

# The Battle Over Scientific Whaling: A New Proposal to Stop Japan's Lethal Research and Reform the International Whaling Commission

Laura Hoey

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# THE BATTLE OVER SCIENTIFIC WHALING: A NEW PROPOSAL TO STOP JAPAN'S LETHAL RESEARCH AND REFORM THE INTERNATIONAL WHALING COMMISSION

LAURA HOEY\*

*Hugest of living creatures, in the deep  
Stretched like a promontory sleeps or swims,  
And seems a moving land; and at his gills  
Draws in, and at his breath spouts out a sea.*

—John Milton, *Paradise Lost*<sup>†</sup>

## INTRODUCTION

The whale had been harpooned at 10.15 in the morning. . . . Apparently the master already realized that they had an unusually wary and resourceful whale on their harpoon. Normally these whalers harpoon, chase, lance and kill their whales in about an hour and 20 minutes. Already this whale had succeeded in avoiding the fatal lancing from the canoa for two hours . . . 13.12 — . . . And so the hunt goes, hour upon hour, the brave bull whale, through the day lanced again and again, dives and eludes, dragging the whalers after him. . . . The hunt begins against at dawn . . . 06.55 — . . . The harpooner throws the lance repeatedly, in the end using the lance to jab deeply without throwing. Twenty-one thrusts are made, and the whale begins spouting fountains of blood . . . 07.46 — . . . The whale surfaces, seems tired, confused, hurt. The harpooner thrusts his lance 18 times more . . . 08.07 — Still

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\* J.D. Candidate, William & Mary Law School, 2017; B.A. Law & Society, American University, 2011. Thank you to the staff of the *William & Mary Environmental Law and Policy Review* for their efforts on this Note. Thank you also to my husband, Keegan, for his continued support as I move forward in this career. This Note is dedicated to those who work to protect these magnificent creatures.

<sup>†</sup> JOHN MILTON, *PARADISE LOST* 209 (Oxford Univ. Press 2005).

lancing, there is no point in counting. The harpooner is working close enough to jab the lance deeply, over and over . . . 09.55 — The whale is dead. . . . The whale has taken 23 hours and 40 minutes to die.<sup>1</sup>

Japanese scientific whaling in the Antarctic has long angered wildlife conservationists. Many say that Japanese whaling is for commercial, rather than scientific, purposes. In 2014, conservationists saw a huge victory when the United Nations International Court of Justice (“ICJ”) ruled that Japan’s killing of Antarctic whales, whose meat ends up sold in shops and restaurants, was unjustified. Just one year later, Japanese whalers announced that they will resume hunting minke whales in the Antarctic as part of a revised scientific research program.

The policies of the International Whaling Commission (the “Commission”) and scientific whaling have been under attack since the early 1960s. Specifically, Japan has taken the brunt of the criticism for its scientific whaling initiatives. The recent Hague decision demonstrates how the Commission is failing when it comes to controlling Japanese whaling. This Note proposes a trifold solution that could be implemented to solve the scientific whaling problem: (1) address Japanese cultural perceptions of whaling through grassroots campaigns; (2) address Japan’s food security concerns; and (3) address the Commission itself through various reforms.

First, this Note will examine the relevant history of the Commission, beginning with its conception to its current state. Next, this Note will examine Japan’s position in regards to whaling since the founding of the Commission. An in-depth analysis of whaling in the Antarctic will follow along with Japan’s response to the decision. Finally, this Note will identify the root cause of Japan’s insistence on scientific whaling and propose a solution to address such concerns.

## I. HISTORY OF THE INTERNATIONAL WHALING COMMISSION

In 1930, the League of Nations Committee of Experts for the Progressive Codification of International Law prepared a report recommending a convention to regulate the exploitation of products of the sea.<sup>2</sup> The

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<sup>1</sup> DAVID DAY, *THE WHALE WAR* 144–47 (1987). This particular hunt was recorded by ecologist David Moody in July 1979.

<sup>2</sup> TUOMAS KUOKKANEN, *INTERNATIONAL LAW AND THE ENVIRONMENT: VARIATIONS ON A THEME* 129 (2002).

Economic Committee received this report, and after conferring with the International Council for the Exploitation of the Seas (“ICES”), concluded that a whaling convention was necessary.<sup>3</sup> As a result, in September of 1931 a convention was held in Geneva [hereinafter the 1931 Convention].<sup>4</sup> Although limited, the 1931 Convention was the first major international agreement regulating whaling.<sup>5</sup> The 1931 Convention prohibited the taking and killing of whales, calves, suckling whales, immature whales, and female whales accompanied by calves.<sup>6</sup> The scope of the 1931 Convention was broadened in 1937 and again in 1938.<sup>7</sup> While sound in theory, practically, these agreements had little effect on the whaling industry.<sup>8</sup>

True efforts to regulate whaling did not begin until the end of the Second World War.<sup>9</sup> Under the United States’ leadership,<sup>10</sup> on December 2, 1946, in Washington, fifteen nations<sup>11</sup> convened to sign the International Convention for the Regulation of Whaling (the “ICRW”).<sup>12</sup> This treaty created the International Whaling Commission (the “IWC”).<sup>13</sup> The 1946 Convention sought to safeguard “for future generations the great natural resources represented by the whale stocks” by confining whaling operations “to those species best able to sustain exploitation in order to give an interval for recovery to certain species of whales now depleted in numbers.”<sup>14</sup> In contrast to the 1931 Convention and subsequent amendments,

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<sup>3</sup> *Id.*

<sup>4</sup> KURKPATRICK DORSEY, *WHALES & NATIONS: ENVIRONMENTAL DIPLOMACY ON THE HIGH SEAS* 43 (2013).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 49.

<sup>8</sup> R. Michael M’Gonigle, *The Economizing of Ecology: Why Big, Rare Whales Still Die*, 9 *ECOLOGY* L.Q. 131 (1980).

<sup>9</sup> DORSEY, *supra* note 4, at 82.

<sup>10</sup> M’Gonigle, *supra* note 8, at 132–33. While no longer a whaling nation, the United States both organized and drafted proposals for the convention. Two policy reasons explain why the United States took such an active role: (1) the need for capital in war-torn countries was high. Whales were seen as a free resource that could provide both consumption goods in the form of meat and capital in the form of oil; and (2) American postwar political strategy. As the leader in this international organization, the United States maintained a voice in a global industry.

<sup>11</sup> *Membership and Contracting Governments*, INTERNATIONAL WHALING COMMISSION, <https://iwc.int/members> [<https://perma.cc/27YU-UPAH>] (last visited Nov. 15, 2016).

<sup>12</sup> DORSEY, *supra* note 4, at 114.

<sup>13</sup> *Id.* at 124.

<sup>14</sup> International Convention for the Regulation of Whaling, Preamble, Dec. 2, 1946, 62 Stat. 1716 [hereinafter ICRW].

the IWC had greater power to regulate whaling through a Schedule.<sup>15</sup> The Schedule set forth regulations regarding (1) protected and unprotected species; (2) open and closed seasons; (3) open and closed waters, including designated sanctuary areas; (4) size limits for each species; (5) time, methods, and intensity of whaling; (6) types of gear allowed; and (7) methods of measurement and catch returns and other records.<sup>16</sup> The IWC had the power to directly amend the Schedule, thus giving it the power to directly regulate whaling.<sup>17</sup>

Although an improvement over the 1930s-era whaling efforts, the IWC proved weak as well. Only nations who signed the treaty were bound to the Schedule.<sup>18</sup> However, even these nations could escape any subsequent Schedule amendments by objecting within ninety days.<sup>19</sup> Furthermore, while the treaty did provide for prosecutions of offenders, such prosecutions were the responsibility of the "Government having jurisdiction over the offence."<sup>20</sup> In practice, this meant that there was no guarantee a contracting government would actually prosecute its citizens for alleged infractions.<sup>21</sup>

Some conservationists went as far to call the IWC a whalers' club where nations "sat down at the table and bargained until they agreed among themselves what the sporting number of whales to be bagged [that] year would be."<sup>22</sup> Thus, many saw the IWC and its Schedule as a "kind of 'gentlemen's agreement' between nations to abide by sporting rules: an exact date for the opening of the season, a ban on the killing of nursing mothers and undersized whales, and an immediate end to the killing when the quota was reached."<sup>23</sup>

The fact that none of these gentlemen stuck to their agreement can be seen in the following two figures: Figure 1<sup>24</sup> shows the catches of Blue, Fin, Sei/Bryde's and Minke whales from 1910 until 1980.

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<sup>15</sup> KUOKKANEN, *supra* note 2, at 130.

<sup>16</sup> ICRW, *supra* note 14, at Article V.

<sup>17</sup> *Id.*

<sup>18</sup> MICHAEL LUCK, THE ENCYCLOPEDIA OF TOURISM AND RECREATION IN MARINE ENVIRONMENTS 443 (2008).

<sup>19</sup> M'Gonigle, *supra* note 8, at 135. Surprisingly, it was actually the United States that insisted on this provision over fears of national sovereignty.

<sup>20</sup> ICRW, *supra* note 14, at Article IX.

<sup>21</sup> See M'Gonigle, *supra* note 8.

<sup>22</sup> DAY, *supra* note 1, at 27.

<sup>23</sup> *Id.*

<sup>24</sup> S. FROST, WHALES AND WHALING, REPORT OF THE INDEPENDENT INQUIRY FOR THE GOVERNMENT OF AUSTRALIA 32 (1978).

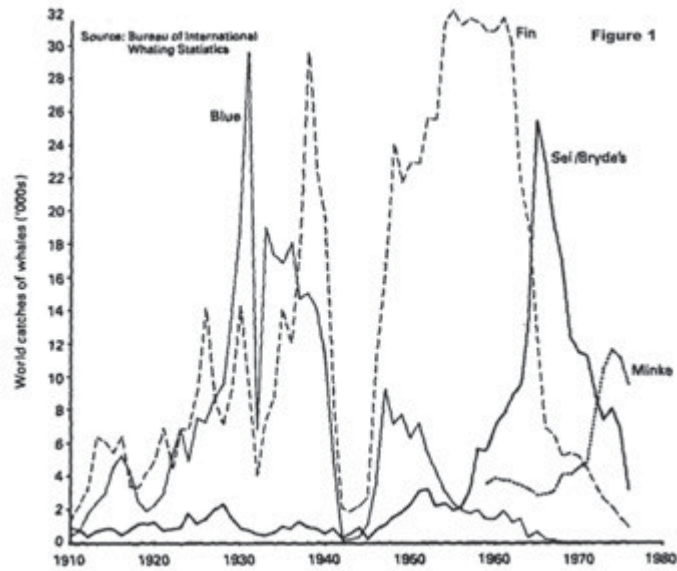


Figure 2<sup>25</sup> shows the catches of Sperm and Humpback whales for the same time period.



