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## Trouble on the High Seas: A Need for Change in the Wake of *Australia v. Japan*

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# TROUBLE ON THE HIGH SEAS: A NEED FOR CHANGE IN THE WAKE OF *AUSTRALIA v. JAPAN*

MATT DICENSO\*

**Abstract:** On March 31, 2014, the International Court of Justice (ICJ) held that Japan’s whaling program, known as JARPA II, lacked scientific merit and thus violated three provisions of the Schedule to the International Convention for the Regulation of Whaling (ICRW). This victory for whale conservationists was short-lived, however, as Japan, ignoring procedural safeguards put in place by the International Whaling Commission (IWC), soon announced its plan to launch a new whaling program in conformity with both the ICJ’s decision and the ICRW. Japan’s course of action highlights not only the limited applicability of the ICJ’s judgment, but also the inability of the IWC to effectively regulate Contracting Governments.

## INTRODUCTION

*Look sharp, all of ye! There are whales hereabouts! If ye see a white one, split your lungs for him!*

—Moby Dick<sup>1</sup>

Since the days of Herman Melville’s whaling adventures—which provided the inspiration for his literary masterpiece, *Moby Dick*—the practice of whaling has evolved into a contentious international environmental issue.<sup>2</sup> In order to “provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry,” the International Convention for the Regulation of Whaling (ICRW) was signed in 1946.<sup>3</sup> The ICRW established the International Whaling Commission (IWC), an inter-governmental body that is tasked with collectively deciding

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<sup>1</sup> HERMAN MELVILLE, *MOBY DICK* 115 (Tony Tanner ed., Oxford Univ. Press 1988).

<sup>2</sup> See generally Mark Derr, *To Whale or Not to Whale*, ATLANTIC MONTHLY, Oct. 1997, <http://www.theatlantic.com/magazine/archive/1997/10/to-whale-or-not-to-whale/376971/> [<https://perma.cc/XNG3-Q3HH>] (discussing the continuing international debate over the risk of whale extinction and which, if any, whales can be hunted).

<sup>3</sup> International Convention for the Regulation of Whaling pmbl., Dec. 2, 1946, 63 Stat. 1716, 161 U.N.T.S. 72 [hereinafter ICRW].

how to regulate the whaling industry and promote whale conservation.<sup>4</sup> Although a moratorium on commercial whaling has been in place since 1986, the government of Japan has continued to practice special-permit whaling in accordance with Article VIII of the ICRW.<sup>5</sup> A special permit under Article VIII allows member countries to kill whales for scientific research purposes and places regulatory power in the hands of individual governments rather than the IWC.<sup>6</sup> Japan's special-permit program—known as JARPA II—was the subject of a suit filed by Australia in 2010, charging Japan with disguising a commercial whaling venture in the Antarctic as a scientific research program.<sup>7</sup> On March 31, 2014, the International Court of Justice (ICJ) ruled against Japan in *Australia v. Japan: New Zealand Intervening*, finding that Japan's whaling program lacked scientific merit and thus violated three provisions of the Schedule to the ICRW.<sup>8</sup> As a result of the judgment, Japan was required to formally discontinue its JARPA II program.<sup>9</sup>

Although the outcome in *Australia v. Japan: New Zealand Intervening* is undoubtedly a win for the whales, the judgment itself may accomplish little more than ending one Japanese whaling program to make room for another.<sup>10</sup> In November 2014, Japan announced its proposed research plan for a new scientific whaling program, NEWREP-A, to launch in 2015.<sup>11</sup>

Part I of this Comment provides background on the facts of *Australia v. Japan: New Zealand Intervening*, as well as pertinent portions of the ICRW. Part I also outlines the procedural history of the proceedings before the ICJ. Part II highlights each party's arguments and the ICJ's analysis. Part III analyzes this judgment in light of Japan's new proposed research program and discusses the case's implications on the interpretation and ap-

<sup>4</sup> See *id.* art. III, ¶ 1.

<sup>5</sup> See *id.* art. VIII; International Convention for the Regulation of Whaling, Schedule, § III, ¶ 10(e), Dec. 2, 1946, 63 Stat. 1716, 161 U.N.T.S. 72 [hereinafter Schedule].

<sup>6</sup> See ICRW, *supra* note 3, art. VIII.

<sup>7</sup> See Whaling in the Antarctic (*Australia v. Japan: New Zealand Intervening*), Judgment, 2014 I.C.J. 226, ¶ 48 (Mar. 31) [hereinafter *Judgment*].

<sup>8</sup> See *id.* ¶¶ 228, 244. The ICJ found that Japan's program violated the following provisions of the Schedule: "the obligation to respect zero catch limits for the killing for commercial purposes of whales from all stocks (para. 10 (e)); the factory ship moratorium (para. 10 (d)); and the prohibition on commercial whaling in the Southern Ocean Sanctuary (para. 7 (b))." *Id.* ¶ 228.

<sup>9</sup> See *id.* ¶ 245.

<sup>10</sup> See generally JAPAN MINISTRY OF AGRIC., FORESTRY & FISHERIES, PROPOSED RESEARCH PLAN FOR NEW SCIENTIFIC WHALE RESEARCH PROGRAM IN THE ANTARCTIC OCEAN (NEWREP-A), <http://www.jfa.maff.go.jp/j/whale/pdf/newrep--a.pdf> [https://perma.cc/VD47-B63V] [hereinafter NEWREP-A] (outlining, among other things, the research methods and objectives of Japan's proposed whaling program).

