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GREASY LUCK TO WHALERS

How the International Whaling Commission and International Court of Justice can use principles of American administrative and environmental law to keep Japan from circumventing the International Convention for the Regulation of Whaling

CHRISTINA CAREY MCCLINTOCK

Abstract: The International Convention for the Regulation of Whaling allows whaling to be conducted for the purposes of scientific research. Japan has manipulated this exception and conducted commercial whaling under the guise of the scientific research exception. This paper examines how the International Whaling Commission and International Court of Justice could use insights from administrative and environmental law to improve and tighten regulation of scientific whaling programs in order to ensure that such programs do not frustrate the purposes of the Convention.

*Death to the living,
Long life to the killers,
Success to sailors' wives
And greasy luck to whalers.*

A Traditional Nantucket Drinking Toast¹

The whaling capital of the world in the “late 18th and early 19th centuries,”² Nantucket was in many ways a town ahead of its time. Heavily influenced by Quaker roots,³ Nantucket welcomed religious diversity⁴ and was home to a robust abolitionist movement.⁵ It embraced gender equality: its de facto town leader was a woman, Mary Coffin Starbuck, and “[i]t was said that nothing of consequence was done on Nantucket without Mary’s approval.”⁶ Moreover, Nantucketers lived and worked in harmony at a level achieved by few other societies in history.⁷

This progressive island decimated its local whaling population by the late eighteenth century⁸ yet felt no qualms doing so: “Nantucketers saw no contradiction between their livelihood and their religion. God Himself had granted them dominion over the fishes of the sea.”⁹ The world has a different view of whaling today. Yet anyone looking for signs of guilt over Nantucket’s role in the decline of whaling populations would be sorely disappointed. A

¹ Nathaniel Philbrick, *In the Heart of the Sea* 9 (2000).

² Nathaniel Philbrick, “How Nantucket Came to Be the Whaling Capital of the World.” *Smithsonian Magazine* (Dec. 2015), <http://www.smithsonianmag.com/history/nantucket-came-to-be-whaling-capital-of-world-180957198/>.

³ Philbrick, *supra* note 1, at 6.

⁴ *Id.*

⁵ “The Abolitionist Movement: The Atheneum Celebrates Nantucket’s Anti-Slavery Movement and Local Abolitionists” *The Nantucket Atheneum* <https://www.nantucketatheneum.org/about/testhistory/nantucket-the-abolitionist-movement/> (last visited (accessed 4/30/2017)).

⁶ Philbrick, *supra* note 1, at 5.

⁷ Clifford W Ashley, *The Yankee Whaler* 99 (1938) (“There is no finer example in history of communal enterprise than the Nantucket Whale Fishery. The inhabitants were uniquely situated for united effort Through intermarriage they were generally related to one another, and in fact were more like a large family than a civic community The people were so law-abiding that there was little or no government in evidence on the Island.”) Cited in Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 *J.L. ECON. & ORGANIZATION* 83, 86 (1989).

⁸ Philbrick, *supra* note 1, at 4

⁹*Id.* at 6.

local museum celebrates Nantucket's past as a whaling juggernaut,¹⁰ as does one of the most popular local beers.¹¹

In the height of Nantucket's whaling prowess, courts would defer to the customs of whalers.¹² Like most of the world, courts take a different view of whalers these days. In *Australia v. Japan*, the International Court of Justice declined to defer to the national government of Japan even when Japan, at least in the views of one judge, demonstrated "formal compliance" with the law.¹³ Admittedly, the nature of the trust here is somewhat different: the US cases dealt with competing claims to possession of a single whale, whereas *Australia v Japan* assessed the validity of permits to kill whales en masse.

It may seem hard to reconcile the celebration of Nantucket's whaling history with the moral outrage that accompanies Japan's modern efforts at maintaining whaling. Japan has its own rich tradition of whaling, one that extends even further back in time – back to before the sixteenth century.¹⁴ And whaling in the United States ended because it ceased to be a profitable industry,¹⁵ not because the country had a change of heart.

In the height of the whaling era, however, no one harbored any illusions about what whalers were trying to accomplish: whalers "might 'act the Quaker,' but that didn't keep them from pursuing profits with a lethal enthusiasm."¹⁶ Japan, by contrast, has been circumventing

¹⁰ <https://www.nha.org/sites/>.

¹¹ <http://ciscobrewers.com/beer/whales-tale-pale-ale>.

¹² *Ghen v. Rich*, 8 Fed. 159 (D. Mass. 1881); *Swift v. Gifford*, 23 Fed. Cas. 558 (D. Mass. 1872) (No. 13,696). See generally Ellickson, supra note 7.

¹³ *Australia v. Japan* [2014], Separate Opinion of Judge Bhandari (International Court of Justice).

¹⁴ Junichi Takahashi, "Japanese Whaling Culture: Continuities and Diversities," available at <http://www.marecentre.nl/mast/documents/Japanesewhalingculture.pdf>. (note -- unable to find additional publication information).

¹⁵ Derek Thompson, "The Spectacular Rise and Fall of U.S. Whaling: An Innovation Story," THE ATLANTIC, (Feb. 22, 2012), <https://www.theatlantic.com/business/archive/2012/02/the-spectacular-rise-and-fall-of-us-whaling-an-innovation-story/253355/>.

¹⁶ Philbrick supra note 1, at 13.

international whaling law while claiming to follow it. Frustration with this lack of honesty seemed to be driving the International Court of Justice in a 2014 decision invalidating Japan's whaling program. Unfortunately, the International Court of Justice reached this conclusion through an overly fact-heavy analysis that did not ask two seemingly fundamental questions: (1) did Japan articulate a purpose for research that was consistent with the goals of the International Convention for the Regulation of Whaling and (2) did Japan set a target for whale killings that would not undermine the purposes of the Convention? This paper first explores the shortcomings of the International Court of Justice's decision. Next it will look at areas of American administrative and environmental law to indicate how the International Court of Justice's reasoning could be improved.

