligations assumed by Japan under the International Convention for the Regulation of Whaling..., as well as its other international obligations for the preservation of marine mammals and the marine environment.³⁶

Australia (and New Zealand)³⁷ requested the ICJ to determine that Japan, in operating its JARPA II scientific programme, was in breach of its international obligations and order Japan to:

- (a) cease implementation of JARPA II;
- (b) revoke any authorizations, permits or licenses allowing the activities which are the subject of this application to be undertaken; and
- (c) provide assurances and guarantees that it will not take any further action under the JARPA II or any similar program until such program has been brought into conformity with its obligations under international law.³⁸

Specifically Australia argued in its Memorial that Japan, by carrying out JARPA II in the Southern Ocean, was in breach of its international obligations in that it had not adhered to the zero catch limit imposed by the global moratorium. Further that Japan should not kill fin whales in the IWC mandated Southern Ocean Sanctuary and should not utilize factory ships to hunt certain species of whales (except minke whales). Australia requested the ICJ determine that JARPA II should not be considered scientific whaling as per Article VIII and that the program should be concluded and any authorizations allowing the program should be terminated.³⁹

³⁴ Ibid.

³⁵ Jacquelin Magnay, 'Japan Ordered to End Whaling' *The Australian* (online), 5 January 2015 <<http://www.theaustralian.com.au/national-affairs/policy/japan-ordered-to-end-whaling/story-fn59nm2j-1226870372371>>.

³⁶ *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, Judgment, (31 March, 2014) (unreported) 9, above n 16. Australia was referencing the Convention on Biological Diversity, opened for signature 5 June 1992 [1993] ATS 32, (entered into force 29 December 1993). Available at <<http://www.cbd.int/convention/text/>>; Convention on International Trade in Endangered Species of Wild Flora and Fauna, opened for signature 3 March 1973 [1976] ATS 29, (entered into force 1 July 1975). Available at <<http://www.cites.org/eng/disc/text.php>>

³⁷ On 20 November 2012, New Zealand, pursuant to Article 63, paragraph 2, of the Statute, sought to be allowed the right to intervene as a non-party to the proceedings. Since there were no objections the Court did not deem it necessary to hold hearings on the question of their admissibility. Ibid 10.

³⁸ Ibid 13.

³⁹ Ibid 14.

On the 31st of March 2014, the International Court of Justice handed down its decision on the matter. Below is a critical analysis of the key reasons for decision that focuses on the judgment's potential impacts in the further issuance of special permits, the IWC and future international environmental litigation before the ICJ.

A. *The Application of a 'Standard of Review' Procedural Approach*

Once the initial question of whether the ICJ had jurisdiction over the matter was dispensed with,⁴⁰ the Court considered Japan's argument that it was entitled to a 'margin of appreciation'⁴¹ when issuing special permits since that particular state was best placed to evaluate any proposal proffered. Japan in its counter-memorial had argued that Article VIII(1) of the ICRW gave it the authority to issue special permits (and the conditions applied) and both the JARPA I and JARPA II programmes were within this 'margin of appreciation'. Thus the Japanese government maintained it had an unalloyed ability to grant itself special permits subject to the procedural requirements of Article VIII of the ICRW. The Japanese claimed that simply diverging from global standards is not, in itself, evidence of bad faith nor an improper exercise of discretion.⁴²

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

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

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

⁴² *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, Judgment, (31 March, 2014) (unreported) 417, above n 16.

⁴³ Cymie Payne, 'Whaling at the ICJ-Oral Proceedings in Australia v Japan' (IntLawGrrils, 2013). Available at <<http://ilg2.org/2013/07/10/whaling-at-the-icj-oral-proceedings-in-australia-v-japan/>>.

VIII, paragraph 1.⁴⁴ Granting a special permit should however, adhere to an ‘objective’ standard which, according to New Zealand, should not be decided by that state.⁴⁵

Further, Australia and New Zealand argued that various IWC Resolutions⁴⁶ demonstrated subsequent acceptance of these provisions as per Article 31 Vienna Convention on the Law of Treaties.⁴⁷ Neither party ultimately prevailed but rather the Court adopted a ‘wisdom of Solomon’ approach to the issue. The ICJ held that Article VIII does give latitude for member-states to reject special permit requests or determine the settings under which a permit is given. However, ‘whether the killing, taking and treating of whales pursuant to a requested special permit is for purposes of scientific research cannot depend simply on that State’s perception’.⁴⁸ The Court determined that ICW members have a fundamental duty to cooperate with the IWC and give ‘due regard’ to its recommendations. Thus while non-lethal scientific approach resolutions did not affect the requirements of Article VIII, Japan needed to adduce evidence of significant consideration of the relevant recommendations.⁴⁹

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

⁴⁴ *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, Judgment, (31 March, 2014) (unreported) 28. Available at <<http://www.icj-cij.org/docket/files/148/18136.pdf>>.