<sup>25</sup> *Id.*

Tragically, the Schedule as adopted in the 1946 conference actually worked to encourage whaling.<sup>26</sup> By limiting the seasons in which whalers could hunt, nations worked to develop the most efficient ships and killing techniques in order to maximize their share of the whaling quotas.<sup>27</sup> The resulting intense national competition caused an overcapitalized industry, coined the Whaling Olympics.<sup>28</sup>

This tragedy of the commons continued throughout the 1950s and 1960s.<sup>29</sup> The structure of the Commission itself is the problem.<sup>30</sup> Despite having formed a Scientific Committee to review catch limits, the Committee has no real power.<sup>31</sup> Yet, conservation furthered no national interest because a majority of member nations were involved in Antarctic whaling themselves.<sup>32</sup>

The 1970s saw the first large-scale environmental movement against whaling in the United States.<sup>33</sup> Domestic pressure from conservationists culminated in a ban on the importation of whale products into the United States.<sup>34</sup> In 1972, the United States submitted Proposal 33 at the United Nations Conference on the Human Environment held in Stockholm.<sup>35</sup> The proposal was unanimously adopted:

It is recommended that Governments agree to strengthen the International Whaling Commission, to increase international research efforts, and as a matter of urgency to call for an international agreement under the auspices of the International Whaling Commission and involving all governments concerned, for a 10-year moratorium on commercial whaling.<sup>36</sup>

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<sup>26</sup> M'Gonigle, *supra* note 8, at 137.

<sup>27</sup> GEORGE L. SMALL, *THE BLUE WHALE* 91 (1971).

<sup>28</sup> *Id.*

<sup>29</sup> DAY, *supra* note 1, at 28 (noting that in 1962, the USSR was suspected of having exceeded its quota of humpback whales by 5,000).

<sup>30</sup> *Id.* at 28–29.

<sup>31</sup> *Id.* at 29.

<sup>32</sup> Scott McVay, *Reflections on the Management of Whaling*, in *THE WHALE PROBLEM, A STATUS REPORT* 376 (Schevill 2d ed. 1974) (at the time the United States was leading proposal for a reduction in the quota for the Antarctic, a California-based company was hunting a population of humpback whales off the coast of California to extinction). M'Gonigle, *supra* note 8, at 140.

<sup>33</sup> RICHARD ELLIS, *MEN AND WHALES* 437 (1991).

<sup>34</sup> Endangered Species Act of 1973, 16 U.S.C. §§ 1533–1544 (1979).

<sup>35</sup> Report of the United Nations Conference on the Human Environment, June, 1972, UN Doc. A/CONF. 48/14 Rev. I.

<sup>36</sup> *Id.*

In an ironic twist, the IWC rejected Resolution 33 (previously, “Proposal 33”) in 1972 and again in 1973, failing to meet the required three-fourths majority (see Table 1).<sup>37</sup>

TABLE 1: VOTING ON MORATORIUM AT 1972 AND 1973 MEETING<sup>38</sup>

Country	1972			1973		
	For	Against	Abstain	For	Against	Abstain
Argentina	x			x		
Australia			x	x		
Canada			x	x		
Denmark			x			x
France			x	x		
Iceland		x			x	
Japan		x			x	
Mexico	x			x		
Norway		x			x	
Panama		x		x		
South Africa		x			x	
U.K.	x			x		
U.S.A.	x			x		
U.S.S.R.		x			x	
Total	4	6	4	8	5	1

Despite the Commission’s failure to adopt Resolution 33, the Commission did make efforts to restrict whaling.<sup>39</sup> The Commission phased out the killing of Antarctic fin whales by 1976, established separate quotas for male and female sperm whales, created distinct regions in the Southern Hemisphere, refused to increase quotas for small minke whales and reduced quotas for the sei whale.<sup>40</sup>

In a politically unpopular move, Japan and the USSR both objected to the Commission’s new efforts.<sup>41</sup> Both countries objected to the

<sup>37</sup> See INT’L COMM’M ON WHALING, *Twenty-Fourth Report of the Commission* (1972–73), at 27.

<sup>38</sup> PEGGY JONES, JONATHAN BARZDO, JOANNA GORDON CLARK & FRIENDS OF THE EARTH, *THE WHALE MANUAL* 31 (1978).

<sup>39</sup> See INT’L COMM’M ON WHALING, *Twenty-Fifth Report of the Commission* (1973–74), at 29.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 6–7.



phase out of fin whales in the Antarctic and the catch limit of 5,000 minke whales.<sup>42</sup> At the time, the United States, in response to intense domestic conservationist pressure, passed a series of legislation including the Marine Mammal Protection Act of 1972<sup>43</sup> and the Endangered Species Act of 1973.<sup>44</sup> More importantly, in 1971 after a dispute with Denmark over alleged salmon overfishing, the United States passed the Pelly Amendment to the Fisherman's Protective Act.<sup>45</sup> The Amendment provided for sanctions against nations violating international conservation regulations, including a ban on all fisheries imports from nations that conducted "fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program."<sup>46</sup> This obscure piece of legislation could finally be used to "give teeth to [the] IWC rulings internationally."<sup>47</sup>

Despite the Secretary of Commerce's ruling that the Japanese and USSR objections to the IWC regulation was an action under the Pelly Amendment, President Ford reported to Congress that he believed the countries would respect the quotas in the future and took no further action.<sup>48</sup> Domestic conservationists responded by boycotting Japanese and Soviet goods.<sup>49</sup> It was clear that the goals of the IWC were to be taken seriously.<sup>50</sup>

Mounting conservationist efforts toward a moratorium led to the Australian government introducing a compromise proposal (the "New Management Procedure") at the Commission's 1974 meeting.<sup>51</sup> Under the "selective" moratoria, each species of whales was classified into one of three categories: Initial Management Stocks, Sustained Management Stocks and Protection Stocks.<sup>52</sup> The categories centered around maximum sustainable yield ("MSY") and species were classified based on the advice of the Scientific Committee.<sup>53</sup> Those species above the MSY were

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<sup>42</sup> *Id.*

<sup>43</sup> Marine Mammal Protection Act of 1972, 16 U.S.C. § 1361 (1972).

<sup>44</sup> Endangered Species Act of 1973, 16 U.S.C. § 1531 (1973).

<sup>45</sup> Pelly Amendment, Pub. L. No. 92-219, 85 Stat. 786 (1971).

<sup>46</sup> *Id.*

<sup>47</sup> DAY, *supra* note 1, at 32.

<sup>48</sup> [1974-1975] TWENTY-SIXTH REP. COMM'N 25-26 (Int'l Whaling Comm'n).

<sup>49</sup> William Hargrove, *Boycott Japanese Goods: Environmentalists Harpoon Whalers*, THE DESERT SUN, Apr. 26, 1974, at D10.

<sup>50</sup> DAY, *supra* note 1, at 32.

<sup>51</sup> DAVID M. LAVIGNE, GAINING GROUND: IN PURSUIT OF ECOLOGICAL SUSTAINABILITY 116 (2006).

<sup>52</sup> M'Gonigle, *supra* note 8, at 144.

<sup>53</sup> *Id.*

Initial Management Stocks, at or near were Sustained Management Stocks and those below were Protection Stocks.<sup>54</sup> The New Management Procedure was adopted and came into effect in 1975.<sup>55</sup>

Many conservationists believed that the New Management Procedure would cause the collapse of the whaling industry within a “year or two.”<sup>56</sup> To the contrary, Japan’s whaling efforts increased.<sup>57</sup> In 1976, Japan’s major fishing companies merged to form the Japan Joint Whaling Company.<sup>58</sup> It seemed that Japan was streamlining its whaling efforts rather than retiring them.<sup>59</sup> Although it remained a member of the Commission, Japan continued to object and circumvent the Commission’s proposed quotas and Schedules.<sup>60</sup> For example:

in 1964, Japan finally agreed to stop the killing of blue whales. . . . At the same time that Japan was piously pronouncing that it was giving full protection to the blue whale, the Japanese government licensed its whalers to set up shore stations in Chile to go after the blues. For four years between 1964 and 1968, the Japanese killed 690 blue whales.<sup>61</sup>

Japan’s first attempt to sidestep Commission quotas through the scientific permit was in 1976, when Japan issued itself a permit to kill 240 Bryde’s whales despite the Commission’s zero quota for this species.<sup>62</sup> This action prompted a change in the Commission’s rules, whereby the members agreed to submit their proposed permits to the Scientific Committee for consideration before issuing them.<sup>63</sup> Another concern came before the Commission the next year regarding Japan: pirate whaling.<sup>64</sup> While most of the noncomplying hunts were conducted by other nations, Japan controlled the operations through corporations and the products of

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 148.

<sup>57</sup> *Joint Whaling Firm Set for Small Quota*, JAPAN STOCK J., Feb. 23, 1976, at 2.

<sup>58</sup> M’Gonigle, *supra* note 8, at 148.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Van Note, *The Pirate Whalers*, GREENPEACE CHRONICLES, Dec. 1978, at 5.

<sup>62</sup> INT’L COMM’M ON WHALING, Twenty-Ninth Annual Meeting, *Report of the Scientific Committee* (IWC/29/4) at A2.

<sup>63</sup> *Chairman’s Report of the Twenty-Ninth Meeting*, 29 REP. INT’L WHALING COMM’N 13, 36 (1977).

<sup>64</sup> ELLIS, *supra* note 33, at 451.

these hunts were exported to Japan.<sup>65</sup> In an article in the *Sunday Times*, Japan's practice of using pirate whalers and transferring vessels to non-member nations was exposed.<sup>66</sup> Despite increased awareness and concern over these practices, the Commission took no action against Japan.<sup>67</sup>

The year 1979 saw an increase in pro-whaling nations to the Commission.<sup>68</sup> This increased support for Japan's position was counter-balanced by the changing policies of other member nations.<sup>69</sup> Australia, New Zealand, the United Kingdom and the United States all supported full-scale moratorium proposals.<sup>70</sup> That year saw only a small victory for conservationists: the adoption of a pelagic moratorium and the establishment of a sanctuary in the Indian Ocean.<sup>71</sup>

Non-whaling states continued to join the Commission.<sup>72</sup> Table 2 shows how pro- or anti-whaling a member country was in the Commission. A conservationist vote scored a plus one, while a non-conservationist vote scored minus one, with an abstention or absence scoring zero. Totaling the numbers shows the shift towards conservation efforts during those three years.