Background

History of International Whaling Law

In the mid-20th century, the world began to take notice of whale species' declining populations. First was the Convention for the Regulation of Whaling, which prohibited the killing of certain categories of whales and required whaling operations by vessels of States parties to be licensed, but it failed to address the increase in overall catch levels."¹⁷ Next was the 1937 International Agreement for the Regulation of Whaling, which "provided for the issuance by a 'Contracting Government . . . to any of its nationals [of] a special permit authorizing that national to kill, take and treat whales for purposes of scientific research.'"¹⁸ While the 1937 Agreement may have allowed these kinds of permits, its enactment marked a shift toward an

¹⁷ *Australia v. Japan* [2014], Court Judgment, 245 (International Court of Justice).

¹⁸ *Id.*, citing 1937 International Agreement.

international regime focused on “safeguarding for future generations the great natural resources represented by the whale stocks”¹⁹ rather than a sole focus on “industrial profitability.”²⁰

The governing documents are the International Convention for the Regulation of Whaling, signed on December 2, 1946,²¹ which established the International Whaling Commission,²² and its “legally binding Schedule which, among other things, sets out catch limits for commercial and aboriginal subsistence whaling.”²³ The Schedule may be amended, but any state (or “Contracting Government”) can avoid being subjected to the amendment if it objects.²⁴ Commercial whaling has been banned since 1986, with Japan assenting to the ban in 1987 after initially objecting.²⁵

The Convention allows whaling to be conducted when it is “for purposes of scientific research,”²⁶ and the Schedule provides “scientific permits” to be issued, subject to review by the Scientific Committee.²⁷ The Scientific Committee of the International Whaling Commission, established in 1950, “reviews and comments on special permits before they are issued by States parties to their nationals for purposes of scientific research under Article VIII, paragraph 1, of

¹⁹ International Convention for the Regulation of Whaling, Preamble, available at http://avalon.law.yale.edu/20th_century/whaling.asp; see also <https://iwc.int/convention>.

²⁰ Australia Memorial, 16, *Australia v. Japan* (May 9, 2011) (International Court of Justice), <http://www.icj-cij.org/docket/files/148/17382.pdf>.

²¹ *Id.*

²² International Convention for the Regulation of Whaling, Article III (1), available at http://avalon.law.yale.edu/20th_century/whaling.asp; see also <https://iwc.int/convention>.

²³ <https://iwc.int/convention>.

²⁴ International Convention for the Regulation of Whaling, Article V (3), available at http://avalon.law.yale.edu/20th_century/whaling.asp.

²⁵ Samuel K. Rebmann, “Japanese Whaling and the International Community: Enforcing the International Court of Justice and Halting NEWREP-A,” 2, available at <https://journals.uair.arizona.edu/index.php/azjis/article/download/19421/19057>.

²⁶ International Convention for the Regulation of Whaling, Article VIII, available at http://avalon.law.yale.edu/20th_century/whaling.asp.

²⁷ International Convention for the Regulation of Whaling, 1946, Schedule paragraph 30, as amended by the Commission at the 66th Meeting, Portorož, Slovenia, October 2016, <https://archive.iwc.int/pages/view.php?ref=3606&k=>.

the Convention.”²⁸ Starting in the middle of the 1980s, “the Scientific Committee has conducted its review of special permits on the basis of “Guidelines” issued or endorsed by the Commission.”²⁹ The current set of Guidelines, for example, requires that the objectives of the research must include the following broad objectives: “(i) improve the conservation and management of whale stocks, (ii) improve the conservation and management of other living marine resources or the ecosystem of which the whale stocks are an integral part and/or, (iii) test hypotheses not directly related to the management of living marine resources.”³⁰ While these Guidelines offer insight to both the Scientific Committee, and, by extension, the International Whaling Commission, the Scientific Committee’s application of them to special permits does not have binding legal force.³¹

Japan’s Attitude toward whaling, JARPA II, and the International Court of Justice Ruling

Japan has been historically antagonistic toward restrictions on whaling; it voted against “the imposition of the moratorium when it was adopted at the IWC’s Thirty-Fourth Annual Meeting on 23 July 1982” and “subsequently lodge[d] a formal objection to the amendment when it did so on 4 November 1982.”³² Japan argued that “the purpose of the Convention was to promote and maintain whale fishery stocks, not to ban whaling completely.”³³ Because the Convention allows for states to use formal objections to avoid being bound to Schedule

²⁸ *Australia v. Japan* [2014], Court Judgment, 247 (International Court of Justice).

²⁹ *Australia v. Japan* [2014], Court Judgment, 248-249 (International Court of Justice).

³⁰ Annex P: Process for the Review of Special Permit Proposals and Research Results from Existing and Completed Permits 1. (1)(d)(i),(ii),(iii). When JARPA II, the program at issue in *Australia v. Japan*, was “proposed in 2005, the applicable Guidelines had been collected” in Annex Y, a precursor to Annex P. *Australia v. Japan* [2014], Court Judgment, 27 (International Court of Justice).

³¹ *Australia v. Japan* [2014], Court Judgment, 248 (International Court of Justice).

³² *Australia v. Japan* [2014], Separate Opinion of Judge Bhandari, 445.

³³ *U.S. Sanctions against Japan for Whaling*, 95 AMERICAN J. INT’L L 149, 150 (2001).

Amendments,³⁴ Japan was originally exempted from the moratorium.³⁵ It agreed to cease commercial whaling only after the United States “threatened in 1984 to certify Japan under the Pelly and Packwood-Magnuson Amendments.”³⁶ Such certifications would have allowed the United States to “prohibit the importation into the United States of fish products of the offending country”³⁷ and to reduce “the actual or proposed allocation of fishing privileges in U.S. waters under the Magnuson Act.”³⁸

Japan’s scientific whaling program began immediately after it ceased its commercial whaling program.³⁹ Japan has now conducted three such programs. The first, entitled “The Japanese Whale Research Program under Special Permit in the Antarctic”, or “JARPA,”⁴⁰ occurred from the 1987-1988 through the 2004-2005 season.⁴¹ It was replaced immediately by JARPA II.⁴² JARPA existed for the stated purpose of “collecting scientific data to contribute to the review and comprehensive assessment of the moratorium on commercial whaling, as

³⁴ International Convention for the Regulation of Whaling Article III (1), available at http://avalon.law.yale.edu/20th_century/whaling.asp; see also <https://iwc.int/convention>.