⁴⁵ Ibid.

⁴⁶ For example, Resolution 1995-9 which recommends that the taking of whales: ‘should only be permitted in exceptional circumstances where the questions address critically important issues which cannot be answered by the analysis of existing data and/or use of non-lethal research techniques.’ International Whaling Commission, http://iwc.int/private/downloads/d51hufqw6s08ow8kw8okwg4wc/IWCRES47_1995.pdf

⁴⁷ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) Article 31.

⁴⁸ *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, Judgment, (31 March, 2014) (unreported) 28, above n 16.

⁴⁹ Richard Caddell, ‘Science Friction: Antarctic Research Whaling and the International Court of Justice’ (*forthcoming*, June 2014) *Journal of Environmental Law* 1. 9.

⁵⁰ Geoffrey Palmer, ‘A victory for Whales’ (2014) *New Zealand Law Journal* 124, 124.

⁵¹ *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, Judgment, (31 March, 2014) (unreported) 29, above n 16.

⁵² Palmer, above n 50.

⁵³ Caroline W. Foster. ‘Motivations and Methodologies: Was Japan’s Whaling Programme for Purposes of Scientific Research?’ *Whaling in the Antarctic: The ICJ Judgment and its Implications Symposium at Kobe University* (31 May 2014) 1, 5.

⁵⁴ Ibid 8.

However, the Court noted that ‘in applying the above standard of review, it is not called upon to resolve matters of scientific or whaling policy’.⁵⁵ Rather the Court observed that there were differing views within global society as to the appropriateness of whaling and it was not for the Court to resolve these issues here. The ICJ limited itself here, ‘only to ascertain whether the special permits granted in relation to JARPA II fall within the scope of Article VIII, paragraph 1, of the ICRW’ rather than investigate and determine the broader issues raised.⁵⁶ Thus by utilizing a standard of review approach the Court did not deem it necessary to directly determine Japan’s motivations in creating and operating the JARPA II programme under the ‘for purposes of’ requirement.⁵⁷

As Foster points out utilizing a standard of review approach had never before been undertaken by the ICJ.⁵⁸ Palmer argues that the standard of review approach adopted by the ICJ is both ‘demanding and rigorous’.⁵⁹ Traditionally international courts have struggled with the complexities of scientific disputes and undertaking a ‘standard of review’ approach could potentially allow a method for future courts to determine a state’s reasons for its actions.⁶⁰ If the ICJ is willing to adopt such a test when examining other multi-lateral international environmental conventions, states may find their capacity for globally acknowledged anti-environmental action curtailed more than they had thought.⁶¹ It will require states to demonstrate in a concrete way that they have given sufficient weight to the majority stance even if they are ultimately not required to adhere to that position. As regards the whaling regime, such a stance will require Japan to give due consideration to IWC resolutions (even if not bound by them) and also will reinforce the important role scientific review should have within the IWC.⁶² Caddell thus maintains that the court has successfully balanced: ‘robust procedural obligations...and a clearer requirement to objectively justify such a programme where it conflicts with recommended international standards’.⁶³

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

The opponents of Japan’s scientific whaling programme have always viewed it as merely a pretext to either gather information to restart commercial whaling or to continue commercial whaling via other methods and that it should not be considered a legitimate scientific endeavor.⁶⁴ Critics point out that the number of whales killed mirror closely Japan’s pre-moratorium figures and that the vessels utilized by the JARPA programmes are those that hunted them in the commercial era.⁶⁵ The scientific validity of the scientific whaling programme has been repeatedly challenged by preservationist states like Australia at the IWC to no avail.⁶⁶ Over the lifetime of the IWC, the organization has passed over thirty resolution

⁵⁵ *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, Judgment, (31 March, 2014) (unreported) 29, above n 16.

⁵⁶ *Ibid.*

⁵⁷ Foster, above n 53, 11.

