

# EVOLUTION THROUGH THE DUTY TO COOPERATE: IMPLICATIONS OF THE WHALING CASE AT THE INTERNATIONAL COURT OF JUSTICE

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*International courts and tribunals face a special challenge when the treaty underlying a dispute was agreed in a distant past. How does (and should) the judicial branch allow for an evolution of international law that is responsive to major legal and social changes whilst remaining faithful to the intention of the treaty parties? We argue that there are two main methods: first, adjudicators may allow for evolution through treaty interpretation, for example by drawing on a treaty's object and purpose or subsequent practice; secondly, adjudicators may focus on the institutional specifics of the relevant regime to which the treaty belongs, for example by drawing on the obligations of parties to give due regard to emerging resolutions even if they are not binding. In resolving the dispute between Japan and Australia (New Zealand intervening) over whaling in the Antarctic, the International Court of Justice engaged primarily with the second method, focussing particularly on procedural arrangements overseen by the International Whaling Commission. This article demonstrates that the Court's formulation of a 'duty to cooperate' has major implications for states, international organisations and other actors in a fragmented legal order, especially in complex commons or shared-resource regimes involving scientific and technical matters updated through institutional or administrative arrangements. We evaluate related developments in the law of the sea, water management and climate regimes.*

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## I INTRODUCTION

International courts and tribunals are sometimes faced with the challenge of interpreting laws and obligations that were agreed in a distant past. The public attitudes and surrounding legal context of that earlier period might be vastly different to the present. Two major methods are available to adjudicate on the evolution of the relevant laws and obligations. First, the international courts and tribunals may use tools of treaty interpretation that, within fairly strict parameters, enable them to draw upon subsequent practice, subsequent agreement or other relevant rules of international law.<sup>1</sup> The relevant parameters are of course designed to ensure fidelity to sovereignty, so that evolution of the meaning of treaty terms and obligations is closely tied to the common intention of the parties. Secondly, the international courts and tribunals may turn to the procedure set down by the relevant treaty obligations and locate in them an agreed facility for evolution and change. There is of course overlap between these two methods (especially with respect to the subsequent practice of the parties), but the former method entails more of a pronouncement (implicit or explicit) on the concept of international law as a ‘system’,<sup>2</sup> while the second method engages more closely with the institutional specifics of the relevant ‘regime’<sup>3</sup> to which the treaty belongs and the duty of states to engage in ongoing cooperation. For example, the institutional mechanisms of the International Whaling Commission (‘IWC’ or ‘the Commission’), as laid down in the *International Convention for the Regulation of Whaling* (‘ICRW’),<sup>4</sup> may be found to give rise to certain procedures and obligations that require treaty parties to cooperate on certain matters, as developed over time. Of particular note is the

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<sup>1</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) arts 31–2 (‘VCLT’).

<sup>2</sup> On international law as a legal system, see Report of the Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN GAOR, 58<sup>th</sup> sess, UN Doc A/CN.4/L.702 (18 July 2006) 7 [14(1)(1)] (‘*Fragmentation of International Law*’). See also the associated Analytical Study finalised by the Chairman of the Study Group: Martti Koskenniemi, Report of the Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN GAOR, 58<sup>th</sup> sess, UN Doc A/CN.4/L.682 (13 April 2006) and UN Doc A/CN.4/L.682/Corr.1 (11 August 2006). See also the ongoing work of the International Law Commission Study Group on Treaties over Time (Subsequent Agreements and Subsequent Practice in relation to Interpretation of Treaties), which is chaired by Georg Nolte and commenced in 2009: International Law Commission, *Report of the International Law Commission on the Work of Its Sixty-First Session*, UN GAOR, 64<sup>th</sup> sess, Supp No 10, UN Doc A/64/10 (2009) 362 [226].