³⁵ Samuel K. Rebmann, “Japanese Whaling and the International Community: Enforcing the International Court of Justice and Halting NEWREP-A,” 66, available at <https://journals.uair.arizona.edu/index.php/azjis/article/download/19421/19057>.

³⁶ *U.S. Sanctions against Japan for Whaling*, 95 AMERICAN J. INT’L L 149, 150 (Jan., 2001). Interestingly, Iceland and Norway have continued to whale because they have chosen not to subject themselves to the moratorium. Australia Memorial, 35, *Australia v. Japan*, (May 9, 2011) (International Court of Justice), <http://www.icj-cij.org/docket/files/148/17382.pdf>.

³⁷ Gene S. Martin, Jr. & James W. Brennan, *Enforcing the International Convention for the Regulation of Whaling: The Pelly and Packwood-Magnuson Amendments*, 17 DENV. J. INT’L L. & POL’Y 293, 295 (1988-1989) (internal citation omitted).

³⁸ *Id.* at 297 (internal citation omitted).

³⁹ Samuel K. Rebmann, “Japanese Whaling and the International Community: Enforcing the International Court of Justice and Halting NEWREP-A,” 66, available at <https://journals.uair.arizona.edu/index.php/azjis/article/download/19421/19057>.

⁴⁰ Government of Japan, Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) - Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources, 1. <http://www.icrwhale.org/eng/SC57O1.pdf>.

⁴¹ *Australia v. Japan* [2014], Court Judgment, 261 (International Court of Justice).

⁴² *Id.*

envisaged by paragraph 10 (e) of the Schedule.”⁴³ Although “[m]ore than 6,700 Antarctic minke whales were killed over the course of JARPA’s 18-year history,”⁴⁴ the International Court of Justice (Court) did not call JARPA’s legality into question when it analyzed JARPA II.⁴⁵

The Court’s framework can be described quite cleanly, but the inquiry it entails is very messy. The Court first asks if a program “involves scientific research” and then goes on to see if “the killing, taking and treating of whales” is done “for purposes of” scientific research.”⁴⁶ In evaluating this second question, it asks “whether the design and implementation of a programme are reasonable in relation to achieving the stated research objectives.”⁴⁷

While the Court noted on multiple occasions that JARPA and JARPA II had “considerable overlap” and were more similar than different,⁴⁸ the court decided that the “far more extensive” use of lethal methods rendered JARPA II a breach of the Convention where JARPA was acceptable.⁴⁹ The Court was insufficiently convinced by Japan’s explanations for its use of lethal methods and further found that it gave “little attention” to “the possibility of using non-lethal research methods.”⁵⁰ The Court also looked at the scale and sample sizes of the program. It determined that the “significant gap between the JARPA II target sample sizes and the actual number of whales that have been killed”⁵¹ supported Australia’s contention that the

⁴³ *Id.* (Internal quotation marks omitted).

⁴⁴ *Australia v. Japan* [2014], Court Judgment, 262 (International Court of Justice).

⁴⁵ *Id.* at 260.

⁴⁶ *Id.* at 255; citing International Convention for the Regulation of Whaling Article VIII, available at http://avalon.law.yale.edu/20th_century/whaling.asp. Matt DiCenso, *Trouble on the High Seas: A Need for Change in the Wake of Australia v. Japan*, 39 B.C. INT’L & COMP. L. REV. 13, 19 (2016).

⁴⁷ *Australia v. Japan* [2014], Court Judgment, 260 (International Court of Justice).

⁴⁸ *Id.* at 273.

⁴⁹ *Id.* at 292. The Court cited expanded use of lethal methods for minke whales as well as the introduction of lethal methods for two other types of whales.

⁵⁰ *Id.* at 293.

⁵¹ *Australia v. Japan* [2014], Court Judgment, 286 (International Court of Justice).

targets were made for reasons unrelated to scientific research.⁵² In fact, the number of whales killed in JARPA II was significantly *lower* than the research proposal,⁵³ suggesting that were Japan to have killed more whales, its plan might have been less legally suspect.

Argument

Although the Court reached a disposition that conservationists might celebrate, its analysis is unsatisfying. The most jarring flaw is the lack of clarity surrounding the world “scientific research,” an issue the Court itself acknowledges.⁵⁴ Moreover, the Court’s analysis of a program’s purpose insufficiently promotes the Conventions objectives in two important ways. On the one hand, by treating scientific research as a purpose in itself and not inquiring into the purposes *of the research*, the Court allows for research programs that are directly antithetical to the goals of the Convention. On the other hand, once the Court finds that the actions are done for an acceptable purpose, the purpose is too great of a shield. As Judge Cançado Trindade flags in his Separate Opinion, the opinion leaves open the possibility that identical programs could be either acceptable or unacceptable depending on whether they are framed as scientific research programs or whale meat supply programs.⁵⁵

This paper will first look at the implications of the International Court of Justice decision. The Statute of the International Court of Justice dictates that “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case,”⁵⁶ and thus the result in this the case does not dictate a result in a particular case. One can imagine, however, that the Judges of the International Court of Justice will approach a future case with the same

⁵² *Australia v. Japan* [2014], Court Judgment, 290 (International Court of Justice).

⁵³ *Australia v. Japan* [2014], Court Judgment, 286 (International Court of Justice).

⁵⁴ *Id.* at 255.

⁵⁵ *Australia v. Japan* [2014], Separate Opinion of Judge Cançado Trindade, 356 (International Court of Justice).

⁵⁶ Statute of the International Court of Justice, Article 59.

type of analysis it used in this case. The time for such analysis may come soon: six months after the Court ruled in *Australia v Japan*, Japan announced a new scientific whaling program.⁵⁷ This program will be even more detrimental than JARPA II: it calls “for 333 minke whales to be taken annually (not including animals struck and lost), which represents an increase from the 252 whales taken in the last year of JARPA II.”⁵⁸ It would be unfortunate if Japan were able to “retro-fit,” to use Australia’s terms,⁵⁹ its research program so as to circumvent the formal requirements of the law while its behavior frustrates the purposes of the Convention.