⁵⁸ *Ibid.* 5.

⁵⁹ Palmer, above n 50, 125.

⁶⁰ Foster, above n 53, 3.

⁶¹ Palmer, above n 50, 125.

⁶² Caddell, above n 49, 9.

⁶³ *Ibid.*

⁶⁴ Rothwell, above n 32, 436.

⁶⁵ Rebecca Lee, ‘The History and Effectiveness of the Legal Regime Governing Whaling, The problems Faced By the International Whaling Commission and its Future, Focusing on Recent IWC Proposals’ (2011) 37(2) *Dublin Legal Review Quarterly* 37, 50-51.

⁶⁶ Maya Park, ‘Japanese Scientific Whaling in Antarctica: Is Australia Attempting the Impossible?’, (2011) 9(2) *New Zealand Journal of Public and International Law* 193, 196-7.

maintaining that it should only be carried out in exceptional circumstances; to meet vital research needs, be consistent with both the Scientific Committee criteria and the IWC states conservation policies, and be carried out non-lethally.⁶⁷

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

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

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

C. *The Use of Lethal Methods*

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

⁶⁷ Christina Voigt, 'A Precautionary Approach to the Whaling Convention: Will the ICJ Challenge the Legality of Scientific Whaling?' in I. L. Backer, O. K. Fauchald, and C. Voigt (eds) *Pro Natura - Festschrift til Hans Christian Bugge* (University of Oslo, 2012) 564; The Japanese Institute of Cetacean Research, *Japan's Whale Research in the Antarctic – Backgrounder I* (Japanese Institute of Cetacean Research. Available at <<http://www.icrwhale.org/eng/background.pdf>>.

⁶⁸ *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, Judgment, (31 March, 2014) (unreported) 29-30, above n 16.

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

⁷⁰ Ibid.

⁷¹ Ibid 32.

⁷² Ibid 32-33.

⁷³ Voigt, above n 66, 565.

⁷⁴ Ibid.

example Resolution 1986-2 which recommended when issuing special permits states need to allow whether, ‘the objectives of the research are not practically and scientifically feasible through non-lethal research techniques.’⁷⁵ Australia further maintained that such resolutions should inform how the ICJ interprets Article VIII since they should be considered, ‘subsequent agreement between the parties regarding the interpretation of the treaty’ and ‘subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’, as per subparagraphs (a) and (b), of paragraph 3 of Article 31 of the Vienna Convention on the Law of Treaties.⁷⁶

Japan disagreed with the Australian position that lethal means can only be utilized if non-lethal options are not possible arguing that Article VIII expressly grants permits for the killing of whales which must thus contemplate utilizing lethal means. Japan contended that it only uses lethal options when necessary and in line with scientific policy (not from legal limitations inherent in the Article). In regards to IWC Recommendations, Japan accepted that the IWC can make such recommendations, but due to them not being of a binding nature, need only give them due consideration.⁷⁷

The ICJ observed that both side’s experts conceded that, as a matter of scientific opinion, lethal means *can* be a part of scientific research. However, the task of the ICJ here was not, in their view to review the scientific conclusions posed, but to interpret the IWC provisions.⁷⁸ In the ICJ’s opinion both Australia and New Zealand had exaggerated the legal importance of the recommendatory resolutions and Guidelines on which they sought to rely.⁷⁹

Critics like Helen Clarke, New Zealand’s onetime Prime Minister, point to the selling of whale meat in Japan to bolster their case that it is a commercial activity. Proponents of the programme maintain that whether the whale byproduct is sold to defray costs is nothing to do with whether JARPA I and JARPA II are justifiable forms of scientific research.⁸⁰ Australia’s argued before the court that selling whale meat was causing the special permit issued to fall outside of the relevant section. However, the ICJ held that the fact that JARPA II has a component of selling whale meat to fund the programme does not, taken alone, cause a special permit to fall outside of the ambit of the relevant section. Thus the sale of whale meat, as part of the Japanese scientific whaling programmes, was allowed and the monies could be utilized to fund ongoing research since such activities were not outside the ambit of Article VIII.⁸¹ However, the court noted that other factors to could be scrutinized to determine if the whales being taken were for other than scientific research, such as the scale of the killing being greater than that needed to achieve the programme’s stated aims.⁸²

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

⁷⁵ *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, Judgment, (31 March, 2014) (unreported) 31, above n 16.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid 32.