TABLE 2: RATING IWC MEMBER NATIONS

1978		1979		1980	
Mexico	+10	France	+16	France	+16
Panama	+10	Panama	+15	Netherlands	+16
France	+9	Netherlands	+15	Oman	+16
Netherlands	+8	Seychelles	+14	Australia	+15
Argentina	+6	Sweden	+12	Seychelles	+15
		United			
United States	+6	Kingdom	+12	New Zealand	+15
New Zealand	0	New Zealand	+11	Sweden	+14

<sup>65</sup> M'Gonigle, *supra* note 8, at 154.

<sup>66</sup> *Id.* at 166.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 170. South Korea, Peru, Chile and Spain joined whereas these countries had previously whaled outside the confines of the Commission. Sweden and Seychelles, whale conservationists, were the other two nations to join that year.

<sup>69</sup> *Id.*

<sup>70</sup> Geoffrey Lean, *Britain is Ready to Outlaw Whale Oil*, THE OBSERVER, July 8, 1979, at 1.

<sup>71</sup> *Chairman's Report of the Thirty-First Meeting*, 31 REP. INT'L WHALING COMM'N 4, 24 (1979).

<sup>72</sup> IWC, *supra* note 11.

	1978		1979		1980
United Kingdom	-1	United States	+10	Mexico	+13
				United Kingdom	+12
Canada	-3	Australia	+10	Switzerland	+10
Australia	-3	Mexico	+7	United States	+10
Brazil	-4	Argentina	+4	Argentina	+9
South Africa	-5	Canada	+2	Canada	+1
Iceland	-6	South Africa	+1	Denmark	+1
Denmark	-6	Spain	-1	South Africa	0
Norway	-7	Norway	-3	Norway	-1
U.S.S.R.	-9	Iceland	-4	Brazil	-8
Japan	-10	Denmark	-4	Iceland	-10
		Brazil	-6	Chile	-12
		Chile	-9	Peru	-12
		U.S.S.R.	-12	South Korea	-14
		Peru	-13	Spain	-14
		Korea	-16	Japan	-15
		Japan	-17	U.S.S.R.	-15
<b>Totals:</b>	<b>-5</b>		<b>44</b>		<b>62</b>

Finally, in 1982, the Commission reached the necessary three-quarters majority it needed to implement a full moratorium on commercial whaling.<sup>73</sup> In relevant part, the moratorium read: “[C]atch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985 and 1986 pelagic seasons and thereafter shall be zero.”<sup>74</sup> While a huge victory, the moratorium applied only to commercial whaling—scientific and aboriginal whaling were still allowed.<sup>75</sup>

## II. JAPAN’S RESPONSE TO THE MORATORIUM

The Japanese stated they “saw no legal or moral obligation to accept any decision of the commission” and as such, it objected to the 1982 moratorium and continued its commercial whaling operations.<sup>76</sup> At the

<sup>73</sup> ICRW, *supra* note 14, at Schedule 10(e).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> DAY, *supra* note 1, at 128.

time, the United States had in place the Packwood-Magnuson Amendment, which directed that any nation certified under the Pelly Amendment as reducing the effectiveness of the Whaling Convention must have its fishery allocation within the U.S. conservation zone reduced by at least fifty percent.<sup>77</sup> At the time, Japan had already been certified under the Pelly Amendment, and thus the automatic sanctions of the Packwood-Magnuson Amendment should have kicked in.<sup>78</sup>

However, in defiance of the country's own legislation, the Reagan Administration conducted a secret meeting with the Japanese in 1984.<sup>79</sup> The two governments struck a deal and the United States allowed Japan to continue its commercial whaling operations until 1988 without fear of sanctions.<sup>80</sup>

Domestic conservationists took their fight to the justice system.<sup>81</sup> Twelve conservationist organizations filed suit in the Washington District court against the U.S. State and Federal Departments for failure to implement the Packwood-Magnuson sanctions against the Japanese.<sup>82</sup> The conservationists won at the district court level, but the government appealed in 1985.<sup>83</sup> Again, the appeals court ruled in favor of the conservationists.<sup>84</sup> In a strategic move, the government appealed to the Supreme Court.<sup>85</sup> By appealing to the highest Court, the decision would again be delayed another year.<sup>86</sup> Even if the Court ruled against the government, the government would have a year in which to implement the sanctions. By that time, it would be 1988 and the government's agreement with Japan would be over.<sup>87</sup>

In a 5-4 decision, the Court ruled in favor of the government and reversed the two lower court decisions.<sup>88</sup> There has been much speculation on whether the Reagan Administration heavily pressured the Court into this decision.<sup>89</sup> "Most conservationists viewed the whole exercise as

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<sup>77</sup> Packwood-Magnuson Amendment, 16 U.S.C. § 1821 (1979).

<sup>78</sup> DAY, *supra* note 1, at 129.

<sup>79</sup> *Id.* at 128.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 129.

<sup>82</sup> *American Cetacean Soc'y v. Baldrige*, 604 F. Supp. 1398 (D.D.C. 1985).

<sup>83</sup> *American Cetacean Soc'y v. Baldrige*, 768 F.2d 426 (D.C. Cir. 1985).

<sup>84</sup> *Id.*

<sup>85</sup> *Japan Whaling Ass'n v. American Cetacean Soc'y*, 474 U.S. 1053 (1986).

<sup>86</sup> DAY, *supra* note 1, at 129.

<sup>87</sup> *Id.*

<sup>88</sup> *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986).

<sup>89</sup> DAY, *supra* note 1, at 130.

a vicious abuse of legal power and government money misused to betray a cause the American public has strongly supported.”<sup>90</sup>

The Japanese had no intention of ceasing their whaling efforts in 1988.<sup>91</sup> After his meeting with President Reagan in 1985, Moriyoshi Sato, the Japanese Minister of Fisheries, assured his citizens that the government would “do its utmost to find out ways to maintain the nation’s whaling in the form of research or other forms.”<sup>92</sup> True to his word, in 1987, Japan issued itself a scientific research permit for the killing of whales.<sup>93</sup> The Japanese Whale Research Program under Special Permit in the Antarctic (“JARPA”) alleged four main objectives: (1) estimation of biological parameters to improve the stock management of the Southern Hemisphere minke whale; (2) elucidate the role of whales in the Antarctic marine ecosystem; (3) elucidation of the effect of environmental change on cetaceans; and (4) elucidation of the stock structure of Southern Hemisphere minke whales to improve stock management.<sup>94</sup> The IWC objected to the permit.<sup>95</sup> Specifically, the Commission stated that the “proposed research program as described . . . [did] not satisfy the criteria set out . . . for scientific research in that the proposed research [did] not appear, on present information, to be structured so as to contribute information essential for rational management of the stock.”<sup>96</sup> In its resolution, the Commission asked the Japanese government to “refrain from issuing special permits to its nationals for the taking of such whales” under JARPA “until such time as the Scientific Committee is able to resolve the serious uncertainties identified in its discussion as to the capability of the research methods proposed.”<sup>97</sup> Despite this, Japanese whalers killed their first minke whale in the Antarctic in February of 1988.<sup>98</sup>

In a surprise move, given the administration’s former position, President Reagan condemned Japan’s actions and initiated sanctions

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 129.

<sup>92</sup> *Id.*

<sup>93</sup> Donald R. Rothwell, *Australia v. Japan: JARPA II Whaling Case before the International Court of Justice*, THE HAGUE JUSTICE PORTAL (July 2, 2010), <http://www.haguejusticeportal.net/index.php?id=11840> [<https://perma.cc/H8KD-PUZR>].

<sup>94</sup> *Scientific Contribution JARPA/JARPA II*, THE INSTITUTE OF CETACEAN RESEARCH, <http://www.icrwhale.org/scJARPA.html> [<https://perma.cc/HXH3-TEN9>] (last visited Nov. 15, 2016).

<sup>95</sup> INT’L WHALING COMM’N, *Resolution on Japanese Proposal for Special Permits* (1987) at 4.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> ELLIS, *supra* note 33, at 408–09.

under the Packwood-Magnuson Amendment.<sup>99</sup> In a letter to the Speaker of the House of Representatives and the President of the Senate, President Reagan discussed the “lack of any evidence that Japan is bringing its whaling activities into conformance with the recommendations of the IWC” and consequently “directed the Secretary of State under the Packwood-Magnuson Amendment to withhold 100 percent of the fishing privileges that would otherwise be available to Japan in the U.S. Exclusive Economic Zone.”<sup>100</sup> At the time, Japan had requested the opportunity to fish for 3,000 metric tons of sea snails and 5,000 metric tons of Pacific whiting in this U.S. controlled zone, both of which were denied.<sup>101</sup> This cost the Japanese an estimated \$425 million in lost revenues per year.<sup>102</sup>

Despite this victory, the Reagan Administration refused to invoke the Pelly Amendment against Japan and restrict the import of marine products from Japan.<sup>103</sup> Without the credible threat of trade sanctions, Japan continued its “scientific whaling.”<sup>104</sup> Over the continued objection of the Commission, Japan hunted under JARPA until 2005.<sup>105</sup> From 1987 to 2005, Japanese whalers killed a total of 6,700 Antarctic minke whales.<sup>106</sup>

In 1994, Japan issued itself another scientific permit called the Japanese Whale Research Programme under Special Permit in the North Pacific, or JARPN.<sup>107</sup> The stated purpose of JARPN was to determine the

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<sup>99</sup> Letter from Ronald Reagan, XL President of the United States, to the Speaker of the House of Representatives and the President of the Senate Reporting on Japanese Whaling Activities (Apr. 6, 1988), <http://www.presidency.ucsb.edu/ws/index.php?pid=35644> [<https://perma.cc/DMA7-3S4J>].

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Richard Black, *Did Greens Help Kill the Whale?*, BBC NEWS (May 16, 2007), <http://news.bbc.co.uk/2/hi/science/nature/6659401.stm> [<https://perma.cc/7BYF-5FWS>].

<sup>103</sup> Isao Miyaoka, *Legitimacy in International Society: Japan's Reaction to Global Wildlife Preservation*, 5 INT'L RELATIONS ASIA PACIFIC 278, 278–80 (2005) (book review).