<sup>3</sup> Regimes have been defined as ‘sets of norms, decision-making procedures and organisations coalescing around functional issue-areas and dominated by particular modes of behaviour, assumptions and biases’: Margaret A Young, ‘Introduction: The Productive Friction between Regimes’ in Margaret A Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press, 2012) 1, 11. This builds on definitions common in international relations scholarship and socio-legal studies. See, eg, Stephen D Krasner, ‘Structural Causes and Regime Consequences: Regimes as Intervening Variables’ in Stephen D Krasner (ed), *International Regimes* (Cornell University Press, 1983) 1; Andreas Fischer-Lescano and Gunther Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ (2004) 25 *Michigan Journal of International Law* 999.

<sup>4</sup> *International Convention for the Regulation of Whaling*, opened for signature 2 December 1946, 161 UNTS 74 (entered into force 10 November 1948) (‘ICRW’). Article 1(1) of the ICRW provides that a Schedule ‘forms an integral part’ of the *Convention*.

ability of states parties to vote on amendments to the Schedule of the *ICRW* ('Schedule') in addition to other recommendations and review mechanisms through which states parties must provide information to the Commission and its Scientific Committee. Such institutional procedures have emerged in a number of regimes with environmental and shared-resource objectives such as the *United Nations Convention on the Law of the Sea* ('*UNCLOS*')<sup>5</sup> and the *United Nations Framework Convention on Climate Change* ('*UNFCCC*').<sup>6</sup>

This article argues that the second method, which locates duties of states to cooperate within regimes as part of specific institutional, administrative and procedural mechanisms, is gaining increasing prominence in jurisprudence of the International Court of Justice ('ICJ' or 'the Court') and other courts and tribunals. We engage primarily with the reasoning of the ICJ in the case of *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* ('the Whaling case'),<sup>7</sup> in which Australia claimed breach of the *ICRW* by a Japanese program involving the killing of whales in the Antarctic known as 'JARPA II'.<sup>8</sup> Australia's claim was especially challenging due to the fact that the *ICRW* was agreed in 1946, when most of its parties were whaling nations seeking to 'make possible the orderly development of the whaling industry'.<sup>9</sup> Since that time, public attitudes about the environment in general, and whaling in particular, have moved away from utilisation and towards a more conservationist approach, evidenced especially in the inclusion in the *ICRW* Schedule of a moratorium on, and zero catch limit for, commercial whaling.<sup>10</sup> Indeed, the shifting international obligations of the parties to the case could be said to have been affected not only by the *ICRW* but by the introduction of a number of later treaties and principles, including the *Convention on Biological Diversity* ('*CBD*'),<sup>11</sup> the *Convention on the International Trade in Endangered Species* ('*CITES*')<sup>12</sup> and others. As such, the case could have involved considerable engagement with the interpretation of the *ICRW* against the backdrop of the phenomenon of the fragmentation and evolution of international law (associated with the first method we identified above). Instead, procedural and institutional mechanisms associated with the IWC and an accompanying duty of cooperation became its main focus.

The Court unanimously found it had jurisdiction over Australia's claim (after Japan disputed that the Court could entertain Australia's application) and, by 12 votes to four, found that the special permits granted by Japan in connection with

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<sup>5</sup> *United Nations Convention on the Law of the Sea*, opened for signature 4 June 1982, 1833 UNTS 396 (entered into force 16 November 1994) ('*UNCLOS*').

<sup>6</sup> *United Nations Framework Convention on Climate Change*, opened for signature 14 May 1992, 1771 UNTS 107 (entered into force 21 March 1994) ('*UNFCCC*').

<sup>7</sup> *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening) (Judgment)* (International Court of Justice, General List No 148, 31 March 2014) ('*Judgment*' or 'Whaling case').

<sup>8</sup> JARPA II is the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic. See *ibid* 9 [1]. It operates in a region designated by the *ICRW* Schedule as the Southern Ocean Sanctuary, in which whaling is prohibited. See also below n 230 and accompanying text.

<sup>9</sup> *ICRW* Preamble.

<sup>10</sup> *ICRW* Schedule, paras 10(d)–(e).