⁸⁰ Lee, above n 64, 50.

⁸¹ Ibid 32.

⁸² *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, Judgment, (31 March, 2014) (unreported) 34, above n 16.

are reasonable in relation to achieving the stated research objectives'.⁸³ The Court argued that the individual actor's motivations, which may include a desire to exceed the stated scientific research parameters, does not prevent a finding that the programme meets the purposes of Article VIII. However, such intentions cannot be used to justify a larger than needed lethal programme. The ICJ determined that, '[T]he research objectives alone must be sufficient to justify the programme as designed and implemented.'⁸⁴ Utilizing this approach the ICJ held that JARPA II, despite involving whale killing, can be determined 'scientific research'. However, the ICJ outlined that the test to be applied in this case was an:

Examination of the evidence with respect to JARPA II will focus on whether the killing, taking and treating of whales in pursuance of JARPA II is *for purposes of scientific* research and thus may be authorized by special permits granted under Article VIII, paragraph 1, of the Convention.⁸⁵

Japan maintained it only uses lethality to meet the programs objectives and that lethal options are integral to JARPA II since the two first objectives of the programmes can only be met by information derived from the whales' internal organs and stomach contents. Australia argued that Japan has demonstrated an 'unbending commitment to lethal take' and that the programme 'JARPA II is premised on the killing of whales'.⁸⁶ Both Japanese whaling programmes, it maintained, were a pretext to continue commercial whaling. Australia contended that there are more effective ways to obtain desired scientific information, premised on non-lethal means (for example, biopsy tagging) using improved technology.⁸⁷

The ICJ Judges determined that lethal means are not unreasonable given the research aims of JARPA II. However, that programme has become more widespread regarding lethal sampling of Antarctic minke whales and now includes two new whale species. Japan argues this expansion is necessary to fulfill the research aims of JARPA II. The Court was not convinced by this position, believing that: 'the target sample sizes in JARPA II are not reasonable in relation to achieving the programme's objectives.'⁸⁸

The design flaws inherent in the JARPA II programme needed to be contemplated in view of its application. Firstly, humpback whales have been culled but Japan cited only non-scientific reasons for this. Secondly, the hunting of fin whales was only a small part of the annual number that the JARPA II Research Plan recommended. Thirdly, the actual number of minke whales killed has been far lower than the annual target established except for one whaling season. Further, Japan did not adequately explain to the Court's satisfaction how these research aims should be considered suitable given the choice to use six-year and 12-year research periods for differing whale species combined with Japan's apparent decision to abandon the lethal sampling of humpback whales entirely and to take only minimal numbers of fin whales. Several of JARPA II's other characteristics such as its open-ended time frame, its minimal scientific output and the absence of meaningful co-operation between JARPA II and other related research projects signified that the programme should not be considered 'scientific research' under Article VIII, paragraph 1.⁸⁹

⁸³ Ibid 35.

⁸⁴ Ibid.

⁸⁵ Ibid 41–42.

⁸⁶ Ibid 42.

⁸⁷ Ibid.

⁸⁸ Ibid 64.

⁸⁹ Ibid 65. The Court noted that during the first research phase of the JARPA II (2005-2006 to 2010-2011) Japan could only reference two peer-reviewed papers that have arisen from the programme. Unfortunately for the Japanese position, the papers in question did not relate to the JARPA II programme's outlined aims, but rather

The ICJ stated that the Parties had conceded that non-lethal means could not be utilized to inspect internal organs and stomach contents and the Court accepted that therefore, for at least part of the information desired by Japanese scientists, non-lethal means were not suitable. The use of lethal options by JARPA II personnel was not unreasonable but it was still required to look carefully at why Japan uses deadly options as part of the programme.⁹⁰ Thus, the ICJ felt compelled to ask whether Japan could meet the stated aims of JARPA II by utilizing non-lethal means.⁹¹

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

The ICJ determined that there are three reasons why JARPA II should have examined the potential of non-lethal means to reduce the planned scale of the programme. Firstly, IWC resolutions and guidelines request member-states to determine whether research aims can be realized using non-lethal options and Japan has acknowledged that it is under an obligation to give 'due regard' to such proclamations. Secondly, Japan has also conceded that, on scientific grounds, it does not utilize lethal options more than it considers necessary and further, non-lethal options are not possible in all situations. The Court pointed out that this implies that some form of examination of lethal options needs to be carried out to determine if they are being utilized to a larger extent than needed to fulfill the programme's goals. Lastly, Australia's experts had alluded to major progress in the scope of non-lethal research methods over the past two decades and that any whaling programme considering utilizing lethal means should critically analyze such advances when designing a programme.⁹²