Next, this paper will analyze how features of American Administrative Law and Environmental Law could help the International Whaling Commission and International Court of Justice take a better approach, one that is more consistent with their goals of conservation. In addition to inadequately assessing the purposes behind scientific research programs, the International Court of Justice also inadequately assessed the implications of the programs. While it got to the right result in this case, it leaves the door open for more detrimental programs in the future.

The Purposes of Scientific Research

That the International Court of Justice declined to scrutinize the legality of the first JARPA program widens the door for tightly written commercial whaling programs to become legal. First, the purpose of JARPA, as stated above, was “collecting scientific data to contribute to the review and comprehensive assessment of the moratorium on commercial whaling, as envisaged by paragraph 10 (e) of the Schedule.”⁶⁰ In other words, immediately after Japan

⁵⁷ “Japan’s ‘New’ Proposal for Continued Research Whaling in the Antarctic Ocean,” Greenpeace, International Foundation for Animal Welfare, and World Wildlife Foundation (Dec. 15, 2014) <http://www.ifaw.org/sites/default/files/2015-Greenpeace-IFAW-WWF-JARPA-III-Briefing.pdf>.

⁵⁸ *Id.*

⁵⁹ *Australia v. Japan* [2014], Court Judgment, 275 (International Court of Justice).

⁶⁰ *Id.* at 261.

finally acceded to the the commercial whaling moratorium of the schedule, it began a program with the exact goal of fighting against the moratorium. The International Whaling Commission and United States both saw this effort for what it was and responded accordingly: President Reagan “strip[ped] Japan of all its fishing rights in U.S. waters pursuant to the Packwood-Magnuson Amendment,” among other efforts,⁶¹ whereas the IWC “strongly urg[ed]” Japan to desist.⁶² Yet the International Court of Justice never expressly disavows this purpose. Judge Cançado Trindade spoke to this issue in his separate opinion, noting that the Agreement as a whole “evidences” a goal of “conservation” and that the agreement “would have been structured differently” if it were intended to protect the whaling industry.⁶³

The Court’s comparisons between JARPA and JARPA II render international whaling law easy to manipulate. The International Court of Justice should have simply invalidated the program once Japan volunteered that the long-term goal of JARPA II was to reinstate commercial whaling. When the Japanese Government wrote up its JARPA II plan, it volunteered that the original JARPA program was undertaken to “pave the way for the resumption of sustainable whaling.”⁶⁴ Japan goes on to explain that it moved from JARPA to JARPA II because the results of its research indicated a need for further research.⁶⁵ Japan does not list

⁶¹ *U.S. Sanctions against Japan for Whaling*, 95 AMERICAN J. INT’L L. 149, 151 (Jan., 2001) citing 12 Letter to the Speaker of the House of Representatives and the President of the Senate Reporting on Japanese Whaling Activities, 1 PUB. PAPERS 424 (1988).

⁶² *U.S. Sanctions against Japan for Whaling*, 95 AMERICAN J. INT’L L. 149, 151 (Jan., 2001) quoting Resolution on Whaling Under Special Permit in the North Pacific Ocean, IWC Res. 2000-5 (2000), <http://ourworld.compuserve.com/homepages/iwcoffice/sciperms.htm>.

⁶³ *Australia v. Japan* [2014], Separate Opinion of Judge Cançado Trindade, 349 (International Court of Justice).

⁶⁴ Government of Japan, Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) - Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources, 5. <http://www.icrwhale.org/eng/SC57O1.pdf>.

⁶⁵ *Id.* (“The meeting also agreed that the results obtained provide clear support for the need to take species-interaction (ecosystem) effects into account in understanding the dynamics of the baleen whale species in the Antarctic ecosystem, and predicting future trends in their abundance and population structure.”)

resuming sustainable whaling as one of its goals,⁶⁶ but it does list as a goal the “sustainable use of these resources,”⁶⁷ which is essentially the same thing. Japan does nothing to correct the conclusion that it is seeking to continue whaling – at no point does it disavow the purposes of JARPA. That Japan describes the research methods as “basically the same as the previous JARPA”⁶⁸ and incorporates the selling of whale meat into its plan⁶⁹ would seem to be the icing on the cake. The International Court of Justice, therefore, did not need to write a 153-page opinion. Japan has admitted – or at least has not denied – that the purposes of its “research” is commercial, and that should be sufficient to invalidate it on its purpose.

In addition to insufficiently scrutinizing the purposes of the research program, the International Court of Justice also does not go far enough in ensuring that the end results of the research program do not frustrate the purposes of the Convention. Instead, the International Court of Justice seemed primarily focused on searching JARPA II for signs of deception. This is a dangerous approach because it means that Japan can wreak further havoc on whale populations in JARPA III provided that it is sufficiently clear and precise about what it intends to do.

⁶⁶ *Id.* at 1 (listing the goals as “1) Monitoring of the Antarctic ecosystem, 2) Modelling competition among whale species and developing future management objectives, 3) Elucidation of temporal and spatial changes in stock structure and 4) Improving the management procedure for the Antarctic minke whale stocks.”).

⁶⁷ Government of Japan, Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) - Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources, 6. <http://www.icrwhale.org/eng/SC5701.pdf>.

⁶⁸ *Id.* at 5.

⁶⁹ *Australia v. Japan* [2014], Court Judgment, 259 (International Court of Justice). The International Court of Justice spends remarkably little time on this issue, noting in passing that “the fact that a programme involves the sale of whale meat and the use of proceeds to fund research is not sufficient, taken alone, to cause a special permit to fall outside Article VIII.” *Id.* Perhaps the Court did not go into greater detail on the use of whale meat because it could use other reasons to find that JARPA II was a commercial whaling program. It was, however, surprising that the International Court of Justice spent so little time on the sale of whale meal, given that Japan has, at times, defended its interest in commercial whaling on the grounds that eating whale meat is an important part of Japanese. *See, e.g.*, Tetsuji Ida, “Researcher aims to bust myth of Japan’s ‘whale-eating’ culture.” *THE JAPAN TIMES* (Oct. 14, 2014), <http://www.japantimes.co.jp/news/2014/10/14/national/researcher-aims-to-bust-myth-of-japans-whale-eating-culture/#.WQUhu2Xw-uU>; Paul Watson, “The Truth about ‘Traditional’ Japanese Whaling.” *Sea Shepherd* (Jun. 27, 2006), <http://www.seashepherd.fr/news-and-media/editorial-060627-1.html>.