<sup>11</sup> *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) ('*CBD*').

<sup>12</sup> *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, opened for signature 3 March 1973, 993 UNTS 243 (entered into force 1 July 1975) ('*CITES*').

JARPA II did not fall within a category of scientific whaling permitted under an exception to the *ICRW*. That exception is contained in art VIII(1) of the *ICRW*, which allows parties to grant their nationals special permits ‘to kill, take and treat whales for purposes of scientific research’.<sup>13</sup>

Other disputes besides the *Whaling* case have given rise to questions about the evolution of underlying legal obligations through a pronounced duty to cooperate. The International Tribunal for the Law of the Sea (‘ITLOS’) recently delivered an advisory opinion in *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*,<sup>14</sup> in which it was asked to rule upon the obligations of flag states in cases where illegal, unreported and unregulated (‘IUU’) fishing activities are conducted within the Exclusive Economic Zones of third party states. In *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*,<sup>15</sup> an arbitral tribunal recently ruled upon alleged failures by the United Kingdom in consulting and cooperating with Mauritius in establishing a Marine Protected Area (‘MPA’) around the Chagos Archipelago.

In this article, we engage with these developments and seek to demonstrate that the duty to cooperate allows international courts and tribunals to deal closely with institutional aspects that formerly received less judicial engagement. Given that the duty to cooperate is highly dependent upon the specifics of the relevant regimes, we deal closely with the *Whaling* case before moving to a broader analysis of its implications. We begin, in Part II, with a review of the Court’s decision, starting with a brief analysis of the Court’s findings on jurisdiction, its decision on the merits (which includes five dissenting opinions and six separate opinions) and its remedies. In Part III, we discuss the Court’s interpretative methodologies, which we argue had a limited role in the Court’s analysis. Contrary to expectations, the Court did not rest its decision on an interpretation of the *ICRW*’s evolving nature through ‘systemic integration’ or other key methods of treaty interpretation. In Part IV, we argue that the whaling regime was nonetheless recognised to have evolved through the Court’s nuanced assessment of the standard of conduct expected of states parties. The Court’s assessment provided for administrative-type obligations, whereby states parties

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<sup>13</sup> *ICRW* art VIII(1) 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.

We note that the International Court of Justice (‘ICJ’ or ‘the Court’) did not classify the provision as an ‘exception’, as discussed further below.

<sup>14</sup> *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)* (International Tribunal for the Law of the Sea, Case No 21, 2 April 2015). See also International Tribunal for the Law of the Sea, *Case No 21* <<http://perma.cc/KY5V-EMXP>>.

<sup>15</sup> *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom) (Award)* (Permanent Court of Arbitration, 18 March 2015). See also Permanent Court of Arbitration, *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* <<http://perma.cc/MY9X-RMP8>>.

are expected to have due regard to norms and procedures of the Commission, even if they have not formally consented to them. The Court's formulation of a duty of cooperation has broad implications for the role of states and international organisations in a fragmented legal order, especially in complex environmental commons or shared-resource regimes involving scientific and technical matters updated through ongoing multilateral engagements and institutions. We further evaluate similar developments in the law of the sea regime (with especial regard to the ITLOS and arbitral tribunal decisions mentioned above), bilateral water management regimes and the *UNFCCC* 'conferences of the parties'. We conclude Part IV by noting broader implications of the duty to cooperate for states, international organisations and other actors.

## II OVERVIEW OF THE INTERNATIONAL COURT OF JUSTICE'S DECISION IN THE WHALING CASE

The decision of the ICJ was handed down in 2014 after proceedings were first filed in 2010,<sup>16</sup> and after a series of disagreements between the parties within the auspices of the IWC. These disagreements were centred on whether Japan's systematic use of lethal whaling techniques and taking of whales formed part of the 'scientific whaling exception' of the *ICRW*, whereby states parties may grant their nationals special permits 'to kill, take and treat whales for purposes of scientific research'.<sup>17</sup> The IWC and its Scientific Committee were central to these questions, because art VIII requires that a state party granting a permit for whaling 'shall report at once to the Commission all such authorizations which it has granted'.