Problematically for Japan, there is no evidence of Japan carrying out feasibility studies of non-lethal methods, either in setting the parameters of the JARPA II sample sizes or, latterly, in setting the same annual quotas.⁹³ Any use of lethal options by JARPA II the ICJ thought needed to be evaluated within the context of the court believing that lethal options should only be used on a scale to achieve the required aims.⁹⁴ Japan had not explained to the Court why the minke whale take during the 'feasibility' phase (first two years) of JARPA II was not set to 440 minke whales taken (the number taken during the final year of the first JARPA programme), but rather was increased to 853 minke whales and ten fin whales. Thus the JARPA II programme started with increased numbers of whales killed yet with a comparable research methodology (e.g. studying ear plugs to determine age at death) but without receiving any feedback from the IWC Scientific Committee about the efficacy of JARPA. Such an oversight (and the launch date of JARPA II) the Court believed demonstrated that the programme was not driven by 'strictly scientific considerations' but rather lent weight to Australia's contention that Japan's actions

were based on the data collected from the initial two-year feasibility study and comprise only seven and two minke whales caught. Japan attempted to bolster its case by citing three scientific conference presentations and eight papers presented to the Scientific Committee. The scientific validity of this material was assessed by the Court as being of, at best, questionable value. Six of the papers were merely JARPA II cruise reports, one of the two remaining papers was an assessment of the JARPA II feasibility study and the other was part of the programme's non-lethal photo identification of blue whales. Given that JARPA II has been in operation since 2005 and 3,600 minke whales have been culled, the scientific validity of the output remains minimal. Ibid 63.

⁹⁰ Ibid 43.

⁹¹ Ibid.

⁹² Ibid 43–44.

⁹³ Ibid 44–45.

⁹⁴ Ibid 45.

in creating JARPA and JARPA II could be better explained as an attempt to merely continue whaling.⁹⁵

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

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

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

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

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

⁹⁵ Ibid 47–48.

⁹⁶ Ibid 51–52.

⁹⁷ Ibid 56.

⁹⁸ Ibid.

⁹⁹ Ibid 57.

¹⁰⁰ Ibid 58.

¹⁰¹ Ibid 60.

¹⁰² Ibid 61.

¹⁰³ Ibid 62.

Japan's ongoing reliance on the first two JARPA II objectives to justify its cull numbers, despite the incongruity between the actual numbers taken and set, combined with the admission Japan can render significant scientific results from killing less whales also undermined casting JARPA II as a scientific endeavor. The Court concluded that the target cull rates are 'larger than are reasonable' to achieve the programme's stated aims. It noted that the actual numbers of fin and humpback whales taken appears to be a question more suited to an interpretation of political and logistical considerations being paramount. Such a conclusion the Court believed further weakened the supposed connection between JARPA II's research aims and its sample cull numbers, particularly the Japanese decision to utilize lethal methods on minke whales in relatively large numbers.¹⁰⁴

E. *Is Scientific whaling commercial whaling in disguise?*

Anti-whaling states have long charged that Japan's scientific research programme is '*commercial whaling in disguise*' or being carried out with a view for providing evidence of rebounding whale stocks to justify overturning the commercial moratorium.¹⁰⁵ The Court here proceeded on the assumption that the current Japanese whaling programme fell outside of Article VIII, paragraph 1, (excepting the issue of aboriginal subsistence whaling), and was subject to the three Schedule provisions raised by Australia. This conclusion derived from the Court's interpretation of the ICRW and thus should be applied to any special permit issued under Article VIII, paragraph 1. Consequently, the Court deemed it unnecessary to consider whether JARPA II could potentially be considered commercial whaling.¹⁰⁶

From 2005-14 Japan set catch limits above zero for three species (850 for minke whales, 50 for fin whales and 50 for humpback whales). Since the Court ruled that all whaling carried out, with the exception of aboriginal subsistence whaling) is subject to paragraph 10(e) of the Schedule, it logically flows that Japan has not adhered to its obligations under paragraph 10(e) in each of the years JARPA II has operated, 'because those permits have set catch limits higher than zero'.¹⁰⁷