<sup>11</sup> See *Japan Plans Unilateral Restart to Antarctic Whaling in 2015, Says Official*, GUARDIAN (June 20, 2015), <http://www.theguardian.com/environment/2015/jun/20/japan-plans-unilateral-restart-to-antarctic-whaling-in-2015-says-official> [https://perma.cc/57DX-EYTR].

plication of Article VIII of the ICRW. Part III also urges the IWC to maintain greater oversight over the issuance of special permits and adopt procedures to address member noncompliance.

## I. BACKGROUND

On May 31, 2010, Australia filed an application instituting proceedings against Japan before the ICJ.<sup>12</sup> At the center of the suit was JARPA II, Japan's special-permit scientific whaling program, which launched in 2005.<sup>13</sup> JARPA II is the successor to JARPA, Japan's first research program in the Antarctic introduced during the 1987–88 whaling season.<sup>14</sup> As scientific whaling programs, both JARPA and JARPA II were regulated under Article VIII of the ICRW.<sup>15</sup> In its pertinent part, Article VIII provides that “any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research.”<sup>16</sup> These special permits may be issued notwithstanding the ICRW's contents.<sup>17</sup> Contracting Governments are given a fair amount of

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<sup>12</sup> See Whaling in the Antarctic (Australia v. Japan), Application Instituting Proceedings, (May 31, 2010), <http://www.icj-cij.org/docket/files/148/15951.pdf> [<https://perma.cc/54HB-KQEY>].

<sup>13</sup> See Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening), Judgment, 2014 I.C.J. 226, ¶ 48 (Mar. 31) [hereinafter *Judgment*].

<sup>14</sup> See *id.* ¶ 100.

<sup>15</sup> See ICRW, *supra* note 3, art. VIII. Article VIII of the ICRW states:

1. Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted.

2. Any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted.

3. Each Contracting Government shall transmit to such body as may be designated by the Commission, in so far as practicable, and at intervals of not more than one year, scientific information available to that Government with respect to whales and whaling, including the results of research conducted pursuant to paragraph 1 of this Article and to Article IV.

4. Recognizing that continuous collection and analysis of biological data in connection with the operations of factory ships and land stations are indispensable to sound and constructive management of the whale fisheries, the Contracting Governments will take all practicable measures to obtain such data.

*Id.*

<sup>16</sup> *Id.* ¶ 1.

<sup>17</sup> See *id.*

discretion in crafting these programs because the research is “subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit.”<sup>18</sup> Article VIII simply requires Contracting Governments to submit collected scientific information and data to the IWC “in so far as practicable, and at intervals of not more than one year.”<sup>19</sup>

In March 2005, Japan submitted to the IWC Scientific Committee its plan for JARPA II.<sup>20</sup> Japan’s research plan identified four research objectives: “(1) Monitoring of the Antarctic ecosystem; (2) Modelling competition among whale species and future management objectives; (3) Elucidation of temporal and spatial changes in stock structure; and (4) Improving the management procedure for Antarctic minke whale stocks.”<sup>21</sup> The JARPA II program operated in an area located within the Southern Ocean Sanctuary, a region where all commercial whaling was banned in 1994.<sup>22</sup> In an even more controversial move, Japan chose to utilize both lethal and non-lethal methods to pursue its research objectives.<sup>23</sup> Specifically, the research plan for JARPA II provided for an annual catch of 50 fin and humpback whales and 850 Antarctic minke whales—over double the numbers of its predecessor JARPA, which resulted in the killing of more than 6700 minke whales in the span of 18 years.<sup>24</sup> The case before the ICJ, brought by Australia and joined by New Zealand as an intervener, centered on allegations that JARPA II did not fall within the Article VIII exception for scientific research.<sup>25</sup> As a result, Australia and New Zealand argued that Japan had breached obligations established by the Schedule to the ICRW.<sup>26</sup> The Schedule is an integral part of the ICRW which—among other things—establishes legally binding catch limits for both commercial and aboriginal whaling.<sup>27</sup> The provisions of the Schedule can be amended by the IWC.<sup>28</sup>

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* ¶ 3.

<sup>20</sup> *See Judgment*, 2014 I.C.J. ¶ 109.

<sup>21</sup> *Id.* ¶ 113.

<sup>22</sup> *See* Schedule, *supra* note 5, ¶ 7(b); ‘Business as Usual’ as Japan Publishes New ‘Research Whaling’ Plan, WHALE & DOLPHIN CONSERVATION (Nov. 18, 2014, 10:48 AM), <http://us.whales.org/news/2014/11/business-usual-japan-publishes-new-research-whalingplan> [<https://perma.cc/Z288-SN8W>].

<sup>23</sup> *See Judgment*, 2014 I.C.J. ¶ 121.

<sup>24</sup> *See id.* ¶¶ 104, 123.

<sup>25</sup> *See id.* ¶ 48; Press Release, I.C.J., Whaling in the Antarctic (Australia v. Japan): The Court Authorizes New Zealand to Intervene in the Proceedings, I.C.J. Press Release No. 2013/2 (Feb. 13, 2013). Article VIII of the ICRW authorizes member countries to engage in the killing, taking, and treating of whales for purposes of scientific research, but it does not explicitly define scientific research. ICRW, *supra* note 3, art. VIII.