Australia's original application to the Court, however, referred not only to Japan's obligations under the *ICRW* but also to Japan's 'international obligations for the preservation of marine mammals and the marine environment'.<sup>18</sup> Those other obligations were argued by Australia to be based on, inter alia, the *CITES*<sup>19</sup> and the *CBD*. Australia did not press the Court on this set of alleged non-*ICRW* breaches in its written or oral submissions,<sup>20</sup> possibly because of the additional evidentiary hurdles that would have accompanied such claims. There is no reference to them in the majority opinion of the Court. Yet arguably the relevant

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<sup>16</sup> See 'Application Instituting Proceedings', *Whaling in the Antarctic (Australia v Japan)*, International Court of Justice, General List No 148, 31 May 2010.

<sup>17</sup> *ICRW* art VIII(1).

<sup>18</sup> 'Application Instituting Proceedings', *Whaling in the Antarctic (Australia v Japan)*, International Court of Justice, General List No 148, 31 May 2010, [2].

<sup>19</sup> On the prohibition of whaling within *CITES*, see Peter H Sand, 'Japan's "Research Whaling" in the Antarctic Southern Ocean and the North Pacific Ocean in the Face of the *Endangered Species Convention (CITES)*' (2008) 17 *Review of European Comparative & International Environmental Law* 56.

<sup>20</sup> See 'Memorial of Australia', *Whaling in the Antarctic (Australia v Japan)*, International Court of Justice, General List No 148, 9 May 2011, [1.9]:

While JARPA II does envisage the taking of humpback whales and special permits have been issued by Japan authorising the killing of that species, no humpbacks have yet been taken pursuant to that program. In the event that humpback whales are taken pursuant to JARPA II, Australia reserves the right to seek remedies from the Court in relation to a breach of the *Convention on International Trade in Endangered Species of Wild Fauna and Flora ('CITES')*. Australia is not seeking any remedy flowing from the obligations of Japan under the *Convention on Biological Diversity*.

obligations inform the reasoning in the *Whaling* case; the international legal context surrounding the *ICRW* is more explicitly considered by the members of the Court who issued separate opinions, including Australia's ad hoc judge, Hilary Charlesworth.

In this Part, we consider the dispute as it developed after the institution of proceedings at the ICJ and provide a brief analysis of the Court's findings on jurisdiction, merits and remedies.

#### A Jurisdiction of the Court

Australia invoked as the basis for the jurisdiction of the Court the so-called 'optional clause' declarations of Australia and Japan, in which they recognise as compulsory, 'in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes'.<sup>21</sup> These declarations were made pursuant to the *Statute of the International Court of Justice* ('*ICJ Statute*'), art 36(2), on 22 March 2002 and 9 July 2007 respectively. Japan contested the jurisdiction of the Court<sup>22</sup> on the basis of a reservation Australia made to its declaration and according to the principle of reciprocity.

Australia's declaration of 22 March 2002 states that it does not apply, *inter alia*, to:

(b) any dispute concerning or relating to the delimitation of maritime zones, including the territorial sea, the exclusive economic zone and the continental shelf, or arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation.<sup>23</sup>

Japan argued that the dispute over whaling in the Antarctic fell within the terms of para (b) of Australia's declaration, because it is a dispute 'arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation'.<sup>24</sup> This construction rested on a characterisation of the dispute as one that related to exploitation of a maritime area claimed by Australia. Australia rejected this construction, arguing that the reservation applied to 'exploitation of resources covered by a potential delimitation arrangement and not any exploitation unrelated to that delimitation situation that happens to occur in the relevant geographic area'.<sup>25</sup> Australia stated that it had no delimitation dispute with Japan, which was rather about

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<sup>21</sup> *Judgment* (International Court of Justice, General List No 148, 31 March 2014) [31]. See also *Statute of the International Court of Justice* art 36(2) ('*ICJ Statute*'). It is recalled that the relevant legal disputes concern

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established, would constitute a breach of an international obligations;
- d. the nature or extent of the reparation to be made for the breach of an international obligation.