<sup>104</sup> *Id.*

<sup>105</sup> IWC Scientific Committee, *Report of the Intersessional Working Group to Review Data and Results from Special Permit Research on Minke Whales in the Antarctic*, SC/49/Rep1, 48 REPORT INT'L WHALING COMM'N 411, 377–412 (May 1997); IWC Scientific Committee, *Report of the Intersessional Workshop to Review Data and Results from Special Permit Research on Minke Whales in the Antarctic*, SC/59/Rep1, 10 J. Cetacean Research and Management 411 (2006), at 9. The Scientific Committee reviewed JARPA in 1997 and again in 2006. In both instances, the Committee questioned the validity of the program and the data and recommended that Japan cease its whaling operations.

<sup>106</sup> Remi Moncel, *Dangerous Experiments: Scientific Integrity in International Environmental Adjudications After the ICJ's Decision in Whaling in the Antarctic*, 42 ECOLOGY L.Q. 305, 333 (2015).

<sup>107</sup> *Scientific Contribution JARPN/JARPNII*, THE INSTITUTE OF CETACEAN RESEARCH, <http://www.icrwhale.org/scJARPN.html> [<https://perma.cc/2G7R-2QV2>] (last visited Nov. 15, 2016).

stock structure of common minke whales as well as the feeding ecology in the North Pacific.<sup>108</sup> The program called for the taking of 100 whales annually.<sup>109</sup> In the year 2000, the Scientific Committee reviewed the program and urged Japan to cease its use of lethal research methods.<sup>110</sup>

In 2000, Japan issued itself JARPN II, which called for the taking of 100 minke whales, fifty Bryde's whales and ten sperm whales in the North Pacific.<sup>111</sup> The stated objectives were to study feeding ecology, stock structure and the whale's environmental impact on the region.<sup>112</sup> The study was completed in 2002, at which time Japan began a long-term study on how whale feeding impacted Japan's Exclusive Economic Zone.<sup>113</sup> Under this study, Japan proposed to take 340 minke whales, fifty Bryde's whales, 100 sei whales and ten sperm whales.<sup>114</sup>

JARPN II prompted much disagreement amongst the Scientific Committee over the objectives, methodology, and value of the program.<sup>115</sup> Unlike previous scientific permits, this study had no proposed end date.<sup>116</sup> Ultimately, the Scientific Committee found the permit's objectives unnecessary for stock management and that the study findings would not contribute to any research needs.<sup>117</sup> The Committee continued to disagree over whether lethal means were necessary in order to obtain the data sought.<sup>118</sup> The Commission passed resolutions in 2000, 2001, and 2003 urging Japan to cease the use of research permits for whaling and halt its use of lethal research methods.<sup>119</sup>

In 2005, Japan issued itself a third scientific permit, the Japanese Whale Research Program under Special Permit in the North Pacific Phase II, or JARPA II.<sup>120</sup> JARPA II consisted of six-year length phases

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Scientific Committee, *Report of the Scientific Committee*, 7 J. CETACEAN RESEARCH AND MGMT. 47 (2005).

<sup>111</sup> *Id.* at 46.

<sup>112</sup> *Id.* at 47.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Japan's Lethal Research Programme—JARPN II Review*, WHALE AND DOLPHIN CONSERVATION (May 28, 2002), <http://us.whales.org/news/2002/05/japans-lethal-research-programme-jarpn-ii-review> [<https://perma.cc/VE4C-BAW5>].

<sup>117</sup> Scientific Committee, *supra* note 110, at 49.

<sup>118</sup> *Id.* at 47.

<sup>119</sup> *Reaction to Lost Votes: Japan Threatens to Pull Out of the IWC*, THE JAPAN TIMES ONLINE (June 21, 2003), <http://www.japantimes.co.jp/news/2003/06/21/national/japan-threatens-to-pull-out-of-the-iwc> [<https://perma.cc/UB85-XADJ>].

<sup>120</sup> *Scientific Contribution: JARPA/JARPAII*, INSTITUTE OF CETACEAN RESEARCH, <http://>



in which the government proposed to monitor the Antarctic ecosystem, model competition among species, understand stock structure, and improve management procedures.<sup>121</sup> The permit authorized both lethal and nonlethal research means and authorized the taking of fifty fin whales, fifty humpback whales and 850 minke whales.<sup>122</sup>

Before the end of the first phase, Australia brought suit against Japan in the International Court of Justice.<sup>123</sup>

### III. THE AUSTRALIAN PERSPECTIVE

Due to Australia's proximity to the Antarctic waters, the country has been one of the most vocal in opposing Japanese whaling.<sup>124</sup> Along with Greenpeace, the World Wildlife Fund, and other environmental groups, Australia has long argued that Japan's scientific whaling is a cover for commercial operations. Ironically, Australia was once a strong proponent of the whaling industry.<sup>125</sup> In the days leading up to the 1977 IWC meeting, anti-whaling activists chased Australian whaling vessels off the West Australian coast.<sup>126</sup> The vessel fired a harpoon, which hit and sank the dinghy into shark-infested waters.<sup>127</sup>

The incident garnered worldwide media coverage.<sup>128</sup> These chases were followed by daily demonstrations outside the conference.<sup>129</sup> With heavy criticism being leveraged at the country as a result of the media coverage, Australia changed its position within six months to join the advocates of the moratorium.<sup>130</sup>

Support for the anti-whaling cause quickly swept through the country.<sup>131</sup> The Save the Whale Movement was an important platform for the Prime Minister's 1977 election campaign and an IWC opinion poll revealed that seventy percent of Australians supported anti-whaling

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[www.icrwhale.org/scJARPA.html](http://www.icrwhale.org/scJARPA.html) [<https://perma.cc/2ZY4-A5DZ>] (last visited Nov. 15, 2016).

<sup>121</sup> Moncel, *supra* note 106, at 334.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 335.

<sup>124</sup> CHARLOTTE EPSTEIN, *THE POWER OF WORDS IN INTERNATIONAL RELATIONS: BIRTH OF AN ANTI-WHALING DISCOURSE* 148 (2008).

<sup>125</sup> *Id.* at 149.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> EPSTEIN, *supra* note 124, at 149.

<sup>131</sup> *Id.* at 150.

efforts.<sup>132</sup> Just one year later, in November of 1978, the last Australian whaling company announced it would cease operations.<sup>133</sup> The country banned whaling outright by April 1979.<sup>134</sup>

In 1980, Australia enacted the Whale Protection Act. The Act's purpose was to "provide for the preservation, conservation and protection of whales and other cetaceans."<sup>135</sup> The Act was the first of its kind, prohibiting people from killing, capturing, injuring, or interfering with whales, dolphins, and porpoises in Australian waters.<sup>136</sup> The Act also specifically prohibited Australian citizens from engaging in whaling activities internationally.<sup>137</sup> Finally, the Act banned the importation of all whale products as of January 1981.<sup>138</sup>

In 1999, the country created a Whale Sanctuary with the passage of the Environment Protection and Biodiversity Conservation Act of 1999.<sup>139</sup> Specifically, the Act declared as a whale sanctuary the waters from the three-mile state waters limit to the boundary of the country's Exclusive Economic Zone (i.e., roughly 200 miles from the coast).<sup>140</sup> Severe penalties attached to anyone violating the Act.<sup>141</sup>

Australia's relationship with Japan over whaling has been strained over the past decades. In 2007, over concerns that Japanese whalers were violating the Whale Sanctuary, the Australian government announced plans to monitor Japanese whalers entering the waters for a potential international legal challenge.<sup>142</sup> In 2008, Australia sent the *Oceanic Viking* on a surveillance mission.<sup>143</sup> From this endeavor, Australia released photos

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<sup>132</sup> *Id.* at 149–50.

<sup>133</sup> *Id.* at 150.

<sup>134</sup> *Id.*

<sup>135</sup> The Whale Protection Act, 1980 (Austl.).

<sup>136</sup> *Id.* at pts. 1–2.

<sup>137</sup> *Id.*

<sup>138</sup> ARNE KALLAND, UNVEILING THE WHALE: DISCOURSES ON WHALES AND WHALING 87 (2013).

<sup>139</sup> Environment Protection and Biodiversity Conservation Act, 1999 ch. 5 pt. 13 div. 3 subdiv. B para. 225 (Austl.).

<sup>140</sup> *Id.* at para. 225, 227.

<sup>141</sup> *Id.* at subdiv. C para. 229–30.

<sup>142</sup> Malcolm Farr & Lauren Williams, *Navy, RAAF to Shadow Whalers*, THE DAILY TELEGRAPH (Dec. 14, 2007), <http://www.dailytelegraph.com.au/navy-raaf-to-shadow-whalers/story-e6frev90-1111115106808>.

<sup>143</sup> *Customs Ship to Shadow Japanese Whalers*, ABC NEWS (Dec. 18, 2007), <http://www.abc.net.au/news/2007-12-19/customs-ship-to-shadow-japanese-whalers/992974> [https://perma.cc/YRU4-P43M]; Rob Taylor, *Australia Sends Patrols to Shadow Japan Whalers*, REUTERS (Dec. 19, 2007), <http://www.reuters.com/article/environment-australia-whaling-dc-idUSSYD13128120071219> [https://perma.cc/2AWB-EXH4].

of a mother and calf minke whale being killed by Japanese whalers within the Sanctuary.<sup>144</sup>

As a result, Australia threatened to sue Japan if it did not cease its whaling efforts in the Southern Ocean.<sup>145</sup> New Zealand also indicated that it was considering a case against Japan.<sup>146</sup>

Japan responded, claiming that it does not recognize Australia's territorial claim on the waters and would not cease its whaling efforts in the Southern Ocean.<sup>147</sup> In 2009, Australia's Prime Minister again reiterated the country's intent to take international legal action.<sup>148</sup> "[I]f we cannot resolve this matter diplomatically, we will take international legal action. I'm serious about it, I would prefer to deal with it diplomatically, but if we cannot get there, that's the alternative course of action."<sup>149</sup>

Diplomacy failed and on May 31, 2010, the Australian government filed formal proceedings against Japan in the International Court of Justice in the Hague, Netherlands.<sup>150</sup>

#### IV. WHALING IN JAPAN: AUSTRALIA V. JAPAN

In 2014 Australia, joined by New Zealand, brought suit against Japan in the International Court of Justice.<sup>151</sup> In its initial application to the Court, Australia made four main requests of the Court:

<sup>144</sup> Lawrence Bartlett, *Australia has 'Shocking' Evidence of Japan's Whaling: Minister*, THE SYDNEY MORNING HERALD (Feb. 7, 2008), <http://www.smh.com.au/world/australia-has-shocking-evidence-of-japans-whaling-minister-20080207-1qs9.html>.