As to the issue of factory ships, the ICRW defines such ships as one, 'in which or on which whales are treated either wholly or in part' and defines a 'whale catcher' a ship, 'used for the purpose of hunting, taking, towing, holding on to, or scouting for whales' (Article II, paragraphs, 1 and 3). Again given the Courts position that all whaling carried out that cannot fit under Article VIII (other than aboriginal subsistence whaling) is subject to paragraph 10(d) of the Schedule and thus Japan has not adhered to its obligations under paragraph 10(d) in each whaling season JARPA II was active.¹⁰⁸

¹⁰⁴ Ibid They further noted that, given the open-ended time frame of JARPA II and noted that, as regards scientific research a, 'time frame with intermediary targets' would be more suitable. Ibid. 63.

¹⁰⁵ Lee, above n 64, 436.

¹⁰⁶ *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, Judgment, (31 March, 2014) (unreported) 66, above n 16.

¹⁰⁷ Ibid 67.

¹⁰⁸ Ibid; The factory ship moratorium, paragraph 10 (d) provides: 'Notwithstanding the other provisions of paragraph 10, there shall be a moratorium on the taking, killing and treating of whales, except minke whales, by factory ships or whale catchers attached to factory ships. This moratorium applies to sperm whales, killer whales and baleen whales, except minke whales.' *International Convention for the Regulation of Whaling 1946* (62 Stat. 1716) 7.

Since JARPA II had operated within the Southern Ocean Sanctuary borders, paragraph 7(b) did not apply to minke whales in relation to Japan since Japan objected to the paragraph. However, since Japan had killed fin whales under the JARPA II rubric in some whaling seasons and the Judges had decreed that all whaling that did not fit within Article VIII (other than aboriginal subsistence whaling), it was subject to paragraph 7(b) of the Schedule with Japan not adhering to its obligations under paragraph 7(b).¹⁰⁹

The ICJ issued an order that: 'Japan shall revoke any extant authorization, permit or licence to kill, take or treat whales in relation to JARPA II, and refrain from granting any further permits under Article VIII, paragraph 1, of the Convention, in pursuance of that programme'.¹¹⁰ The Judges did not issue the additional remedy sought by Australia to refrain from special permit whaling not for scientific research since all IWC member-states are already under such an obligation.¹¹¹

F. Responses to the Ruling

International Court of Justice rulings are binding and are not subject to appeal.¹¹² Although sovereign states can and have ignored them previously, both Japan and Australia had pledged prior to the proceedings to abide by the Court's decision.¹¹³ After the decision was handed down Japan stated it respected international law and would abide by the Hague's decision.¹¹⁴ However, Japan also added it, 'regrets and is deeply disappointed by the decision.'¹¹⁵

In Australia, the reaction to the verdict by the government and conservationist groups was to proclaim that a great victory had been achieved.¹¹⁶ The former Environment Minister Peter Garrett, who helped launch the initial legal action stated he was 'overjoyed' by the finding stating: '...It means we won't see harpoons in the southern Ocean - we certainly shouldn't see them down there any longer.'¹¹⁷ The Shadow Attorney-General Mark Dreyfus, who while in government led Australia's legal challenge in the Hague, said he was 'thrilled' at the decision arguing that: '[T]his decision...can't but have some effect on whaling in other parts of the world,' he said...'It will add to pressure on ... [the] small number of countries who continue

¹⁰⁹ *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, Judgment, (31 March, 2014) (unreported) 28, above n 68.

¹¹⁰ Ibid.

¹¹¹ Ibid 70; The Court saw no need to order the additional remedy requested by Australia, which would require Japan to refrain from authorizing or implementing any special permit whaling which is not for purposes of scientific research within the meaning of Article VIII. That obligation already applies to all States parties. Ibid.

¹¹² Toby Sterling, 'Japan's Controversial Whaling Program Suspended By World Court' *Huffington Post* (online), 31 March 2014 <http://www.huffingtonpost.com/2014/03/31/japan-whaling-world-court_n_5061042.html>.

¹¹³ Ibid.

¹¹⁴ Nic MacBean, 'Japanese Whaling: What Next?' *ABC News* (online), 31 March 2014. Available at <<http://www.abc.net.au/news/2014-03-31/japanese-whaling-international-court-justice-what-next/5357472>>;

Tokyo's agent at the court, Koji Tsuruoka, said: 'As a state that respects the rule of law, the order of international law and as a responsible member of the global community, Japan will abide by the decision of the court.' Ibid.