<sup>22</sup> See 'Counter-Memorial of Japan', *Whaling in the Antarctic (Australia v Japan)* International Court of Justice, General List No 148, 9 March 2012, cited in *Judgment* (International Court of Justice, General List No 148, 31 March 2014) [24].

<sup>23</sup> *Judgment* (International Court of Justice, General List No 148, 31 March 2014) [31].

<sup>24</sup> *Ibid* [32].

<sup>25</sup> *Ibid* [34].

compliance of JARPA II with the *ICRW*.<sup>26</sup> Submissions were also made about the intent underlying Australia's reservation, which Australia stated was to give effect to a preference for negotiation rather than litigation for its overlapping maritime claims, especially with respect to the maritime boundary delimitations with New Zealand and Timor-Leste.<sup>27</sup>

The Court accepted that the interpretation of Australia's reservation should be confined to disputes where there are overlapping claims relating to maritime areas. In doing so, it drew on evidence of Australia's intention in entering into the reservation as well as previous jurisprudence of the Court. Japan's objection to the Court's jurisdiction was unanimously rejected.<sup>28</sup>

Neither party referred to the fact that Australia chose not to challenge Japan's conduct under its 'JARPN II'. This is a separate research program involving the killing of whales in the North Pacific which Japan has claimed is justified by *ICRW* art VIII. As Donald Rothwell has noted, it was formally open to Australia to challenge JARPN II, given that its standing was based upon Australia's position as a party to the *ICRW*, and not its direct interest in the territory in which the whaling was being conducted.<sup>29</sup> Yet in expanding its claim, Australia would have encountered additional legal and scientific complexities and possible delays, especially as it had only undertaken extensive gathering of evidence in relation to the Southern Ocean.<sup>30</sup> In addition, the early framing of the dispute as one involving breaches of obligations in the *CBD* (relating to ensuring that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction) was more closely related to JARPA II than JARPN II.

As a result, the ICJ made no finding in relation to whaling in geographic areas that are outside of Australia's direct interests. This is somewhat unfortunate, given that the Court escaped articulating the precise source of Japan's responsibility *erga omnes partes* under the *ICRW* (a similar concern has been voiced with respect to Japan's failure to challenge Australia's legal standing on

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<sup>26</sup> Ibid [34]–[35].

<sup>27</sup> Ibid [34].

<sup>28</sup> Ibid [41]. See also the first order of the Court: at [247]. As such, even Judge Owada agreed with this conclusion.

<sup>29</sup> Donald R Rothwell, 'The Whaling Case: An Australian Perspective' in Malgosia Fitzmaurice and Dai Tamada (eds), *Whaling in the Antarctic: The Judgment and Its Implications* (Brill, forthcoming). See also Donald R Rothwell, 'The Antarctic Whaling Case: Litigation in the International Court and the Role Played by NGOs' (2013) 3 *Polar Journal* 399. As James Crawford has noted, Australia's claim was framed as one 'invok[ing] an obligation *erga omnes partes* under the *International Convention for the Regulation of Whaling*, despite basing the jurisdiction of the Court on Article 36(2) of its *Statute* and the respective declarations of ... Australia and Japan'. See James Crawford, 'Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC *Articles on Responsibility of States for Internationally Wrongful Acts*' in Ulrich Fastenrath et al (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press, 2011) 224, 235.