<sup>145</sup> Beatrice Gitau, *Japanese Whalers Fined for Hunting in Antarctic Waters Off Australia*, THE CHRISTIAN SCIENCE MONITOR (Nov. 18, 2015), <http://www.csmonitor.com/World/Global-News/2015/1118/Japanese-whalers-fined-for-hunting-in-Antarctic-waters-off-Australia>; see also Justin McCurry, *Australia Threatens Legal Action Over Japanese Whaling*, THE GUARDIAN (Feb. 19, 2010), <https://www.theguardian.com/world/2010/feb/19/australia-japan-whaling-lawsuit-theat> [<https://perma.cc/V8SQ-2685>].

<sup>146</sup> Amy Coopes, *Australia to Sue Japan over Whaling*, PHYS.ORG. (May 28, 2010), <http://phys.org/news/2010-05-australia-sue-japan-whaling.html> [<https://perma.cc/NF99-V4NM>].

<sup>147</sup> Gitau, *supra* note 145.

<sup>148</sup> Press Release, The Honorable Peter Garrett MP, Minister for the Environment, Heritage and the Arts & The Honorable Bob Debus MP, Minister for Home Affairs, Whaling Announcement—Release of Images from the Oceanic Viking (Feb. 7, 2008), <http://www.environment.gov.au/minister/archive/env/2008/pubs/tr20080207a.pdf> [<https://perma.cc/L35K-ZU8L>].

<sup>149</sup> David Fox, *Australia 'Seriously' Considering Whaling Challenge*, REUTERS (Dec. 10, 2009), <http://www.reuters.com/article/us-whaling-australia-idUSTRE5BA06120091211> [<https://perma.cc/75FS-W3QD>].

<sup>150</sup> See Whaling in the Antarctic (Austl. v. Japan), Application Inst. Proceedings, 2010 I.C.J. (May 31), <http://www.icj-cij.org/docket/files/148/15951.pdf> [<https://perma.cc/SEW6-JRAX>].

<sup>151</sup> Whaling in the Antarctic (Austl. v. Japan: N.Z. intervening), Judgment, 2014 I.C.J. Rep. 226 (Mar. 31).

1. to “adjudge and declare that Japan is in breach of its international obligations in implementing the JARPA II program in the Southern Ocean”;
2. to order that Japan “cease implementation of JARPA II”;
3. to revoke any authorizations, permits, or licenses allowing whaling; and
4. to provide assurances and guarantees that Japan will not take any further action under JARPA II or any similar program until such program complies with the Commission’s requirements and international law.<sup>152</sup>

A. *Jurisdiction of the Court*

Japan first challenged the jurisdiction of the Court.<sup>153</sup> In rejecting Japan’s argument and holding that the Court did have proper jurisdiction over the case, the Court noted that the case was about whether Japan had unlawfully violated its obligations under the ICRW and not whether Japan was whaling in a maritime zone over which Australia asserted sovereign rights.<sup>154</sup>

Thus, having determined the Court had jurisdiction to hear the case, the Court proceeded to address the merits of the case.<sup>155</sup>

1. Standard of Review

The Court next turned to what the appropriate standard of review should be in reviewing the grant of a special permit “authorizing the killing, taking and treating of whales on the basis of Article VIII, paragraph 1, of the Convention.”<sup>156</sup>

Article VIII, paragraph 1 of the Convention states that a special permit may be authorized to “kill, take and treat whales for the purposes of scientific research subject to such restrictions” imposed by the Contracting Government.<sup>157</sup>

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<sup>152</sup> Whaling in the Antarctic, *supra* note 150, at 40–41.

<sup>153</sup> *Austl. v. Japan: N.Z. intervening*, 2014 I.C.J. 226, 238–39, ¶ 24 (Mar. 31).

<sup>154</sup> *Id.* at 246, ¶¶ 40–41.

<sup>155</sup> *Id.* at 246, ¶ 41.

<sup>156</sup> *Id.* at 253, ¶ 62.

<sup>157</sup> *Id.* at 249–50, ¶ 51.

The Court broke down the above paragraph and examined the phrases “for purposes of” and “scientific research” separately. Interestingly enough, the Court rejected Australia’s proposed four-step criteria for what constitutes “scientific research”<sup>158</sup> but did not “consider it necessary to devise alternative criteria or to offer a general definition of ‘scientific research.’”<sup>159</sup>

As to “for the purposes of,” the Court concluded that a government may have multiple objectives in instituting a research program, and also that the fact that a program “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.”<sup>160</sup>

Ultimately, the Court (somewhat haphazardly) set the standard of review as whether the methods (i.e., lethal sampling) are “reasonable in relation to achieving the programme’s stated research objectives. The research objectives alone must be sufficient to justify the programme as designed and implemented.”<sup>161</sup>

## 2. The Court’s Conclusions

The Court seemed skeptical of Japan’s arguments from the beginning of the opinion. At issue throughout the opinion were the apparent inconsistencies between the proposed research program under JARPA II and the way in which Japan actually implemented the program. While the Court found that the “use of lethal sampling per se is not unreasonable in relation to the research objectives of JARPA II,”<sup>162</sup> the Court did find that the means in which Japan carried out the program were “not reasonable in relation to achieving the programme’s objectives.”<sup>163</sup>

First, the Court found that while the objectives of JARPA and JARPA II were roughly identical, JARPA II outlined a considerable increase in lethal whale sampling without sufficient explanation.<sup>164</sup> Second, the sample sizes for fin and humpback whales, two species which JARPA II sought to research, were “too small to provide the information that is necessary to pursue the JARPA II research objectives based on Japan’s

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<sup>158</sup> *Id.* at 258, ¶ 83.

<sup>159</sup> *Austl. v. Japan: N.Z. intervening*, 2014 I.C.J. Rep. at 238–39 ¶ 24.

<sup>160</sup> *Id.* at 259, ¶ 94.

<sup>161</sup> *Id.* at 260, ¶ 97.

<sup>162</sup> *Id.* at 292, ¶ 224.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 292, ¶ 225.

own calculations, and the programme's design [appeared] to prevent the random sampling of fin whales."<sup>165</sup> Third, the Court held that "the process used to determine the sample size for minke whales lack[ed] transparency."<sup>166</sup> Fourth, the Court held that some evidence "suggest[ed] that little attention was given to the possibility of using non-lethal research methods more extensively to achieve the JARPA II objectives and that funding considerations, rather than strictly scientific criteria, played a role in the programme's design."<sup>167</sup>

In addition to the problems with the actual research program design, the Court took issue with the way in which the program was implemented.<sup>168</sup> First, no humpback whales were sampled, despite a catch-limit of fifty whales annually outlined in JARPA II.<sup>169</sup> Second, the actual take of fin whales accounted for only a small percentage of what the research plan actually prescribed.<sup>170</sup> Third, the actual take of minke whales was much lower than what the research plan prescribed.<sup>171</sup> Fourth, neither "JARPA II's objectives nor its methods have been revised or adapted to take account of the actual number of whales taken."<sup>172</sup> Furthermore, Japan failed to "explain how those research objectives remain viable given the decision to use six-year and 12-year research periods for different species, coupled with the apparent decision to abandon the lethal sampling of humpback whales entirely and to take very few fin whales."<sup>173</sup>

Ultimately, the Court was not convinced that the program was for purposes of scientific research.<sup>174</sup> Accordingly, the Court held that "JARPA II involves activities that can broadly be characterized as scientific research, but that the evidence does not establish that the programme's design and implementation are reasonable in relation to achieving its stated objectives."<sup>175</sup> Thus, the Court concluded "that the special permits granted by Japan for the killing, taking and treating of

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<sup>165</sup> *Austl. v. Japan: N.Z. intervening*, 2014 I.C.J. Rep. at 292 ¶ 24.

<sup>166</sup> *Id.* at 292–93, ¶ 225.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 293, ¶ 226.

<sup>169</sup> *Id.* at 266, 293, ¶ 123, 226.

<sup>170</sup> *Id.* at 293, ¶ 226.

<sup>171</sup> *Austl. v. Japan: N.Z. intervening*, 2014 I.C.J. Rep. at 292 ¶ 24.

<sup>172</sup> *Id.* at 293, ¶ 226.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 293, ¶ 227.

<sup>175</sup> *Id.*

whales in connection with JARPA II are not for purposes of scientific research pursuant to Article VIII, paragraph 1, of the Convention.”<sup>176</sup>

### 3. Remedies

Australia requested that Japan: (a) refrain from authorizing special permit whaling, which is not explicitly for scientific research under Article VIII; (b) immediately cease the implementation of JARPA II; and (c) “revoke any authorization, permit or license that allows the implementation of JARPA II.”<sup>177</sup> The Court agreed to two of the three requests, ordering “that Japan shall revoke any extant authorization, permit or license 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.”<sup>178</sup>

However, 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 [because] that obligation already applies to all State parties.”<sup>179</sup>

## V. JAPANESE AND INTERNATIONAL RESPONSES TO THE HAGUE'S DECISION

Humanitarians saw the International Court of Justice's decision as a major victory. Many saw the ruling as elevating environmental concerns and respect for international environmental law over “political considerations.”<sup>180</sup> After the decision was announced, Japan made all indications that it would comply with the Court's ruling.<sup>181</sup>

Noriyuki Shikata, Japanese Foreign Ministry spokesman for the Japanese delegation to the International Court of Justice said, “Japan was ‘disappointed’ by the court's decision but would abide by it ‘as a state

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<sup>176</sup> *Id.*

<sup>177</sup> *Austl. v. Japan: N.Z. intervening*, 2014 I.C.J. Rep. at 298, ¶ 244.

<sup>178</sup> *Id.* at 298, ¶ 245.

<sup>179</sup> *Id.* at 298, ¶ 246.

<sup>180</sup> Moncel, *supra* note 106, at 308.