<sup>26</sup> *See Judgment*, 2014 I.C.J. ¶ 48.

<sup>27</sup> *See* ICRW, *supra* note 3, art. I, ¶ 1; Schedule, *supra* note 5, § III, ¶ 10(e).

<sup>28</sup> *See* ICRW, *supra* note 3, art. V, ¶ 1.

Notable provisions of the Schedule include the establishment of the Southern Ocean Sanctuary<sup>29</sup> and the 1986 moratorium on commercial whaling.<sup>30</sup>

Japan's most recent proposal for scientific whaling, NEWREP-A, focuses on minke whales and sets its sample size at 333 whales annually over a 12-year period.<sup>31</sup> Due to the program's similarity to its predecessors—the proposed research plan involves lethal sampling of whales and would once again implicate the Southern Ocean Sanctuary—opponents are referring to it as JARPA III.<sup>32</sup>

## II. DISCUSSION

The ICJ established jurisdiction over this dispute based on each party's declaration of acceptance under Article 36, Paragraph 2 of the ICJ's statute.<sup>33</sup> In broad terms, Australia claimed that Japan's JARPA II program did not fall within the meaning of scientific research permitted by Article VIII.<sup>34</sup> It followed that Japan had breached and continued to breach its obligations under the Schedule to the ICRW, specifically:

- (1) the obligation to respect the moratorium setting zero catch limits for the killing of whales from all stocks for commercial purposes;
- (2) the obligation not to undertake commercial whaling of fin whales in the Southern Ocean Sanctuary; and
- (3) the obligation to observe the moratorium on the taking, killing or treating of whales, except minke whales, by factory ships or whale catchers attached to factory ships.<sup>35</sup>

Japan contested all of Australia's allegations, contending that JARPA II was indeed a program undertaken for scientific research and, therefore, was

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<sup>29</sup> See Schedule, *supra* note 5, ¶ 7(b). Established in 1994, the Southern Ocean Sanctuary is an area where all commercial whaling is banned. See *id.* The Sanctuary comprises the waters of the Southern Hemisphere southwards of the following line: starting from 40 degrees S, 50 degrees W; thence due east to 20 degrees E; thence due south to 55 degrees S; thence due east to 130 degrees E; thence due north to 40 degrees S; thence due east to 130 degrees W; thence due south to 60 degrees S; thence due east to 50 degrees W; thence due north to the point of beginning. *Id.*

<sup>30</sup> See *id.* ¶ 10(e). In 1982, the IWC set the catch limit for commercial whaling at zero, effectively banning the practice. See INT'L WHALING COMM'N, *Commercial Whaling* (2016), <https://iwc.int/commercial> [<https://perma.cc/F9AF-MNEG>]. Still in effect today, the moratorium applied to the 1985–86 season and onwards. See *id.*

<sup>31</sup> See NEWREP-A, *supra* note 10, at 10, 30.

<sup>32</sup> See INT'L FUND FOR ANIMAL WELFARE, JAPAN'S "NEW" PROPOSAL FOR CONTINUED RESEARCH WHALING IN THE ANTARCTIC OCEAN (2014), <http://www.ifaw.org/sites/default/files/2015-Greenpeace-IFAW-WWF-JARPA-III-Briefing.pdf> [<https://perma.cc/AC6Z-7KAH>].

<sup>33</sup> See Whaling in the Antarctic (*Australia v. Japan: New Zealand Intervening*), Judgment, 2014 I.C.J. 226, ¶ 31 (Mar. 31) [hereinafter *Judgment*].

<sup>34</sup> See *id.* ¶ 48.

<sup>35</sup> *Id.*

exempted from the obligations invoked by Australia.<sup>36</sup> As intervener, New Zealand argued that JARPA II was not designed for scientific purposes and, thus, was not exempted from the obligations set out in the Schedule of the ICRW.<sup>37</sup>

Because each party's claims dealt extensively with scientific evidence, the ICJ employed a scheduled process for the presentation and subsequent review of such evidence.<sup>38</sup> The ICJ's development of a schedule for presenting expert witnesses and their testimonies—both to opposing parties and to the ICJ itself—proved to be a welcome departure from past dealings with technical scientific evidence.<sup>39</sup> Jacqueline Peel, Professor of Law at the Melbourne Law School in Australia and current co-chair of the American Society of International Law's International Environmental Law Interest Group, praised the ICJ's "streamlined process," as one that "demonstrates that the ICJ can be an effective and efficient forum for the resolution of contested law/science matters."<sup>40</sup>

For the ICJ, the central issue in *Australia v. Japan: New Zealand Intervening* was the interpretation and application of Article VIII of the ICRW.<sup>41</sup> As an "integral part of the Convention," the ICJ determined that Article VIII had to be interpreted with the object and purpose of the ICRW in mind.<sup>42</sup> Taking into account the preamble of the ICRW, which highlights objectives of the treaty ranging from conservation to sustainable exploitation of whale

<sup>36</sup> See *id.* ¶ 49.