<sup>30</sup> Rothwell, 'An Australian Perspective', above n 29.

these grounds).<sup>31</sup> The lack of a detailed consideration of the implications of states pursuing ‘collective interests’ has been criticised as a missed opportunity,<sup>32</sup> although arguably it simply affirms that there is no separate standing requirement for states in invoking the Court’s jurisdiction.<sup>33</sup>

## B Merits

The Court accepted Australia’s claim that the killing, taking and treating of whales under special permits granted for JARPA II was not for purposes of scientific research within the meaning of art VIII. As a consequence, Japan was found to have violated the obligations set out in three paragraphs of the Schedule: the zero catch limits for the killing of whales, the prohibition on whaling in a region designated as the Southern Ocean Sanctuary and the moratorium on commercial whaling.<sup>34</sup>

In determining the standards set by the *ICRW*, the Court dwelt heavily upon the role and practice of the Commission. The Commission is established by the *ICRW* and is made up of one member from each Contracting Government.<sup>35</sup> The Commission may amend the Schedule to the *ICRW* by a three-fourths majority of votes,<sup>36</sup> and such amendments may include regulations with respect to the fixing of protected and unprotected species, open and closed seasons and open and closed waters.<sup>37</sup> The conferral of these functions on the Commission was seen by the Court as attesting to the *ICRW*’s status as an evolving instrument.<sup>38</sup> In addition, the Commission’s independent ability to make recommendations relating to whales and whaling,<sup>39</sup> and to be supported in this by a Scientific Committee, was of note.<sup>40</sup> Recommendations of the Commission can be adopted

<sup>31</sup> Priya Urs, ‘Guest Post: Are States Injured by Whaling in the Antarctic?’ on *Opinio Juris* (14 August 2014) <<http://perma.cc/VW63-8ANJ>>. See also Natalie Klein and Tim Stephens, ‘Whaling in the Antarctic: Protecting Rights in Areas Beyond National Jurisdiction through International Litigation’ in Clive Schofield, Seokwoo Lee and Moon-Sang Kwon (eds), *The Limits of Maritime Jurisdiction* (Martinus Nijhoff, 2014) 525, 532 (writing before the filing of the memorials and counter-memorials and noting that if Japan would argue that Australia lacked standing given the absence of a direct injury, the case would bring ‘to the fore the issue of how to challenge the actions of States that occur in areas beyond national jurisdiction, and the viability of international adjudication or arbitration in doing so’).

<sup>32</sup> Christian J Tams, ‘Roads Not Taken, Opportunities Missed: Procedural and Jurisdictional Questions Sidestepped in the *Whaling Judgment*’ in Malgosia Fitzmaurice and Dai Tamada (eds), *Whaling in the Antarctic: The Judgment and Its Implications* (Brill, forthcoming).

<sup>33</sup> Note that Christian Tams considers the *Whaling* case, together with *Belgium v Senegal*, to ‘perhaps reflect a new willingness on the part of the Court to handle disputes transcending reciprocal inter-State relations’: *ibid* 18.

<sup>34</sup> *ICRW* Schedule paras 10(e) (zero catch limit), 10(d) (moratorium on killing whales, except minke whales), 7(b) (Sanctuary), 30 (obligation to provide Commission with proposed scientific permits before they are issued). The Court did not accept Australia’s claim that Japan has violated its obligations under para 30 of the Schedule with respect to the timely submission of proposed permits to the International Whaling Commission (‘IWC’) Secretary. See the sixth order given in the *Whaling* case, decided 13 votes to three, with Judges Sebutinde, Bhandari and Charlesworth dissenting: *Judgment* (International Court of Justice, General List No 148, 31 March 2014) [247].

<sup>35</sup> *ICRW* art III(1).

<sup>36</sup> *Ibid* arts III(2), V.

<sup>37</sup> *Ibid* art V(1).

<sup>38</sup> *Judgment* (International Court of Justice, General List No 148, 31 March 2014) [45].

<sup>39</sup> *ICRW* art IV.

<sup>40</sup> *Judgment* (International Court of Justice, General List No 148, 31 March 2014) [46]–[47].



by a simple majority of voting members,<sup>41</sup> and take the form of resolutions. Whether and how the institutional provisions of the whaling regime were relevant to the interpretation of the *ICRW* divided the Court, and the reasoning adopted by the majority decision, the separate opinions and the dissenting opinions carry different implications for the modern character of international organisations and their impact on the sources of international law.