<sup>181</sup> Justin McCurry, *Japan Told to Halt Antarctic Whaling by International Court*, THE GUARDIAN (Mar. 31, 2014), <https://www.theguardian.com/environment/2014/mar/31/japanese-whaling-halt-antarctic-international-court> [<https://perma.cc/5J8W-3WP8>].

that places great importance on the international legal order and the rule of law as a basis of the international community.”<sup>182</sup> Shikata continued, saying, “In terms of a future course of action, people in Tokyo will examine that, but we have made our position clear—that we will abide by the judgment.”<sup>183</sup>

Inherent in the Court’s decision was the ability for Japan to revise its whaling program in order to comply with Article VIII of the Convention.<sup>184</sup> Thus, despite giving all indications that it would cease its whaling operations in the Antarctic following the Court’s ruling, Japan announced in early January of 2015 its plans to resume its Antarctic whaling.<sup>185</sup> In a statement, Japan’s newly formed New Scientific Whale Research Program in the Antarctic Ocean (officially titled NEWREP-A, but referred to commonly as JARPA III) said, “After giving serious scientific consideration, it has been concluded that age data at the annual scale can be obtained only through lethal sampling methods, and thus lethal methods need to be employed under this program.”<sup>186</sup>

## VI. NEWREP-A/JARPA III

This new program was scheduled to start in the summer of 2015 and last for twelve initial years.<sup>187</sup> The proposal calls for the taking of 333 minke whales, which is an increase from the 252 whales that were killed in the final year of JARPA II.<sup>188</sup> The plan also covers a larger area around the Antarctic (Figure 3).<sup>189</sup> This new proposed research area overlaps with the Commission’s Whale Sanctuary (Figure 4).<sup>190</sup>

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<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> Melissa Cronin, *Japan’s Whaling Fleet Hunts Again, But With a New Sinister Strategy*, THE DODO (Jan. 7, 2015), <https://www.thedodo.com/whaling-japan-non-lethal-917956758.html> [<https://perma.cc/VU3W-PHAQ>].

<sup>186</sup> *Id.*

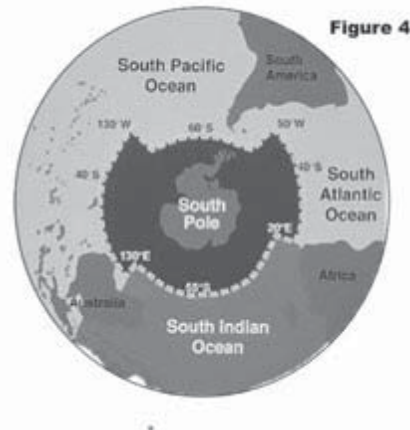
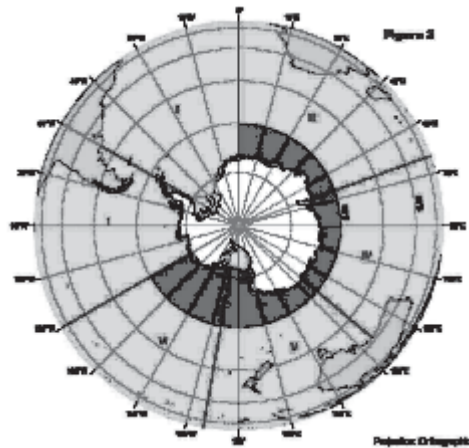
<sup>187</sup> Indi Hodgson-Johnston, *Japan’s New Whaling Program is a Small Win for Whales, but . . .*, THE CONVERSATION (Nov. 19, 2014), <http://theconversation.com/japans-new-whaling-program-is-a-small-win-for-whales-but-34420> [<https://perma.cc/QD6U-Z4ZE>].

<sup>188</sup> Greenpeace, IFAW & WWF, *Japan’s “New” Proposal for Continued Research Whaling in the Antarctic Ocean*, INTERNATIONAL FUND FOR ANIMAL WELFARE, <http://www.ifaw.org/sites/default/files/2015-Greenpeace-IFAW-WWF-JARPA-III-Briefing.pdf> [<https://perma.cc/AY77-E2DP>].

<sup>189</sup> Hodgson-Johnston, *supra* note 187.

<sup>190</sup> *Id.*; *Whale Sanctuaries*, WORLD WILDLIFE FUND, [http://www.wwf.org.au/our\\_work/saving\\_the\\_natural\\_world/wildlife\\_and\\_habitats/australian\\_priority\\_species/whales/what\\_is](http://www.wwf.org.au/our_work/saving_the_natural_world/wildlife_and_habitats/australian_priority_species/whales/what_is)





The proposal itself is over one hundred pages long and discusses the requirements of the Court's ruling at length.<sup>191</sup> The stated objectives of the proposal are to: (1) improve the precision of biological and ecological information regarding Antarctic minke whales; and (2) investigate the structure and dynamics of the Antarctic ecosystem.<sup>192</sup>

Greenpeace, the IFAW, and the WWF have all criticized Japan's new proposal as "contrary to the obligations to take account of the Court's reasoning and conclusions."<sup>193</sup> First, conservationists point to Japan's failure to have the permit reviewed by the Scientific Committee, as required by the newly adopted Resolution 2014-5.<sup>194</sup> Second, the main objectives of NEWREP-A have been criticized as being much the same objectives under JARPA and JAPRA II.<sup>195</sup> Third, Japan stated in the proposal that the sampling design of JARPA II was largely successful.<sup>196</sup> However, the Scientific Committee's review of JARPA concluded that after eighteen years and 7,000 kills, the main research objectives of the program remained largely unmet.<sup>197</sup> Thus, conservationists have been quick to ask how this new program, which mirrors its predecessors, will "be able to

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[\\_wwf\\_doing\\_to\\_protect\\_whales/whale\\_sanctuaries/ \[https://perma.cc/ZX5J-3X3Y\]](https://perma.cc/ZX5J-3X3Y) (last visited Nov. 15, 2016). Note, the yellow dotted line indicates the boundary of the Sanctuary.

<sup>191</sup> Greenpeace, *supra* note 188.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> Greenpeace, *supra* note 188.

answer the scientific questions that the first two [programs] failed to answer.”<sup>198</sup>

Ultimately, it appears that Japan’s new program is a cleverly worded scheme to “justify its scientific objectives”<sup>199</sup> while skirting the true spirit and holding of the Court’s decision.

## VII. CONTINUED DISAGREEMENTS BETWEEN AUSTRALIA AND JAPAN

In defense of its new plan, “Japan says it wants to collect more data on the Antarctic minke whale population—in case the moratorium is ever lifted—and to study the Antarctic marine ecosystem.”<sup>200</sup> However, the “IWC panel concluded that the Japanese proposal lacked clear scientific objectives and contained ‘insufficient information’ to complete a full review.”<sup>201</sup> The IWC informed Japan that it would review the proposed plan and provide recommendations at the annual meeting of the IWC Scientific Committee in May of 2015.<sup>202</sup>

At the time, despite no clear permission from the International Whaling Commission, Japan asserted that it has the right to hunt whales in the Antarctic.<sup>203</sup> Once the panel reviewed Japan’s new proposal at the May meeting, it ultimately concluded that the program did not justify the killing and taking of whales on scientific grounds.<sup>204</sup> “The committee deferred a potential decision until its next meeting, in 2016, but 44 committee members from 13 countries signed a statement agreeing that there was no scientific reason to kill whales for research.”<sup>205</sup>

In November of 2015, an Australian court responded to the continued whaling by Japan in parts of the Australian Southern Ocean Sanctuary by imposing an AU\$1,000,000 (approximately \$700,000 USD) fine on Kyodo Senpaku Kaisha, the Japanese firm responsible for the violation.<sup>206</sup>

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<sup>198</sup> *Id.*

<sup>199</sup> Hodgson-Johnston, *supra* note 187.

<sup>200</sup> Emily J. Gertz, *Japan Says it has a Right to Hunt Whales*, TAKEPART.COM (June 22, 2015), <http://www.takepart.com/article/2015/06/22/whaling-commission-scientific-committee-delays-decision-japan-scientific-whaling> [<https://perma.cc/NN7M-T3M6>].

<sup>201</sup> *Id.*

<sup>202</sup> David Kirby, *Did Japan’s Whale Hunt Just Get Harpooned*, TAKEPART.COM (Apr. 14, 2015), <http://www.takepart.com/article/2015/04/14/are-japans-whale-hunting-days-numbered> [<https://perma.cc/LBR7-KCV2>].

<sup>203</sup> Gertz, *supra* note 200.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Australia Court Fines Japanese Firm \$700,000 for Killing Whales*, THE JAPAN TIMES (Nov. 18, 2015), <http://www.japantimes.co.jp/news/2015/11/18/national/australia-court>

The Japanese whalers are now also facing suits filed by the Sea Shepherd (an international non-profit marine conservation group) in the federal district court in Seattle, Washington.<sup>207</sup> “Sea Shepherd has asked the court to find that Japan’s Southern Ocean whaling program violates international law, and to impose an injunction to prevent it from continuing.”<sup>208</sup>

## VIII. IDENTIFICATION OF THE PROBLEM

### A. *The Court’s Decision*

With such mounting pressure to cease its whaling operations, conservationists are left asking two questions: (1) why does Japan believe its renewed whaling efforts comply with the Hague’s decision; and (2) why does the Japanese government insist on hunting whales?

Japan maintains that it will abide by the Hague’s decision.<sup>209</sup> Yet, Japan also plans to begin hunting minke whales in 2016.<sup>210</sup> How does the Japanese government square these two statements?

The issue lies with the Hague decision itself. The Court narrowed its ruling to whether or not JARPA II met the whaling convention’s requirements.<sup>211</sup> While this is a great victory for activists, the decision only worked to cease Japan’s whaling under that specific permit.

First, the decision is extremely limited in scope. The Court limited its discussion to lethal sampling under JARPA II.<sup>212</sup> The Court did *not* widen the scope of the case and say that scientific whaling in general is unlawful.<sup>213</sup> Throughout the decision, the Court was careful to carve out exceptions and narrow its discussion to only the JARPA II permit. Discussions on aboriginal subsistence whaling were expressly excluded from

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-fines-japanese-firm-700000-killing-whales/#.VtZI3ja9-JY [https://perma.cc/G6PS-5PZJ].

<sup>207</sup> *Australian Federal Court Finds Japanese Whalers Guilty of Contempt of Court and Issues \$ 1 Million Fine for Violating Injunction*, SEA SHEPARD (Nov. 18, 2015), <http://www.sea-shepherd.org/news-and-media/2015/11/18/australian-federal-court-finds-japanese-whalers-guilty-of-contempt-of-court-and-issues-1-million-fin-1767> [https://perma.cc/L3VV-6924].

<sup>208</sup> *Id.*

<sup>209</sup> Tim Stephens, *Japan Could Resume Whaling—This Time with the Hague’s Blessing*, THE CONVERSATION (Sep. 8, 2014), <http://theconversation.com/japan-could-resume-whaling-this-time-with-the-hagues-blessing-31351> [https://perma.cc/3FXW-KN65].