¹¹⁵ Holligan, above n 23.

¹¹⁶ Mark Kenny and Andrew Darby, 'Japan Disappointed but Conservationists Cheer over ICJ's Whaling Ruling' *The Sydney Morning Herald* (online), 4 February 2014 <<http://www.smh.com.au/federal-politics/political-news/japan-disappointed-but-conservationists-cheer-over-icjs-whaling-ruling-20140401-35wh0.html>>.

¹¹⁷ 'International Court Orders Japan to Immediately Stop Whaling in Antarctic', *ABC News* (online), 31 March 2014. Available at <<http://www.abc.net.au/news/2014-03-31/icc-japan-whaling-southern-ocean-scientific-research/5357416>>.

to engage in whaling.¹¹⁸ Mr Garrett proclaimed that, '[T]his is the end of so-called scientific whaling, surely.'¹¹⁹

V. OUTCOME AND SIGNIFICANCE OF THE DECISION

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

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

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

However the decision is a long way away from an unalloyed victory for anti-whaling forces and indeed states may be wary of using the ICJ to achieve environmental outcomes in the future. Firstly, the ICJ was asked only to address the JARPA II programme's validity, but not JARPN II, a mirror 'research whaling' program in the North Pacific with current quotas of 340 minke, 50 Bryde's whales, 100 sei whales and 100 sperm whales.¹²⁰ The fears of many environmentalists were realized when Japan continued whaling in the North Pacific after the IWC decision was handed down taking 90 sei whales and 25 Brydes whales in the 2014 hunt.¹²¹ Further, despite its initial public pronouncements after the ICJ decision was published Japan has now stated publicly that it wishes to recommence whaling in the Southern Ocean in late 2015. To that end it intends to submit a proposal to the IWC Scientific Committee in November 2014 with the final decision as to by the Commission mid-2015.¹²²

¹¹⁸ Kenny and Darby, above n 98.

¹¹⁹ Ibid.

¹²⁰ Darby, above n 22.

¹²¹ Andrew Darby. 'New Zealand follows Australia's lead to prevent Japan from whaling again in the Southern Ocean', *The Age* (online), July 31, 2014, <<http://www.theage.com.au/federal-politics/political-news/new-zealand-follows-australias-lead-to-prevent-japan-from-whaling-again-in-the-southern-ocean-20140731-3cvhw.html>>

¹²² Ibid.

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

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

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

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

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

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

¹²³ 'International Court Orders Japan to Immediately Stop Whaling in Antarctic', *ABC News* (online), 31 March 2014. Available at <<http://www.abc.net.au/news/2014-03-31/ijc-japan-whaling-southern-ocean-scientific-research/5357416>>; Norway, one of the other whaling nation, in 1993 shifted away from scientific whaling to 'commercial' catches, where the meat is sold directly to consumers. Norway set a quota of 1,289 minke whales in the north Atlantic in last year's summer hunt, saying stocks were plentiful in the region *ibid*; Last season, Norwegian fishermen, took 590 minke whales in nearby waters, according to the Norwegian Whalers' Association. This was less than half the Norwegian government's 1286 whale limit. Darby, above n 22.

¹²⁴ Darby, above n 22.

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

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

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

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

However, there are now real questions as to what any future Japanese scientific whaling programme would look like.¹²⁵ Japan was forced to concede that it does not utilize lethal means more than is necessary in its programme. In any new programme Japan would now be forced to examine the potential of non-lethal means to achieve its goals. It is arguable now that the test that should be applied to any scientific research whaling programme is that if the goals can be achieved via non-lethal means, there is no strict scientific necessity to use lethal methods. Steven Freeland argues Japan now finds itself in a difficult position because the ICJ has taken away its justification for whaling.¹²⁶ As demonstrated in this paper this is not strictly true. Whilst it has taken away the legal underpinnings of the JARPA II programme, it specifically leaves the door ajar for Japan to continue scientific whaling if the programme is redesigned with the Court's caveats in mind.

¹²⁵ Darby, above n 22.

¹²⁶ MacBean, above n 96.