The reasoning of the Court was structured according to an initial interpretation of the relevant provisions of the *ICRW* and a secondary assessment of JARPA II in light of this interpretation. We discuss those methods in Parts III and IV respectively and argue that the secondary assessment, which led the Court to pronounce upon a duty of Japan to ‘give due regard’ to IWC resolutions and guidelines, gave rise to recognisable evolution of the *ICRW*. Before turning to the relevant arguments, we conclude this Part by examining the remedies that the Court imposed.

### C Remedies and Further Developments

As a consequence of its findings, and given that JARPA II was an ongoing program, the Court accepted ‘that measures that go beyond declaratory relief are warranted’. The Court decided ‘that Japan shall revoke any extant authorization, permit or licence granted in relation to JARPA II, and refrain from granting any further permits in pursuance of that programme’.<sup>42</sup>

In its application, Australia had also requested the Court to order that Japan ‘refrain from authorizing or implementing any special permit whaling which is not for purposes of scientific research within the meaning of Article VIII’,<sup>43</sup> but the Court considered this obligation to already apply to all states parties. Instead, it stated ‘[i]t 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>44</sup>

A few weeks after the judgment, Japan signalled its intention to resume commercial whaling by conducting research whaling.<sup>45</sup> Its Minister for Agriculture, Forestry and Fisheries proclaimed that the ICJ had ‘reaffirm[ed] that one of the purposes of the *International Convention for the Regulation of*

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<sup>41</sup> *ICRW* art III(2).

<sup>42</sup> See the seventh order given by the Court (12 votes to four, with Judges Owada, Abraham, Bennouna and Yusuf dissenting): *Judgment* (International Court of Justice, General List No 148, 31 March 2014) [247].

<sup>43</sup> *Ibid* [244]. See also at [23]. This request was associated with Australia’s desire for the ruling to impact on JARPN II as well as JARPA II. See Rothwell, ‘An Australian Perspective’, above n 29.

<sup>44</sup> *Judgment* (International Court of Justice, General List No 148, 31 March 2014) [246].

<sup>45</sup> Yoshjimasa Hayashi, ‘Policy towards the Future Whale Research Programs: Statement by Minister for Agriculture, Forestry and Fisheries, the Government of Japan’ (Policy Statement, 18 April 2014), cited in Joji Morishita, ‘IWC and the ICJ Judgment’ in Malgosia Fitzmaurice and Dai Tamada (eds), *Whaling in the Antarctic: The Judgment and Its Implications* (Brill, forthcoming):

The ICJ judgment reaffirms that one of the purposes of the *International Convention for the Regulation of Whaling (ICRW)* is the sustainable exploitation of whale resources. In light of this, Japan has confirmed its basic policy of pursuing the resumption of commercial whaling, by conducting research whaling ...

Whaling (ICRW) is the sustainable exploitation of whale resources'.<sup>46</sup> Japan announced that it wished to

follow an internationally open and highly transparent process through securing the participation of renowned scientists from Japan and abroad, and through other processes including discussions at the IWC Scientific Committee's workshop and coordination with other institutions conducting relevant studies.<sup>47</sup>

At the IWC meeting in September 2014, New Zealand introduced a resolution at the IWC which highlighted the ICJ's conclusion that Japan's JARPA II special permits were not for the purposes of scientific research and requested that no further special permits for the take of whales be issued until they had been reviewed by the Scientific Committee and received recommendations by the Commission.<sup>48</sup> Consensus was not reached<sup>49</sup> but the resolution was adopted with a vote.<sup>50</sup> Among other things, the resolution instructs the Scientific Committee to provide advice to the Commission on

whether the design and implementation of the programme, including sample sizes, are reasonable in relation to achieving the programme's stated research objectives; [and] ... such other matters as the Scientific Committee considers relevant to the programme, having regard to the decision of the International Court of Justice.<sup>51</sup>