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> Jacqueline Peel, *Introductory Note to Whaling in the Antarctic*, 54 I.L.M. 1, 3 (2014).

<sup>213</sup> Stephens, *supra* note 209.

the Court's discussions. As such, the Court's decision applies only to the Southern Ocean, leaving open the possibility that Japan begin other similar whaling operations in different areas.<sup>214</sup> Furthermore, the Court was quite careful to state that its decision was not meant to pass judgment on larger policy views of whaling.

Second, the decision lacks procedural clarity.<sup>215</sup> The Court did not engage in a discussion of what "science" is in terms of whaling. The ICJ does not allow amicus briefs.<sup>216</sup> As such, the Court's understanding as to the science behind Japan's whaling was limited. While the Court did weigh in on how much deference to give a nation's scientific findings, it did not provide a standard for "the admission of scientific evidence, a standard or proof," or clarify who bears the "burden of proving scientific facts."<sup>217</sup> This lack of procedural clarity creates difficulties for countries, like Australia, who wish to claim that a permit is not meeting its scientific requirements. If there is no specified scientific standard, how can the international community know when it has been violated?

Third, the Court's decision is not binding. It does not bind itself, nor does it bind other international tribunals.<sup>218</sup> "Limited resources, state political pressure, lack of scientific expertise, or limited transparency could tilt the balance against scientific integrity."<sup>219</sup> A lack of clarity, coupled with a non-binding decision creates room for exploitation. "In short, it is dangerous to leave environmental protection at the mercy of international tribunals' ad hoc procedural experiments."<sup>220</sup>

Lastly, there are no enforcement mechanisms. At the end of its decision, the Court merely declares that JARPA II lacked scientific merit and did not conform to the requirements set forth by the Commission. So what next? If Japan decided to continue its hunts under the guise of JARPA II or other similar permit, the Court lacks any real power to stop it.

Thus, while the Hague's decision is seen as a large political victory, the scope of the decision itself is extremely narrow. Japan is free to submit, and has done so, requests for new whaling permits.<sup>221</sup> The Court

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<sup>214</sup> Peel, *supra* note 212, at 3.

<sup>215</sup> Moncel, *supra* note 106, at 308.

<sup>216</sup> I.C.J., *How the Court works*, <http://www.icj-cij.org/court/index.php?p1=1&p2=6> [https://perma.cc/3BCK-U5BP].

<sup>217</sup> Moncel, *supra* note 106, at 308.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> Sara Phillips, *Japan Whaling: Renewed Program Slammed by International Whaling Commission Scientists*, AUSTL. BROADCASTING CORP. NEWS (Jan. 20, 2016), <http://www>

set a low bar in terms of requirements Japan must meet in order to obtain a permit. “The Court did not set specific limits on the number or species of whale that Japan could legitimately target . . . [it] simply [ruled] that the sample sizes needed to be ‘reasonable.’”<sup>222</sup>

As such, Japan can submit a new permit application and still be in compliance with the Court’s decision. An application that sets a “less ambitious scientific [objective] and . . . [seeks] to take fewer whales,” would likely meet or exceed the Court’s recommendations and eliminate Japan’s risk for recrimination.<sup>223</sup>

### B. *Japanese Cultural Tradition*

The popularity for whale meat in Japan is dwindling. In fact, “whale meat was only [] popular across the island nation during a short period following World War II.”<sup>224</sup> So why, in the face of global criticism, does the Japanese government continue to pursue whaling? The first reason is cultural. Many scholars have argued that Japanese people “don’t tend to see whales as charismatic mammals that should be protected from human consumption by a universal taboo.”<sup>225</sup> In Japan, whales are considered to be “really big fish” and “most Japanese lack any special love of whales and disagree with Western animal rights activists who [insist] on whales’ rights.”<sup>226</sup>

This sentiment was perfectly expressed in a 1988 letter to the editor of the *Yomiuri Daily*, a Tokyo newspaper:

First of all, we must get this straight: whales are born to be exploited. Unless we start with this consensus, our arguments will get nowhere. Second, we should emphasize that minke whales are not on the endangered species list. Therefore, there can be nothing wrong with catching a reasonable number of them. Third, we should repeat that no one has the right to dictate to others what they should

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.abc.net.au/news/2016-01-21/whaling-japan-scientists-slam-renewed-program/7099336 [https://perma.cc/DC9Z-C298].

<sup>222</sup> Stephens, *supra* note 209.

<sup>223</sup> *Id.*

<sup>224</sup> Tom Philpott, *2 Surprising Reasons Why Japan Won't Stop Hunting Whales*, MOTHER JONES (Dec. 16, 2015), <http://www.motherjones.com/tom-philpott/2015/12/japan-stirs-whale-controversy-its-tiny-appetite-big-fish> [https://perma.cc/ZC4E-EV5D].

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

or should not eat. No one but the barbarians who do not appreciate cultural relativism and subtlety would undertake such an absurdity. One senses a tinge of cultural arrogance lurking on the part of those who attempt to discredit whaling.<sup>227</sup>

### C. *Politics and Food Security*

The second justification for Japan's continued whaling efforts is political. Many believe that Japan sees whaling as political turf to be maintained in the face of global condemnation—both domestic and abroad.

Domestically, the interministerial rivalries within the Japanese government are intense. "It is not likely that one actor would voluntarily concede one of their areas of jurisdiction. Should the whaling program end, certain officials would find themselves out of work."<sup>228</sup>

Abroad, some scholars point to Japan's concerns over food security.<sup>229</sup> During the twentieth century, the Japanese government has made food security a chief concern among the public.<sup>230</sup> "Dependence on imports is a common media discourse in Japan. It both expresses food security concerns among the public and helps to reproduce them."<sup>231</sup> As such, consumers are encouraged and taught to "side with producers in a joint effort" to work towards self-sufficiency in food.<sup>232</sup> Japanese insistence on whaling illustrates this line of thinking. Whaling is seen as a step towards food supply self-sufficiency and, thus, the public is taught to support it.

### D. *The Commission*

The third justification is the International Whaling Commission itself. The struggle over Japanese whaling is a great case study, which highlights the difficult situation in which the Commission has been put. The Commission was never a conservationist group, and yet it has now been given that mantle. Many of the 1980s conservationist groups described the Commission as "a 'whalers' club' . . . [where delegates] . . . sat

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<sup>227</sup> ELLIS, *supra* note 33, at 492.

<sup>228</sup> Philpott, *supra* note 224.

<sup>229</sup> KATE BARCLAY & GRAEME SMITH, EAST ASIA'S DEMAND FOR ENERGY, MINERALS AND FOOD: THE INTERNATIONAL POLITICS OF RESOURCES 91 (2016).

<sup>230</sup> *Id.* at 100.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

down at a table and bargained until they agreed among themselves what the sporting number of whales to be bagged this year would be.”<sup>233</sup>

The structure and treaties under which the Commission operates were written at a time when the Commission's main objective was to protect whales *for* whaling, not *from* whaling. There are no provisions for the enforcement of the Schedule, and member nations may simply object to the Schedule and continue their whaling operations as they please.<sup>234</sup>

The way in which the Commission operates can be seen in a larger context of undermining the effect and validity of international treaties. If a nation is going to be a member nation under an international treaty, it should not be able to “object” to the treaty's goals while still remaining a member nation. This juxtaposition weakens the integrity of all international treaties.

#### *E. Proposed Solution*

This Note proposes a trifold solution to the Japanese whaling problem. The first prong addresses Japanese cultural perception of whales as food, the second addresses Japanese food security concerns, and the third, the IWC itself.

“One senses a tinge of cultural arrogance lurking on the part of those who attempt to discredit whaling.”<sup>235</sup> If it is true that the majority of the Japanese see the Save the Whale movement as the West attempting to push their ideals onto another nation, it is understandable why the nation has been stubborn in its reluctance to stop whaling. As expressed in the editorial, many may see this Western pressure as a threat to Japan's sovereignty. “Sovereignty is the legal expression of national independence. Sovereignty is to a nation what liberty is to an individual.”<sup>236</sup>

In the face of such strong sentiment, how does one create meaningful change? Australia itself is a wonderful case study. The country went from a great supporter of whaling to one of the industry's staunchest critics. This change was largely effected through grassroots movements and international media pressure. In much the same way, a strong Japanese grassroots movement could bring about a switch in the way the country's public perceives whaling.

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<sup>233</sup> DAY, *supra* note 1, at 27.

<sup>234</sup> *Id.*

<sup>235</sup> ELLIS, *supra* note 33, at 492.

<sup>236</sup> Jeremy Rabkin, *National Sovereignty: Why it is Worth Defending*, WORLD FAMILY POLICY FORUM 78 (2000).

Of utmost importance is the idea that the movement come from *within* Japan. If the movement were to be Western led, it would be seen as the West attempting to force its ideals upon the island nation, and it will fail. There is already a foundation set in Japan for an anti-whaling movement. In 1989, a Japanese anti-whaling group, the Elsa Nature Conservancy, released its first press release, which was distributed to delegates at that year's IWC meeting.<sup>237</sup>

Eiji Fujiwara, the then director of the group, wrote in the publication's opening statement:

The Japanese whaling industry is structurally a semi-government operation and to the world opinion which has tilted toward the ban on commercial whaling, the Fisheries Agency of the government and the whaling companies together stood against it. Moreover, they carried out propaganda and manipulated the public opinion so that there would be no voice against the national policy within the nation.<sup>238</sup>

In a separate publication, Fujiwara noted that: (1) whaling was started in 1933 by outsiders and thus was not a Japanese cultural tradition; (2) financial contributions of whaling are insignificant; (3) the habit of eating whale meat only developed recently; (4) local demand for whale meat is decreasing; and (5) many whaling towns have developed post-whaling plans.<sup>239</sup>

The fact that there exists at least one Japanese anti-whaling group is encouraging. It signals that there are those within the nation that support the movement. Community outreach and education can surely work from within the nation to build greater support for the anti-whaling movement.