Relevant Principles of American Administrative Law and Environmental Law

Conservationists working in the United States have faced similar issues to those trying to protect whales abroad. Just as the International Court of Justice's reasoning in *Australia v. Japan* allows states to kill large numbers of whales as long as they cleverly and meticulously explain what they are doing, so too does the National Environmental Policy Act (NEPA)⁷⁰ allow for government agencies to destroy the environment so long as they do not make any procedural missteps. As a result, environmental challenges have been largely ineffective: "The US Supreme Court, going back to the Rehnquist court, has been particularly unfriendly to cases brought under the National Environmental Policy Act (NEPA), ruling against the environmentalists in 15 straight cases."⁷¹

The root of the ineffectiveness of NEPA challenges is the the Supreme Court's determination that NEPA is a "procedural" statute⁷² and "does not mandate particular results, but simply prescribes necessary process."⁷³ In other words, while NEPA requires government agencies to disclose the damage they will do to the environment,⁷⁴ it allows the agencies to disregard entirely the consequences after they have listed them out.

This deference is rooted in the U.S. law assumption that agencies have greater technical expertise and that courts should not "substitute its own" judgment for the agencies.⁷⁵ NEPA is no

⁷⁰ 42 U.S.C. §4321 et seq.

⁷¹ Joshua Horwitz, *War of the Whales* 284 (2014).

⁷² *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980).

⁷³ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *See also Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-228, 100 S.Ct. 497, 499-500, 62 L.Ed.2d 433 (1980) (per curiam); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558, 98 S.Ct. 1197, 1219, 55 L.Ed.2d 460 (1978).

⁷⁴ *See generally Sierra Club v. United States Army Corps of Engineer*, 701 F.2d 1011 (2d Cir 1983) (wherein the Court says that an Environmental Impact Statement was not sufficient because it contained substantial factual inaccuracies).

⁷⁵ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). *Chevron* gives agencies broad discretion. For another doctrine illustrating broad agency deference, *see Auer v. Robbins*, 519 U.S. 452 (1997).

exception.⁷⁶ This trust is often misplaced. While the Supreme Court of the United States assumes that analyzing the environmental impacts of a project⁷⁷ is “almost certain to affect the agency’s substantive decision,”⁷⁸ the agency conducting the project is given no incentive to alter its goals in light of environmental considerations. The District of Columbia Circuit has even allowed agencies to stop short of collecting all information where the agency deems that it has collected “enough” information.⁷⁹ This decision was especially unsatisfying in light of the fact that another agency, the Environmental Protection Agency, had been “especially critical” of aspects of the program.⁸⁰

Still, one can understand United States courts’ hesitancy to second guess agencies. Judges, by and large, lack the technical expertise of agency officials. And agencies are more affiliated with the democratically elected branches.

The International Court of Justice has no such need for hesitancy. While United States courts are essentially forced to choose between their judgment and the agencies (and, of course, the parties litigating against the agencies), the International Court of Justice can take a middle ground. It should give great deference to the findings of the Scientific Committee. For that to happen, however, the Scientific Committee would need to be empowered to make determinations

⁷⁶ See, e.g., *Kleppe v. Sierra Club*, 427 U.S. 390, 410n21 (1976) (“Neither the statute nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions.”); *Scenic Hudson Preservation Conference v. FPC*, 453 F.2d 463, 481 (CA2 1971), cert. denied, 407 U.S. 926, 92 S.Ct. 2453, 32 L.Ed.2d 813 (1972); *Natural Resources Defense Council v. Morton*, 148 U.S. App. D.C. 5, 16, 458 F.2d 827, 838 (1972).

⁷⁷ Preparing an “Environmental Impact Statement.” 42 U.S.C. § 4332. See also *Robertson*, 490 U.S. at 336.

⁷⁸ *Robertson*, 490 U.S. at 350.

⁷⁹ *State of Alaska v. Andrus*, 580 F.2d 465, 473 (D.C. Cir. 1978) (“NEPA simply does not specify the quantum of information that must be in the hands of a decisionmaker before that decisionmaker may decide to proceed with a given project. Rather, NEPA was intended to ensure that decisions about federal actions would be made only after responsible decisionmakers had fully adverted to the environmental consequences of the actions, and had decided that the public benefits flowing from the actions outweighed their environmental costs.”)

⁸⁰ *Id.* at 468.

about proposed research programs and would need to have those research programs carry weight. But such a system, were it to exist, would seem to satisfy even the concerns of dissenters. For example, Judge Yusef, in dissent, took issue with the International Court of Justice's inquiry into the reasonableness of the lethal sampling.⁸¹ Judge Yusef was concerned that inquiries into sample size and scale were "matters on which scientists and the statistical calculations they use for that purpose can differ" and were not matters for the International Court of Justice to second-guess.⁸² This debate was framed by the Whale and Dolphin Conservation as a question of "who gets to decide what constitutes science."⁸³ The Scientific Committee is a logical candidate.

Unfortunately, both the International Court of Justice nor the International Whaling Commission seem to be unnecessarily hesitant to empower the Scientific Committee. First, although the International Court of Justice mentions in passing that "[t]he research objectives come within the research categories identified by the Scientific Committee in Annexes Y and P,"⁸⁴ the Court's judgment discusses these Annexes only sparsely. Similarly, while the International Whaling Commission passed a resolution, Resolution 2014-5 that "affirmed the authority of the Scientific Committee of the IWC to 'review and comment on proposed special permits,'"⁸⁵ it still limits the Scientific Committee to an advisory role.

Limiting the influence of the Scientific Committee does not make sense. In the United States, agencies' power to make rules is limited because of a concern that, without limits, parties

⁸¹ *Australia v. Japan* [2014] Dissenting Opinion of Judge Yusef, 392 (International Court of Justice).