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

An intriguing question is how will the Japanese populace respond to this decision? Given that a large percentage of its populace no longer eats whale meat and the Japanese whaling industry is heavily subsidized by the government due to the lack of a market for whale meat, this would be an ideal time to reduce its whaling programme. Freeland argues that the Court's decision will not sway Japanese domestic opinion ruling will do little to persuade a Japan that generally favours continuing the whaling tradition.¹³⁰ However, there is some evidence to suggest that the Japanese public no longer supports whaling.¹³¹ Many young Japanese would not consider whaling to be a Japanese cultural tradition and are unaware of the scale of the JARPA programmes. For example, in a 2006 survey asking about Japanese whale hunts, over 90 per cent were unaware that Japan hunted whales in Antarctica.¹³² Porter and Brown's research has shown that many Japanese now oppose the taking of whales and would rather observe whales in their natural habitats through whale-watching vacations.¹³³ Despite little public appetite for whale products, the Japanese government as note earlier intends to continue scientific whaling in 2015.¹³⁴

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

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

¹²⁷ Magnay, above n 35.

¹²⁸ Ibid.

¹²⁹ Darby, above n 22.

¹³⁰ MacBean, above n 96.

¹³¹ Darby, above n 22.

¹³² Scott, above n 33, 6.

¹³³ S Pamela, D Chasek, L Downie and JW Brown, *Global Environmental Politics* (Westview Press, 5th ed., 2010) 81.

¹³⁴ Darby above n 120.

¹³⁵ Satsuki Fujita, 'ICJ decision darkens future for Japanese whale meat business', *The Asahi Shinbun* (online), August 12, 2014. Available at <http://ajw.asahi.com/article/behind_news/social_affairs/AJ201408120005>.

disputes remains to be seen but Foster argues that, ‘the door seems to have been opened’.¹³⁶ The new test is exacting and would allow international tribunals to unpack a state’s actions, better understanding its reasoning on issues.¹³⁷ If the ICJ is willing to embrace such a groundbreaking approach to critically examine global environmental conventions, states may find their capacity for anti-environmental action limited since they will have to demonstrate in a meaningful way, that they have taken sufficient account of the majorities’ views on a particular matter.¹³⁸

While Foster remains optimistic that the approach may provide an important procedural option for the Court in future endeavors she rightly counsels that there remain many unanswered questions as to how such a procedural approach would function in practice? Would such an approach replace the legal text in determining how conduct should be measured? Is this approach another form of judicial interpretation? Is the standard to be applied an objective one and what criteria should states be judged against? Is the use of such a standard an exercise of powers inherent to the international judiciary?¹³⁹ Only time will tell if this is an exciting new development in international environmental or merely an outlier.

The issue of scientific whaling now returns to the IWC and the battle lines are already being drawn. In an opening salvo New Zealand has recently announced that it will attempt to have the IWC impose stricter control approvals of special permits. The draft proposal would require the Scientific Committee and the IWC to assess any submitted hunt plans in the light of the ICJ decision to ensure they are fully compliant with the ruling. Japan, not surprisingly, has indicated it will fight the draft proposal.¹⁴⁰

VI. CONCLUSION

Despite the hopes of preservationist states and ENGOs the ICJ ruling permits Japan to continue whaling under the ‘scientific’ appellation.¹⁴¹ As Rothwell points out: ‘It needs to be remembered that Article Eight of the whaling convention remains in place and Japan has the opportunity to interpret that consistently with international law’.¹⁴² He goes on to argue correctly that, ‘It would be premature to say it is the final nail in the coffin for the Antarctic whaling’.¹⁴³

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

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

¹³⁶ Foster, above n 53, 5, 13.

¹³⁷ Palmer above n 50, 3.

¹³⁸ Ibid 125.

¹³⁹ Foster, above n 53, 13.

¹⁴⁰ Darby, above n 102.

¹⁴¹ MacBean, above n 96.

¹⁴² *International Court Orders Japan to Immediately Stop Whaling in Antarctic*, above n 105.

¹⁴³ Darby, above n 22.

programme Japan will have to show that it has considered advances in non-lethal approaches and might need to demonstrate that feasibility studies have been undertaken as to the suitability of the research aims, methodology and scope as well as being a transparent process. Failure to do any of the above would open up any new research programme to potential ICJ (and global) scrutiny. Japan will also need to show that any research programme undertaken has scientific validity. Such conditions to demonstrate validity give options for anti-whaling states to continue to seek to limit scientific whaling in the future, for example the current New Zealand proposal before the IWC Scientific Committee to impose stricter controls on special permits.

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

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

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

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