Second, Japan sees the ability to whale as integrally tied to their food supplies and, thus, national security. Often touted as a reason for continuing to whale, the Japanese believe that if they voluntarily cease whaling, then countries may eventually put pressure on them to halt their other fishing efforts. As an island nation, it "gets a large proportion of its protein from fish and shellfish."<sup>240</sup> As opposed to the United States,

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<sup>237</sup> ELLIS, *supra* note 33, at 496.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 492.



which is a “vast, rich country with millions of acres committed to raising food,” Japan’s population is:

crammed into the rocky islands. . . . Conservation is a luxury that Japan can ill afford if they expect to feed their 120 million people. Lack of space also means that the Japanese cannot economically raise cattle or pigs, since most of the feed that might be used to cultivate these animals has to be imported.<sup>241</sup>

Yet, while whaling may be what is held up to protect Japan’s interest in fishing, the government needs to realize that this position hinders their interests more than it helps. A Google image search of “Japanese Whaling” will produce thousands of grisly images depicting mother whales and calves being hauled aboard Japanese vessels, blood stained waters, and blood stained decks carrying dismembered whales.<sup>242</sup>

Over the years, whales and dolphins have held the fascination of the public as new research reveals that these creatures have a “rare intelligence in the animal kingdom.”<sup>243</sup> Researchers suggest that cetaceans may actually be more advanced than humans in speech production, emotions, and cognition.<sup>244</sup> According to a study out of Michigan State University, cetaceans “have the distinct advantage over [humans] in that their primary sense is the same as their primary means of communication, both are auditory. With primates, the primary sense is visual and the primary means of communication is auditory.”<sup>245</sup> As a result, researchers theorize that cetaceans are “able to project an ‘auditory image’ that replicates a sonar message they may receive.”<sup>246</sup> The equivalent in the human world would be the ability to “create instantaneous holographic pictures to convey images to other people.”<sup>247</sup>

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<sup>241</sup> *Id.* at 493.

<sup>242</sup> Image Search for “Japanese Whaling,” Google Images, <http://images.google.com> (search “Japanese Whaling”).

<sup>243</sup> *Brain Power*, WHALE AND DOLPHIN CONSERVATION, <http://us.whales.org/whales-and-dolphins/brain-power> [<https://perma.cc/X6Z6-KV4X>] (last visited Nov. 15, 2016).

<sup>244</sup> Madison Montgomery, *Still Think Humans are the Most Intelligent Animals? Here’s Why Whales and Dolphins Have Us Beat*, ONE GREEN PLANET, <http://www.onegreenplanet.org/animalsandnature/human-intelligence-versus-whales-and-dolphins/> [<https://perma.cc/P3GE-JKK7>] (last visited Nov. 15, 2016).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

Research has also revealed that the limbic system of whales is “so large it erupts into the cortex in the form of an extra paralimbic lobe.”<sup>248</sup> The limbic system of cetaceans, the system which creates emotions and is the foundation of memories, is therefore larger and more complex than that of humans.<sup>249</sup>

As human understanding of cetaceans grows, so does the public’s special fascination with these creatures. Japan’s continued whaling efforts are seen to the rest of the world as “barbaric.”<sup>250</sup> An online comment to a news article covering resumed Japanese whaling after the Hague’s decision states, “Consecutive federal governments have done absolutely nothing to stop this barbaric practice which also thumbs its nose at international treaties and our territorial sovereignty.”<sup>251</sup> This statement demonstrates how strongly the public feels about Japan’s whaling policy, seeing it even as a violation of international treaties and a threat to national security.

Japan’s stance on whaling has actually led to *greater* food security concerns. Recall that in 1988, President Reagan directed the Secretary of State under the Packwood-Magnuson Amendment to withhold 100 percent of Japan’s fishing privileges in the United States Exclusive Economic Zone.<sup>252</sup>

Japan’s food security concerns are not unfounded. When a large percentage of food is imported, a nation becomes “particularly vulnerable to natural disasters and global [events] that might disrupt shipping and the food supply.”<sup>253</sup> However, there are less controversial ways to combat this concern. Hawaii makes a great case study. In 2012, the island state released its “Increased Food Security and Food Self-Sufficient Strategy.”<sup>254</sup> In its report, the state estimated that eighty-five to ninety percent of food is imported. To combat this, the state proposed three objectives: increase demand for and access to locally grown foods, increase production of locally

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<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> Terry Barnes, *We Don’t Have the Power to Stop Japan’s Whaling, but Our Friends Do*, ABC NEWS (Dec. 8, 2015), <http://www.abc.net.au/news/2015-12-09/barnes-we-should-respond-to-japanese-whaling-with-force/7010184> [https://perma.cc/2PAK-AGD5].

<sup>251</sup> *Id.*

<sup>252</sup> Letter from November 13, 2016 Ronald Reagan, *supra* note 99.

<sup>253</sup> Office of Planning Department of Business Economic Development & Tourism, *Increased Food Security and Food Self-Sufficiency Strategy*, DEP’T OF AGRIC. STATE OF HAW. (Oct. 2012), at ii, [http://files.hawaii.gov/dbedt/op/spb/INCREASED\\_FOOD\\_SECURITY\\_AND\\_FOOD\\_SELF\\_SUFFICIENCY\\_STRATEGY.pdf](http://files.hawaii.gov/dbedt/op/spb/INCREASED_FOOD_SECURITY_AND_FOOD_SELF_SUFFICIENCY_STRATEGY.pdf) [https://perma.cc/2PD7-EFMF].

<sup>254</sup> *See id.*

grown foods, and provide policy and organizational support to meet food self-sufficiency needs.<sup>255</sup>

Among its recommendations were things such as encouraging residents to buy locally grown food through a marketing campaign, creating a fund to repair and maintain irrigation systems, and promoting workforce developments in agricultural, energy, and natural resource related sectors.<sup>256</sup> While the strategy would have to be adjusted to meet Japan's unique needs, such a program would be a great starting place to increase Japan's self-sufficiency, and thus decrease the nation's food security concerns.

Third is the International Whaling Commission itself. While drastic, there are two solutions for dealing with this issue. The first is to completely rewrite the Convention and the Schedule. The current Convention and Schedule are written in a way to *allow* for whaling. Public sentiment and attitudes towards whaling has changed since these documents were drafted in 1946. Whales used to be used for lamp oil, cooking oil, candles, soaps, cosmetics, corsets, umbrellas, animal feed, fertilizer, and string for tennis racquets.<sup>257</sup> Modern innovation has made replacements for all of these products.<sup>258</sup> Currently, the *only* product produced from whaling is whale meat itself.<sup>259</sup> Rewriting the controlling documents with a modern perspective would go a long way to protecting whales for their own sake, rather than for the sake of would-be whalers.

Should the Convention be rewritten, of utmost importance would be the way in which scientific permits are issued. Instead of allowing member nations to "object" or issue scientific permits themselves, the Scientific Committee should have the exclusive authority to issue research permits. Should a member nation desire to contribute to scientific inquiry by conducting research whaling, such permit applications should first be filed with the Scientific Committee.

If the member nation puts forth an application which requests lethal sampling, such permits should be reviewed with great care. First, the reviewing committee should inquire into whether the nation can

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<sup>255</sup> *Id.* at ii.

<sup>256</sup> *Id.* at iii.

<sup>257</sup> *Replacing Natural Resources: Case Study 3 Whales*, THE KEY CENTRE FOR POLYMER COLLOIDS (SUPPORTED UNDER THE AUSTRALIAN RESEARCH COUNCIL'S RESEARCH CENTRES PROGRAM) (Feb. 21, 2001), [http://discovery.kcpc.usyd.edu.au/9.5.1/9.5.1\\_whale.html](http://discovery.kcpc.usyd.edu.au/9.5.1/9.5.1_whale.html) [https://perma.cc/X2H3-HVVN].

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

accomplish the research without the lethal sampling. If not, the Committee should then weigh whether or not the research is of significant value to justify the taking of a life.

Another important provision that should be addressed in new controlling documents would be enforcement mechanisms. For example, member nations should agree that if they are found in violation of the Commission's Schedule or permitting regulations, the Commission will assess a fine to that member nation. These fines could then be used to fund whaling conservation efforts.

Self-monitoring and reporting by the member nations would be an effective way to ensure compliance. Should any member nation suspect another of violating the Schedule or permitting regulations, or should a third party submit evidence to the Commission of a violation, a reviewing committee of disinterested members could form to evaluate the accusations and assess their credibility.

The second, and somewhat related, proposed solution would be to disband the IWC and hold a new convention. The current Commission has come under severe criticism for its failure to protect smaller cetaceans such as dolphins.<sup>260</sup> A newly formed commission could properly address these concerns instead of attempting to patch what the current Commission has failed to address. Should a new convention be held, the same provisions detailed above should be incorporated into the newly formed commission's charter.

## CONCLUSION

"What is it in our nature that propels us to continue a hunt initiated in earlier times?"<sup>261</sup> Human attitude toward whales has made tremendous progress since the first whaling convention. Conservationists have finally seen a long-awaited victory on an international level. And yet, Japan is propelled to continue this archaic hunt.

While cultural sensitivity should not be taken lightly, the question must be asked: when does the importance of morality outweigh the importance of cultural norms? As science continues to progress and understand cetaceans, the truth about their intelligence is becoming increasingly clear: whales are not simply "big fish," but rather intelligent and social creatures who, in many ways, lead lives similar to humans.

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<sup>260</sup> THE COVE (Lionsgate 2009).

<sup>261</sup> ELLIS, *supra* note 33, at 497.

Grassroots support against whaling has died down significantly since its inception; yet, human activities still threaten many species of whales. Chief among them is Japan's insistence on scientific whaling.

An in-depth look at Japan's research reveals that it is less about science, and more about political positioning. Concerns over national sovereignty and food security drive Japan's whaling policy. At the center is the International Whaling Commission, originally an organization set up *for* whalers, now charged with protecting whales *from* whalers.

Outdated and outmoded, the agreement under which the Commission operates does not provide the requisite tools to handle such a charge. As a result, the Commission stands idle as nations like Japan continue to engage in commercial whaling under the guise of scientific research.

Japan's concerns can be addressed in a way that would obviate its need for whaling. Anti-whaling initiatives can be encouraged within the country through grassroots campaigns, and food security concerns can be improved through effective marketing, funding, and investment in natural resource development.

The Commission itself needs updating. Reforms that concentrate permitting power with the Scientific Committee and provide for enforcement mechanisms should be adopted, whether it be through a Convention rewrite or rebirth.

"Men, attracted by the treasure that the victory over the whales might afford him, has troubled the peace of their immense solitary abodes, [and] violated their refuges."<sup>262</sup> These words were first written over two centuries ago. The time for courage and conviction is now. Let us speak for those who have no voice and trouble no more these giants of the deep.

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<sup>262</sup> *Id.* at 500.