<sup>37</sup> See Cymie R. Payne, *Australia v. Japan: ICJ Halts Antarctic Whaling*, AM. SOC'Y OF INT'L LAW (Apr. 8, 2014), <http://www.asil.org/insights/volume/18/issue/9/australia-v-japan-icj-halts-antarctic-whaling> [<https://perma.cc/T358-T6E3>].

<sup>38</sup> See *Judgment*, 2014 I.C.J. ¶¶ 14–22.

<sup>39</sup> See Jacqueline Peel, *Introductory Note to Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening) (I.C.J.)*, 54 AM. SOC'Y OF INT'L LAW 1, 1 (Mar. 31, 2014). As Professor Peel notes, "Past environmental decisions of the ICJ have been criticized for the Court's apparent discomfort and lack of competence in dealing with the technical scientific evidence that is a common feature of international environmental disputes." *Id.* at 1. Specifically, the ICJ was widely criticized for its poor handling of scientific evidence in *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* in 2010. See Payne, *supra* note 37.

<sup>40</sup> See Payne, *supra* note 37.

<sup>41</sup> See 2014 I.C.J. ¶ 50. Article VIII, Section 1 of the ICRW states,

Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted.

ICRW, *supra* note 3, art. VIII.

<sup>42</sup> *Judgment*, 2014 I.C.J. ¶ 55.

stocks, the ICJ determined that neither “a restrictive nor an expansive interpretation of Article VIII is justified.”<sup>43</sup> As the definition of “scientific research” had not been adequately settled before this case, the ICJ determined “foster[ing] scientific knowledge” to be the crucial component of an Article VIII scientific program, leaving room for programs that pursue goals other than those laid out in the ICRW’s preamble.<sup>44</sup> According to Professor Peel, the ICJ’s approach “effectively severed the dispute over Article VIII from the contested values surrounding whaling, focusing instead on the scientific merit of Japan’s program.”<sup>45</sup>

Before analyzing the scientific merit of JARPA II, however, the ICJ addressed the issuance of permits for scientific programs.<sup>46</sup> It rejected Japan’s argument that the nationality of the entity requesting the permit should be given full discretion in granting such permits.<sup>47</sup> Instead, the ICJ developed a two-tiered standard of review to assess the reasonableness of a country’s authorization for special-permit programs.<sup>48</sup> Specifically, the ICJ focused on the “meaning of the terms ‘scientific research’ and ‘for purposes of’ in the [Article VIII] phrase ‘for purposes of scientific research.’”<sup>49</sup> The ICJ found the two elements of the phrase to be cumulative.<sup>50</sup> “As a result, even if a whaling programme involves scientific research, the killing, taking and treating of whales pursuant to such a programme does not fall within Article VIII unless these activities are ‘for purposes of’ scientific research.”<sup>51</sup> Applying this objective standard, the ICJ found that JARPA II’s lethal sampling of whales could “broadly be characterized as ‘scientific research,’” but declined to explicitly define the term.<sup>52</sup>

The second prong of the ICJ’s standard of review—the “for purposes of” inquiry—assesses whether “the programme’s design and implementation are reasonable in relation to achieving its stated objectives.”<sup>53</sup> Japan contended that JARPA II’s lethal sampling of whales was reasonable in relation to two of the program’s research objectives in particular: monitoring of the Antarctic ecosystem and modeling competition among whale species.<sup>54</sup> Although the ICJ determined that “the use of lethal sampling per se is not

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<sup>43</sup> *Id.* ¶ 58.

<sup>44</sup> *Id.*

<sup>45</sup> Peel, *supra* note 39, at 2.

<sup>46</sup> *See Judgment*, 2014 I.C.J. ¶ 59.

<sup>47</sup> *See id.* ¶ 61.

<sup>48</sup> *See id.* ¶ 67.

<sup>49</sup> *See id.* ¶ 70.

<sup>50</sup> *See id.* ¶ 71.

<sup>51</sup> *Id.*

<sup>52</sup> *See id.* ¶ 127.

<sup>53</sup> *Id.* ¶ 67.

<sup>54</sup> *See id.* ¶ 224.

unreasonable in relation to the research objectives of JARPA II[.]” it found that the target sample sizes of the program were unreasonable when compared to its stated objectives.<sup>55</sup> Specifically, the ICJ based this determination on JARPA II’s scale of lethal sampling compared to that of its predecessor JARPA.<sup>56</sup> Because the objectives of the two programs overlapped considerably, the ICJ was not convinced that the small differences between JARPA and JARPA II warranted such an extensive increase in the scale of lethal sampling—JARPA II called for much more extensive sampling of Antarctic minke whales as well as lethal sampling of two other whale species.<sup>57</sup> Consequently, the ICJ ordered Japan to revoke authorization to kill, take, or treat whales in relation to JARPA II.<sup>58</sup> Furthermore, the ICJ stated that it expected Japan to take account of this judgment when contemplating the granting of future permits under Article VIII.<sup>59</sup>

### III. ANALYSIS

The most significant issue that arises from the holding in *Australia v. Japan: New Zealand Intervening* may be the final substantive sentence of the opinion: “It is to be expected that Japan will take account of the reasoning and conclusions contained in this Judgment as it evaluates the possibility of granting any future permits under Article VIII, paragraph 1, of the Convention.”<sup>60</sup>

#### *A. Fool Me Once, Shame on You; Fool Me Twice, Shame on Me*

The ICJ’s ruling did not put an end to special-permit whaling, or scientific whaling in general.<sup>61</sup> Rather, the decision had a binding effect on one specific program: JARPA II.<sup>62</sup> Although the ICJ found that JARPA II could not pass muster under Article VIII, it left the door open for the establishment of scientific programs that did conform to its standards.<sup>63</sup> In other words, the ICJ exposed the IWC to the possibility of being fooled again.<sup>64</sup> If restructured to meet the ICJ’s criteria, another Japanese scientific program

<sup>55</sup> See *id.*

<sup>56</sup> See *id.* ¶¶ 224–225.