⁸² *Id.*

⁸³ "Why is Australia v Japan such a Special Case?" Whale and Dolphin Conservation (July 1, 2013), <http://us.whales.org/blog/2013/07/why-is-australia-v-japan-such-special-case>.

⁸⁴ *Australia v. Japan* [2014], Court Judgment, 267 (International Court of Justice).

⁸⁵ Matt DiCenso, *Trouble on the High Seas: A Need for Change in the Wake of Australia v. Japan*, 39 B. C. INT'L & COMP. L. REV. 13, 21 (2016).

would not be properly noticed of the rules to which they would be subject.⁸⁶ In International Whaling law, however, this concern cuts in the opposite direction. Because the Statute of the International Court of Justice prevents ICJ decisions from carrying precedential value,⁸⁷ it is the Scientific Committee, not the International Court of Justice, that is able to provide notice and predictability to those seeking whaling permits.

The International Whaling Commission seems to recognize this because it has instructed the Scientific Committee to “to revise how it reviews special-permit research programs” in light of the *Australia v. Japan* decision.⁸⁸ Such a determination reflects a desire to give more permanence for a decision whose logic overall supported the goals of the International Whaling Commission. And the International Whaling Commission put a halt on the issuance of scientific whaling permits under existing research programs until, among other things, “the Scientific Committee has reviewed the research programme to enable it to provide advice to the Commission in accordance with the instructions above.”⁸⁹ But as Matt DiCenso notes, this new Resolution does “little more than reaffirm a procedural framework that has proven to be ineffective in the past.”⁹⁰ The same could be said of Resolution 2016-2, which notes that while the Commission will review the Scientific Committee’s finding, the International Whaling Commission will “form its own view.”⁹¹ The International Whaling Commission does not

⁸⁶ See, e.g., *American Min. Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1108-1110 (D.C. Cir. 1993) (describing when notice-and-comment is necessary); *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984); *U.S. Telecom Ass'n v. F.C.C.*, 227 F.3d 450 (D.C. Cir. 2000).

⁸⁷ Statute of the International Court of Justice, Article 59.

⁸⁸ Matt DiCenso, *Trouble on the High Seas: A Need for Change in the Wake of Australia v. Japan*, 39 B. C. INT'L & COMP. L. REV. 13, 21 (2016).

⁸⁹ International Whaling Commission Resolution 2014-5, Resolution on Whaling Under Special Permit (1), <http://fpcj.jp/wp/wp-content/uploads/2015/06/3-Resolution-2014-5.pdf>.

⁹⁰ Matt DiCenso, *Trouble on the High Seas: A Need for Change in the Wake of Australia v. Japan*, 39 B. C. INT'L & COMP. L. REV. 13, 22 (2016).

⁹¹ International Whaling Commission Resolution, 2016-2, Resolution on Improving the Review Process under Special Permit (7),

indicate that weight that the recommendations of the Scientific Committee will be given in either Resolution,⁹² but only that it will “consider” these opinions.⁹³

Annex P, which dictates the review process for special permits, provides a detailed explanation of how whaling permits will be reviewed. The International Court of Justice acknowledges briefly that Annex P, and its predecessor, Annex Y, have dictated what goals are acceptable for whaling.⁹⁴ The International Whaling Commission should indicate that no permits will be issued if the Scientific Committee finds that a research program is not being carried out for the purposes indicated in Annex P.⁹⁵

Furthermore, the International Whaling Commission should expand upon the guidelines given in Annex P and give them more teeth. For example, Specialist Workshops are tasked with reviewing how the research fits in with “relevant IWC resolutions and discussions”⁹⁶ and “the utility of the lethal techniques used by the Special Permit Programme compared to non-lethal techniques.”⁹⁷ The Scientific Committee should create a transparent methodology to evaluate important issues such as whether a program supports or contravenes IWC resolutions and whether lethal methods are used only when strictly necessary. Once the IWC and Scientific

[https://archive.iwc.int/pages/view.php?ref=6373&search=%21collection72&order_by=relevance&sort=D ESC&offset=0&archive=0&k=&curpos=0&restypes=.](https://archive.iwc.int/pages/view.php?ref=6373&search=%21collection72&order_by=relevance&sort=D ESC&offset=0&archive=0&k=&curpos=0&restypes=)

⁹² International Whaling Commission Resolution 2014-5, Resolution on Whaling Under Special Permit (3), <http://fpcj.jp/wp/wp-content/uploads/2015/06/3-Resolution-2014-5.pdf>; International Whaling Commission Resolution, 2016-2, Resolution on Improving the Review Process under Special Permit (7), [https://archive.iwc.int/pages/view.php?ref=6373&search=%21collection72&order_by=relevance&sort=D ESC&offset=0&archive=0&k=&curpos=0&restypes=.](https://archive.iwc.int/pages/view.php?ref=6373&search=%21collection72&order_by=relevance&sort=D ESC&offset=0&archive=0&k=&curpos=0&restypes=)

⁹³ International Whaling Commission Resolution, 2016-2, Resolution on Improving the Review Process under Special Permit (7), [https://archive.iwc.int/pages/view.php?ref=6373&search=%21collection72&order_by=relevance&sort=D ESC&offset=0&archive=0&k=&curpos=0&restypes=.](https://archive.iwc.int/pages/view.php?ref=6373&search=%21collection72&order_by=relevance&sort=D ESC&offset=0&archive=0&k=&curpos=0&restypes=)

⁹⁴ *Australia v. Japan* [2014], Court Judgment, 267 (International Court of Justice).

⁹⁵ Revised Annex P, Process for the Review of Special Permit Proposals and Research Results from Existing and Completed Permits, (Oct. 11, 2012) https://iwc.int/document_3100.

⁹⁶ *Id.* at 4.

⁹⁷ *Id.* at 4.

Committee establish criteria, they should decide that the findings of the Scientific Committee are highly persuasive, if not binding.