<sup>57</sup> See *id.*

<sup>58</sup> See *id.* ¶ 245.

<sup>59</sup> See *id.* ¶ 246.

<sup>60</sup> See Whaling in the Antarctic (*Australia v. Japan: New Zealand Intervening*), Judgment, 2014 I.C.J. 226, ¶ 246 (Mar. 31) [hereinafter *Judgment*].

<sup>61</sup> See *id.* ¶ 245; see, e.g., NEWREP-A, *supra* note 10.

<sup>62</sup> See *Judgment*, 2014 I.C.J. ¶ 245.

<sup>63</sup> See *id.*; see, e.g., NEWREP-A, *supra* note 10.

<sup>64</sup> See *Judgment*, 2014 I.C.J. ¶ 245; see, e.g., NEWREP-A, *supra* note 10.

could potentially fit into the Article VIII exception.<sup>65</sup> Wasting little time, Japan appears to have done just that by releasing plans to launch another scientific whaling program, NEWREP-A, in late 2015.<sup>66</sup> Although Japan has insisted that this new program conforms to the ICJ's ruling and fits within the Article VIII scientific whaling exception, opponents have criticized it as yet another commercial whaling venture in disguise.<sup>67</sup>

To its credit, after the decision in *Australia v. Japan: New Zealand Intervening* and before Japan's release of plans for NEWREP-A, the IWC took steps to improve its special-permit review process by adopting Resolution 2014-5 at its 65th meeting in September 2014.<sup>68</sup> The Resolution recognized the ICJ's findings and stated that the ICJ's reasoning should inform decisions relating to the granting and evaluation of special permits by parties to the ICRW.<sup>69</sup> Resolution 2014-5 affirmed the authority of the Scientific Committee of the IWC to "review and comment on proposed special permits" and for the IWC itself to "receive and consider the reports and recommendations of the Scientific Committee and make such recommendations as it sees fit."<sup>70</sup> Furthermore, the Resolution instructed the Scientific Committee to revise how it reviews special-permit research programs, calling for adoption of the ICJ's reasonableness language.<sup>71</sup> Lastly, the Resolution requested that no further special permits for the taking of whales are to be issued until:

(a) the Scientific Committee has reviewed the research programme to enable it to provide advice to the Commission . . .

(b) the Commission has considered the report of the Scientific Committee and assessed whether the proponent of the special permit programme has acted in accordance with the review process . . . ; and

(c) the Commission has, in accordance with Article VI, made such recommendations on the merits or otherwise of the special permit as it sees fit.<sup>72</sup>

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<sup>65</sup> See *Judgment*, 2014 I.C.J. ¶ 245; see, e.g., NEWREP-A, *supra* note 10.

<sup>66</sup> See NEWREP-A, *supra* note 10; *Japan Plans Unilateral Restart to Antarctic Whaling in 2015*, *Says Official*, *supra* note 11.

<sup>67</sup> See 'Business as Usual' as Japan Publishes New 'Research Whaling' Plan, *supra* note 22.

<sup>68</sup> See Int'l Whaling Comm'n [IWC], Res. 2014-5, pmb., *Resolution on Whaling Under Special Permit* (2014), [https://archive.iwc.int/pages/view.php?ref=3723&search=%21collection72&order\\_by=relevance&sort=DESC&offset=0&archive=0&k=&curpos=0](https://archive.iwc.int/pages/view.php?ref=3723&search=%21collection72&order_by=relevance&sort=DESC&offset=0&archive=0&k=&curpos=0) [<https://perma.cc/2JXD-UTWW>].

<sup>69</sup> See *id.*

<sup>70</sup> See *id.*

<sup>71</sup> See *id.* ¶ 1(a).

<sup>72</sup> *Id.* ¶ 3.

### B. A Disturbing Trend

Overall, the effect of Resolution 2014-5 on the IWC's special-permit review process is minimal: it did little more than reaffirm a procedural framework that has proven to be ineffective in the past.<sup>73</sup> Moreover, as Donald K. Anton, Corresponding Editor of *International Legal Materials* and member of the American Society of International Law, points out, IWC resolutions—especially those addressing Japanese special-permit programs—have historically been disregarded.<sup>74</sup> A 2003 IWC resolution calling for Japan to put an end to JARPA, its first special-permit program established in 1987, was overlooked.<sup>75</sup> Resolutions in 2005 and 2007 that cast doubt on the scientific purposes of JARPA II fared no better.<sup>76</sup> Whether the resolutions “strongly urged” or “called upon” Japan to suspend its special-permit programs, the IWC's recommendations remained unheeded with Japan opting instead to continue its whaling programs.<sup>77</sup>

Japan's lack of compliance with IWC Resolutions is indicative of a disturbing trend—one that in all likelihood will continue with NEWREP-A.<sup>78</sup> In its most recent report published in June 2015, the Scientific Committee of the IWC stated that it was unable to determine whether lethal sampling was justified for the management and conservation of whale stock.<sup>79</sup> This lack of consensus largely stemmed from the report of an IWC expert panel.<sup>80</sup> Comprised of five current members of the Scientific Committee, three independent scientists, one scientist who rarely participates in the Committee, and the Head of Science, the panel was tasked with providing an “objective scientific review of the NEWREP-A proposal.”<sup>81</sup> Overall, the panel found that “it was not able to determine whether lethal sampling is necessary to achieve the [program's] two major objectives,” mainly because “the proposal contained insufficient information for the panel to complete a

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<sup>73</sup> See Donald K. Anton, *Dispute Concerning Japan's JARPA II Program of "Scientific Whaling" (Australia v. Japan)*, AM. SOC'Y OF INT'L LAW (July 8, 2010), <https://www.asil.org/insights/volume/14/issue/20/dispute-concerning-japan%E2%80%99s-jarpa-ii-program-%E2%80%9Cscientific-whaling%E2%80%9D> [<https://perma.cc/C585-6AU9>].

<sup>74</sup> See *id.*

<sup>75</sup> See *id.*

<sup>76</sup> See *id.*

<sup>77</sup> See *id.*

<sup>78</sup> See *id.*; *Experts Slam Japan's New Whaling Plan: No More Whales Need to Be Killed*, INT'L FUND FOR ANIMAL WELFARE (Apr. 13, 2015), <http://www.ifaw.org/africa/news/experts-slam-japan's-new-whaling-plan-no-more-whales-need-be-killed> [<https://perma.cc/BQC8-CUV2>].

<sup>79</sup> See Int'l Whaling Comm'n, Rep. of the Scientific Committee, IWC/66/Rep01(2015), 89 (June 19, 2015), [https://archive.iwc.int/pages/view.php?ref=5429&search=%21collection73&order\\_by=relevance&sort=DESC&offset=0&archive=0&k=&curpos=0](https://archive.iwc.int/pages/view.php?ref=5429&search=%21collection73&order_by=relevance&sort=DESC&offset=0&archive=0&k=&curpos=0) [<https://perma.cc/8WTS-A2E9>].

<sup>80</sup> See *id.*

<sup>81</sup> See *id.*

full review.”<sup>82</sup> Therefore, the panel “concluded that the current proposal did not demonstrate the need for lethal sampling.”<sup>83</sup>

Whale conservationists pegged the panel’s report as a major blow to Japan’s attempt to restart its whaling program.<sup>84</sup> The Global Whale Program Director for the International Fund for Animal Welfare, Patrick Ramage, noted:

It’s 2015. You don’t need to be a scientific expert to know there’s no need to slaughter whales in the Southern Ocean. We urge Japan to continue the non-lethal research work it embarked on this year, and to present the results of that modern approach to the IWC when it meets in September 2016.<sup>85</sup>

In response to the Scientific Committee’s report, Japanese officials said they would submit additional data, but intended to resume whaling for the 2015 season.<sup>86</sup> “We have not changed any policies and our goal,” said Joji Morishita, Japan’s representative to the IWC and IWC Vice-Chair.<sup>87</sup>

As Virginia Morell, contributor to the American Association for the Advancement of Science, noted, Japan does not necessarily need approval from the expert panel, or from the Scientific Committee, to continue with NEWREP-A.<sup>88</sup> Article VIII of the ICRW gives the individual country the power to oversee scientific whaling programs.<sup>89</sup> Additionally, Paragraph 30 of the Schedule to the ICRW merely gives the Scientific Committee the powers of “review and comment” with regard to the process by which parties submit proposed special permits.<sup>90</sup> All things considered, it appears the IWC is all bark and no bite, and Japan has caught on.<sup>91</sup> Andrew Brierley, a marine ecologist at the University of St. Andrews and member of the IWC’s expert panel, said that other panelists warned him at the beginning of the process that Japanese whaling was “inevitable” and that “their review was a

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> See *Experts Slam Japan’s New Whaling Plan: No More Whales Need to Be Killed*, *supra* note 78.

<sup>85</sup> *Id.* (internal quotation omitted).

<sup>86</sup> See *Japan Plans Unilateral Restart to Antarctic Whaling in 2015, Says Official*, *supra* note 11.

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

<sup>88</sup> See Virginia Morell, *Japan Says It Will Hunt Whales Despite Science Panel’s Opposition*, AM. ASS’N FOR THE ADVANCEMENT OF SCI. (Apr. 16, 2015, 12:15 PM), <http://news.sciencemag.org/asiapacific/2015/04/japan-says-it-will-hunt-whales-despite-science-panel-s-opposition> [<https://perma.cc/F5K8-DMVZ>].

<sup>89</sup> See ICRW, *supra* note 3, art. VIII.

<sup>90</sup> See Schedule, *supra* note 5, ¶ 30.