Placing greater weight on the findings of the Scientific Committee will force parties seeking permits to bring forward information about what the positive aspects of their program are. If the International Whaling Commission and the Scientific Committee are transparent about how they are making their determinations and provide a rubric for how determinations are made, then parties will have incentives both to do front-end research and to cooperate with scientists in other countries to get the best information. While the International Court of Justice did not focus on the duty to cooperate in *Australia v. Japan*,⁹⁸ Judge Bhandari believed such duty to be “implicit.”⁹⁹ Whether or not such a duty exists, any policy that gives incentives to collaborate and advance the best possible scientific research would serve the goals of the Convention and the International Whaling Commission.

Mitigation

Annex P hints at another potential that the International Whaling Commission could adopt. While it tasks Specialist Workshops with reviewing “the relationship of the research to relevant IWC resolutions and discussions,”¹⁰⁰ it should require that permitting governments undertake mitigation measures in order to secure the populations of the whales they are researching. Just as in the case of agency deference, a look to NEPA is enlightening.

⁹⁸ The court discussed the concept only once. *Australia v. Japan* [2014], Court Judgment, 240-241 (International Court of Justice).

⁹⁹ *Australia v. Japan* [2014], Separate Opinion of Judge Bhandari, 440 (International Court of Justice) (“I believe that substantive compliance with paragraph 30 encompasses an implicit duty to co-operate with the Commission and the Scientific Committee by providing information that is reflective of the evolving character of JARPA II.”)

¹⁰⁰ Revised Annex P, Process for the Review of Special Permit Proposals and Research Results from Existing and Completed Permits, 4, (Oct. 11, 2012), https://iwc.int/document_3100.

NEPA requires that government agencies prepare “a detailed discussion of possible mitigation measures,”¹⁰¹ but it does not require that agencies undertake these mitigation measures¹⁰² unless they are doing so to get out of writing a full Environmental Impact Statement.¹⁰³

Requiring parties to adopt mitigation measures would be consistent with Australia’s content that exceptions not be read so broadly as to “have the effect of undermining the effectiveness of the regulatory regime as a whole.”¹⁰⁴ Judge Cançado Trindade, who wrote separately, noted however, that the Convention has a strong focus on conservation,¹⁰⁵ as evidenced by the Preamble’s stated goal of “a system of international regulation . . . to ensure proper and effective conservation and development of whale stocks.”¹⁰⁶ Thus, even though the Convention writes that “the killing, taking, and treating of whales . . . shall be exempt from the operation of this Convention,”¹⁰⁷ it does not make sense to allow the program as a whole to frustrate the expressed purposes of the Convention when alternatives are available.

The idea of mitigation measures in a hunting program would not be unique. Namibia¹⁰⁸ and Zimbabwe,¹⁰⁹ for example, permits to hunt endangered species are auctioned off, and the

¹⁰¹ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989).

¹⁰² *Id.* at 352.

¹⁰³ *National Audubon Soc. v. Hoffman*, 132 F.3d 7, 17 (2d. Cir. 1997) (“When the adequacy of proposed mitigation measures is supported by substantial evidence, the agency may use those measures as a mechanism to reduce environmental impacts below the level of significance that would require an EIS.”)

¹⁰⁴ *Australia v. Japan*, Court Judgment, 250. The Court hand-waived the issue of whether to read Article VIII broadly or narrowly, noting that “neither a restrictive nor an expansive interpretation of Article VIII is justified, but not going into detail about what kind of interpretation is merited. *Id.* at 252.

¹⁰⁵ *Australia v. Japan*, Separate Opinion of Judge Cançado Trindade, 349.

¹⁰⁶ International Convention for the Regulation of Whaling, Preamble, available at http://avalon.law.yale.edu/20th_century/whaling.asp.

¹⁰⁷ International Convention for the Regulation of Whaling, Article VIII (1), available at http://avalon.law.yale.edu/20th_century/whaling.asp.

¹⁰⁸ See, e.g., “Can Trophy Hunting Actually Help Conservation?” University of Washington Conservation, (Jan. 15, 2014) <http://www.conservationmagazine.org/2014/01/can-trophy-hunting-reconciled-conservation/>; “Does Trophy Hunting Actually Aid Conservation” The Atlantic (Sept. 8, 2015), <https://www.theatlantic.com/notes/2015/09/radiolab-on-whether-trophy-hunting-can-aid->

money raised is spent on conservation. Although the program is controversial, as might be expected, there is at least some evidence suggesting that it might be effective at promoting conservation.¹¹⁰ There are some ways in which this program might serve as an effective model for the International Whaling Commission. One idea would be to require mitigation measures commensurate with the number of whales killed. In *Australia v. Japan*, the International Court of Justices did a deep dive into the specifics of Japan's JARPA II program in order to determine "whether the design and implementation of a programme are reasonable in relation to achieving the stated research objectives."¹¹¹ One way to better ensure that permittees use lethal methods only when necessary is to require that they donate money or do some other mitigating behavior when they use lethal methods (i.e. when they kill whales).

Discussion and Conclusion

What the above-listed suggestions have in common is a concern that the ends justify the means. By analyzing Contracting Governments' stated intentions closely, giving greater deference to the Scientific Committee, and requiring mitigation measures, the International Whaling Commission and the International Court of Justice can examine "the relationship of the

[conservation/404350/](http://www.npr.org/sections/thetwo-way/2015/05/20/408186635/black-rhino-is-killed-by-u-s-hunter-who-won-controversial-auction); Bill Chappell, "Rare Black Rhino Killed By U.S. Hunter Who Won Controversial Auction" National Public Radio (May 20, 2015), <http://www.npr.org/sections/thetwo-way/2015/05/20/408186635/black-rhino-is-killed-by-u-s-hunter-who-won-controversial-auction>.

¹⁰⁹ Victor K. Muposhi et al., "Trophy Hunting, Conservation, and Rural Development in Zimbabwe: Issues, Options, and Implications" International Journal of Biodiversity (2016), <https://www.hindawi.com/journals/ijbd/2016/8763980/>; Adam Cruise, "Is Trophy Hunting Helping Save African Elephants," National Geographic, (Nov. 17, 2015), <http://news.nationalgeographic.com/2015/11/151715-conservation-trophy-hunting-elephants-tusks-poaching-zimbabwe-namibia/>.