<sup>91</sup> See Morell, *supra* note 88.

waste of time.”<sup>92</sup> “We were made unwilling collaborators in a process that’s moving toward approval,” Brierley said of the panelists.<sup>93</sup>

Considering Japan has stated that it plans to resume whaling in the Antarctic in the coming winter season, the warnings of Brierley’s colleagues appear to hold weight.<sup>94</sup> Although Japan may not necessarily need approval from the Scientific Committee to proceed with NEWREP-A, it is required to follow IWC procedure before launching a special-permit program.<sup>95</sup> Japan’s unilateral restart to scientific whaling in 2015 would be in direct violation of the procedural framework for review of special-permit programs established by Resolution 2014-5.<sup>96</sup> As mentioned above, Resolution 2014-5 called for member countries to suspend the issuance of special permits until, *inter alia*, the IWC can consider the report of the Scientific Committee and make recommendations on the merits or otherwise of the special permit.<sup>97</sup> With NEWREP-A set to launch this year and the IWC not meeting fully until 2016, Japan will effectively bypass the review process.<sup>98</sup>

### C. A Need for Change

Japan’s latest dismissal of an IWC Resolution reveals a need for change.<sup>99</sup> Currently, Article VI of the ICRW states, “The Commission may from time to time make recommendations to any or all Contracting Governments on any matters which relate to whales or whaling and to the objectives and purposes of this Convention.”<sup>100</sup> This, combined with the Scientific Committee’s “review and comment” power under Paragraph 30 of the Schedule, is the only arrow in the IWC’s quiver.<sup>101</sup> If the only weapons at the IWC’s disposal continue to be recommendations, reviews, and comments, Japan will undoubtedly continue to take advantage of the Article VIII scientific whaling exception.<sup>102</sup>

The ICJ addressed the need for greater IWC oversight by stating, “[W]hether the killing, taking and treating of whales pursuant to a requested

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<sup>92</sup> See *id.*

<sup>93</sup> *Id.*

<sup>94</sup> See *Japan Plans Unilateral Restart to Antarctic Whaling in 2015, Says Official*, *supra* note 11.

<sup>95</sup> See Schedule, *supra* note 5, ¶ 30.

<sup>96</sup> See IWC Res. 2014-5, *supra* note 68, ¶ 3; *Experts Slam Japan’s New Whaling Plan: No More Whales Need to Be Killed*, *supra* note 78.

<sup>97</sup> See IWC Res. 2014-5, *supra* note 68, ¶ 3.

<sup>98</sup> See *Experts Slam Japan’s New Whaling Plan: No More Whales Need to Be Killed*, *supra* note 78.

<sup>99</sup> See Anton, *supra* note 73.

<sup>100</sup> ICRW, *supra* note 3, art. VI.

<sup>101</sup> See Schedule, *supra* note 5, ¶ 30.

<sup>102</sup> See Anton, *supra* note 73.

special permit is for purposes of scientific research cannot depend simply on that State's perception."<sup>103</sup> What that oversight should look like is up for debate.<sup>104</sup> One solution could be to amend the Schedule to the ICRW to give Scientific Committee Reports and IWC Resolutions more teeth.<sup>105</sup> This would mean that, in the very least, steps need to be taken so that Contracting Parties cannot blatantly ignore the IWC review process.<sup>106</sup> Judge *ad hoc* Hilary Charlesworth, in a separate opinion to *Australia v. Japan: New Zealand Intervening*, emphasized the duty of cooperation, an element critical to "the fabric of the ICRW."<sup>107</sup> Judge Charlesworth opined that despite the legally nonbinding nature of the Scientific Committee's views on special-permit proposals, the IWC has empowered the Committee to review and comment on proposals, "thereby creating an obligation on the proposing State to co-operate with the Committee."<sup>108</sup>

Although Judge Charlesworth states that the lack of such an obligation would "deprive paragraph 30 [of the Schedule] of any effect," Japan's course of action with NEWREP-A demonstrates that parties can abandon this obligation with little, if any, consequence.<sup>109</sup> One solution could be placing increased emphasis on this "duty of co-operation" by amending the ICRW to elevate this "duty" to a binding legal obligation, including penalties for noncompliance.<sup>110</sup> After all, the concept of a duty to cooperate "is the foundation of legal regimes dealing (*inter alia*) with shared resources and with the environment."<sup>111</sup> If a change in the binding nature of the duty to cooperate, Scientific Committee Reports, or IWC Resolutions is not attainable, the IWC could—at the very least—develop a formal procedure to deal with noncompliance.<sup>112</sup>

In 2010, the Chair and Vice-Chair of the IWC proposed the establishment of a Management and Compliance Committee that would—among other things—report parties' compliance with agreed upon procedures to the

<sup>103</sup> See *Judgment*, 2014 I.C.J. ¶ 61.

<sup>104</sup> See *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, 2014 I.C.J. 226, 453, ¶ 11 (Mar. 31) (separate opinion by Charlesworth, J. *ad hoc*); Tara Jordan, *Revising the International Convention on the Regulation of Whaling: A Proposal to End the Stalemate Within the International Whaling Commission*, 29 WIS. INT'L L.J. 833, 862 (2012).

<sup>105</sup> See ICRW, *supra* note 3, art. V ("The Commission may amend from time to time the provisions of the Schedule by adopting regulations with respect to the conservation and utilization of whale resources . . .").

<sup>106</sup> See Jordan, *supra* note 104, at 862–64.

<sup>107</sup> See 2014 I.C.J. ¶ 11 (separate opinion by Charlesworth, J. *ad hoc*).