¹¹⁰ Victor K. Muposhi et al., "Trophy Hunting, Conservation, and Rural Development in Zimbabwe: Issues, Options, and Implications" International Journal of Biodiversity (2016), <https://www.hindawi.com/journals/ijbd/2016/8763980/>; "Can Trophy Hunting Actually Help Conservation?" University of Washington Conservation, (Jan. 15, 2014) <http://www.conservationmagazine.org/2014/01/can-trophy-hunting-reconciled-conservation/>. *But see* Adam Cruise, "Is Trophy Hunting Helping Save African Elephants," National Geographic, (Nov. 17, 2015), <http://news.nationalgeographic.com/2015/11/151715-conservation-trophy-hunting-elephants-tusks-poaching-zimbabwe-namibia/>.

¹¹¹ *Australia v. Japan* [2014], Court Judgment, 260 (International Court of Justice).

research to relevant IWC resolutions and discussions”¹¹² to see if the program promotes the goals of the International Whaling Commission or detracts from them. But, ideally, both the International Whaling Commission and the International Court of Justice would ask these questions as well. One could imagine the International Whaling Commission implementing something like President Reagan’s Executive Order 12,291, which determined that “regulatory action shall not be undertaken unless the potential benefits to society from the regulation outweigh the potential costs to society.”¹¹³ In the absence of such an order, increased scrutiny over purposes, deference to the Scientific Committee, and the requirement of mitigation measures should accomplish similar goals.

The above suggestions are taken from American administrative and environmental law, but enforcing these would be consistent with existing whaling law. What makes arguing for legal changes difficult is the fact that the International Court of Justice’s opinions are not precedential.¹¹⁴ The actor in the best position to implement changes would therefore seem to be the International Whaling Commission itself.

These suggested improvements, however, can be implemented without any changes to the Schedule or Annex P. In *Australia v. Japan*, Australia argued that Article VIII should be read consistently with the other provisions of the Convention.¹¹⁵ Its position is supported by the Vienna Convention, which established that “[a] treaty shall be interpreted in good faith . . . in

¹¹² Revised Annex P, Process for the Review of Special Permit Proposals and Research Results from Existing and Completed Permits, 4, (Oct. 11, 2012) https://iwc.int/document_3100.

¹¹³ Exec. Order No. 12,291 (Feb. 17, 1981). See also Philip Shabecoff, “Reagan Order on Cost-Benefit Analysis Stirs Economic and Political Debate.” NY Times (Nov. 7, 1981), <http://www.nytimes.com/1981/11/07/us/reagan-order-on-cost-benefit-analysis-stirs-economic-and-political-debate.html?pagewanted=all>.

¹¹⁴ Statute of the International Court of Justice, Article 59.

¹¹⁵ *Australia v. Japan* [2014], Court Judgment, 250 (International Court of Justice) (citing Australia’s argument that “the reliance on Article VIII, paragraph 1, cannot have the effect of undermining the effectiveness of the regulatory regime as a whole.”)

light of its object and purpose.”¹¹⁶ That scientific permits are meant to be read consistently with the rest of the Convention is made clear by the fact that Article VIII applies “notwithstanding anything contained in this Convention.”¹¹⁷ This demonstrates that permits granted under Article VIII should not be granted if the permit would mark an exception so great as to frustrate the goals of the Convention.

More closely scrutinizing articulated purposes, giving greater weight to the Scientific Committee, and requiring mitigation measures are no more outside the Convention or Schedule’s text than the reasonableness test¹¹⁸ the International Court of Justice ended up imposing. The International Court of Justice looked beyond the text, and this is made clear by the fact that the International Whaling Commission has since directed the Scientific Committee to incorporate the test.¹¹⁹ That the International Whaling Convention added the test shows that it was not there in the first place.

At first glance, the reasonableness test advocated by the International Court of Justice would seem to accomplish the same goals as the measures proposed in this paper. But the International Court of Justice’s methodology of examining reasonableness does not accomplish the goals one might expect. The International Court of Justice’s focus on the “significant gap between the JARPA II target sample sizes and the actual number of whales that have been

¹¹⁶ Vienna Convention on the law of treaties (with annex). Concluded at Vienna on 23 May 1969, Article 31; *see also* Australia Memorial, 16, *Australia v. Japan* (May 9, 2011) (International Court of Justice), <http://www.icj-cij.org/docket/files/148/17382.pdf>.

¹¹⁷ International Convention for the Regulation of Whaling, Article VIII (1), available at http://avalon.law.yale.edu/20th_century/whaling.asp. *See also* Australia Memorial, 154, *Australia v. Japan* (May 9, 2011), <http://www.icj-cij.org/docket/files/148/17382.pdf>.

¹¹⁸ *Australia v. Japan* [2014], Court Judgment, 260 (International Court of Justice).

¹¹⁹ Matt DiCenso, *Trouble on the High Seas: A Need for Change in the Wake of Australia v. Japan*, 39 B. C. INT’L & COMP. L. REV. 13, 21 (2016).

killed”¹²⁰ shows that it is more concerned with catching Japan in a lie than with asking the more fundamental question, namely whether Japan’s kill target was acceptable in the first place.

While the International Court of Justice lacks the expertise to answer this question, the Scientific Committee does not. Making the weight of the Scientific Committee’s opinions more clear will help ensure that research program’s kill targets fit within the goals of the program. Requiring that Contracting Governments implement mitigations measures, meanwhile, will force them to scrutinize their kill target more target.

Finally, greater scrutiny of the Contracting Government’s stated objectives not only accords with the Convention and Article 31 of the Vienna Convention but is also common sense. As Justice Scalia has noted, a government can usually come up with a purpose that seems, on its face, to be valid.¹²¹ Where the Contracting Government cannot even do this, as was the case for JARPA II,¹²² the International Court of Justice should not hesitate to invalidate the program.

As Japan embarks on another “research” program, one which promises to kill even more whales, the International Whaling Commission and International Court of Justice (if it oversees a case) should more tightly scrutinize the motives and effects of Japan’s whaling program.

¹²⁰ *Australia v. Japan* [2014], Court Judgment, 286 (International Court of Justice).

¹²¹ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1026 (1992).

¹²² Government of Japan, Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) - Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources, 1, 5-6. <http://www.icrwhale.org/eng/SC57O1.pdf>.