<sup>108</sup> See *id.* ¶ 14.

<sup>109</sup> See *id.*; *Japan Plans Unilateral Restart to Antarctic Whaling in 2015, Says Official*, *supra* note 11.

<sup>110</sup> See *Whaling in the Antarctic*, 2014 I.C.J. ¶ 13 (separate opinion by Charlesworth, J. *ad hoc*).

<sup>111</sup> See *id.*

<sup>112</sup> See Jordan, *supra* note 104, at 863.

IWC and recommend action in response to any violations to the ICRW.<sup>113</sup> The Committee, however, was never created because a consensus decision was not reached.<sup>114</sup> In her paper *Revising the International Convention on the Regulation of Whaling: A Proposal to End the Stalemate Within the International Whaling Commission*, Tara Jordan urged the IWC to follow through with the creation of the Committee.<sup>115</sup> Jordan argues that the Committee would increase accountability of member countries and “provide the IWC with teeth to make it a more effective body as members would be compelled to conform to IWC regulations, and would face consequences for any failure to do so.”<sup>116</sup> Additionally, a formal procedure to address non-compliance with real consequences for violating members would give the IWC more bite.<sup>117</sup> Consequences for noncompliance could range from monetary sanctions and probationary periods to ineligibility for IWC funds and loss of voting privileges.<sup>118</sup>

An increase in accountability coupled with financial consequences could be enough to force Japan to change its tune.<sup>119</sup> Pursuant to Article VIII of the ICRW, Japan is allowed to process and profit from whales killed for purposes of scientific research.<sup>120</sup> A 2013 study conducted by the International Fund for Animal Welfare, however, suggests “whaling is an economic loser in the 21st century.”<sup>121</sup> Looking at the industry’s heavy toll on Japanese taxpayers as well as the decrease in national consumption of whale meat, whaling’s commercial viability is in question.<sup>122</sup> Because disincentives—such as monetary sanctions, probationary periods, and loss of voting privileges—would make what appears to be a money-losing industry even less profitable, Japan would likely have no choice but to comply.<sup>123</sup>

Because a remedy may be years away, the IWC’s diagnosis is clear: noncompliance and lack of accountability are serious impediments to its

<sup>113</sup> See Int’l Whaling Comm’n, Proposed Consensus Decision to Improve the Conservation of Whales from the Chair and Vice-Chair of the Commission, IWC/62/7rev, 7 (Apr. 28, 2010), <https://iwc.int/index.php?cID=752&cType=document> [<https://perma.cc/A23Z-8VUA>].

<sup>114</sup> See *id.*; Jordan, *supra* note 104, at 862.

<sup>115</sup> See Jordan, *supra* note 104, at 862.

<sup>116</sup> See *id.*

<sup>117</sup> See *id.* at 863.

<sup>118</sup> See *id.* at 863–64.

<sup>119</sup> See *id.*

<sup>120</sup> See ICRW, *supra* note 3, art. VIII. Article VIII, Section 2 of the ICRW states, “Any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted.” *Id.*

<sup>121</sup> INT’L FUND FOR ANIMAL WELFARE, THE ECONOMICS OF JAPANESE WHALING 22 (2013), <http://www.ifaw.org/sites/default/files/economics-of-japanese-whaling-japan-ifaw.pdf> [<https://perma.cc/3P7C-6Q9F>].

<sup>122</sup> See *id.* at 2.

<sup>123</sup> See *id.*; Jordan, *supra* note 104, at 863–64.

legitimacy and overall effectiveness in providing “for the proper conservation of whale stocks” and making “possible the orderly development of the whaling industry.”<sup>124</sup> Though a potential solution could take a number of forms, the key seems to be providing the IWC with more teeth.<sup>125</sup> As Jordan notes, “Having a system to respond to non-compliance not only holds members to their obligations under the ICRW, but also enhances member confidence in the IWC.”<sup>126</sup>

## CONCLUSION

The ICJ’s decision in *Australia v. Japan: New Zealand Intervening* was a win for whale conservationists around the world. The ICJ put an end to JARPA II, a program regarded by many as a commercial whaling enterprise disguised as scientific research. The decision also outlined an objective process to determine whether a whaling program falls into the Article VIII exception of the ICRW. Even before the dust settled, however, Japan announced plans for NEWREP-A, a new special-permit whaling program set to launch in 2015. Despite the ICRW’s adoption of the ICJ’s standard of review and adverse findings of an IWC-commissioned expert panel assigned to review NEWREP-A, Japan has made it clear it will resume hunting whales in the coming season. Although the IWC’s implementation of the ICJ’s approach in *Australia v. Japan: New Zealand Intervening* is one step in the right direction, more steps need to be taken to ensure the effective and efficient regulation of the taking of whales. Increasing the bite of the IWC—whether it be through amendments to the Schedule of the ICRW or the establishment of a procedural framework to deal with members’ non-compliance—would better situate the IWC to achieve its stated purpose.

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<sup>124</sup> ICRW, *supra* note 3, pmb1.; see *Whaling in the Antarctic*, 2014 I.C.J. ¶ 11 (separate opinion of Charlesworth, J. *ad hoc*); Jordan, *supra* note 104, at 864.

<sup>125</sup> See Jordan, *supra* note 104, at 862.

<sup>126</sup> *Id.* at 864.