In November 2014, Japan submitted its proposed research plan for the new whaling program in the Antarctic to the IWC.<sup>52</sup> In this plan, Japan stated that it had 'taken seriously the Court's finding that the decision to grant special permits under Article VIII, paragraph 1, of the ICRW, "cannot depend simply on that State's perception"'.<sup>53</sup> The new research plan included an examination of non-lethal techniques, in addition to a lethal sample size for minke whales.<sup>54</sup> It also proposed an increased effort at scientific collaboration and the broader dissemination of scientific output through peer-reviewed journals.<sup>55</sup> In response

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<sup>46</sup> Ibid.

<sup>47</sup> Yoshijima Hayashi, 'Policy towards the Future Whale Research Programs: Statement by Minister for Agriculture, Forestry and Fisheries, the Government of Japan' (Policy Statement, 18 April 2014), quoted in Government of Japan, 'Proposed Research Plan for New Scientific Whale Research Program in the Antarctic Ocean (NEWREP-A)' (Research Plan, 18 November 2014) 7 <<http://perma.cc/H3MG-NDEM>> ('Proposed Research Plan').

<sup>48</sup> International Whaling Commission, *Draft Resolution for IWC 65: Whaling under Special Permit*, Agenda Item 15, IWC Doc IWC/65/14 Rev1 (17 September 2014). See International Whaling Commission, *Chair's Report of the 65<sup>th</sup> Meeting* (Report, 31 October 2014) 17 [141]–[142] ('Chair's Report').

<sup>49</sup> *Chair's Report*, above n 48, 17 [143]–[150]. For the parties' discussion of the case, together with comments from other delegations, see at 26–7 [235]–[253].

<sup>50</sup> International Whaling Commission, *Resolution on Whaling under Special Permit*, IWC Res 2014-5 (2014) ('Resolution on Whaling'). The vote required a simple majority in support and passed with 35 votes in favour, 20 against and five abstentions. See *Chair's Report*, above n 48, 17 [151].

<sup>51</sup> *Resolution on Whaling*, IWC Res 2014-5, paras 1(a), (e).

<sup>52</sup> *Proposed Research Plan*, above n 47.

<sup>53</sup> Ibid 7.

<sup>54</sup> Ibid 32.

<sup>55</sup> Ibid 10.

to Japan's announcement, Australia reiterated its opposition to commercial whaling and lethal research methods.<sup>56</sup>

An expert panel convened by the Scientific Committee delivered its review of Japan's proposed research plan on 13 April 2015.<sup>57</sup> The panel concluded that it 'was not able to determine whether lethal sampling is necessary to achieve the [relevant research] objectives; therefore, the current proposal does not demonstrate the need for lethal sampling to achieve those objectives'.<sup>58</sup> It gave recommendations on work that Japan needed to do *before* a full review of its proposal could be made, drawing distinctions between analytical, logistical, laboratory and field effort. The panel emphasised that this work was to be done based on existing data. Thus, the panel avoided making suggestions on how to improve upon the proposal itself: for some, an expectation for such suggestions risks making panel members 'collaborators in an iterative approach towards approving whaling proposals' which 'subvert[s] the norm of independent review'.<sup>59</sup> This issue demonstrates the complex relationship between law and science, and the way the procedural emphasis of the former may not always fit neatly with the substantive requirements of the latter. An evaluation of the Court's remedies, like the evaluation of its reasoning, is tied very much to the ongoing procedure of the IWC. We now turn more closely to this procedure in Parts III and IV.

### III EVOLUTION THROUGH INTERPRETATION

The *Vienna Convention on the Law of Treaties* ('VCLT') contains a useful set of methodologies to allow a treaty-interpreter to take into account the evolution of treaty provisions and subsequent legal developments, including object and purpose (VCLT art 31(1)), subsequent agreement<sup>60</sup> (VCLT art 31(3)(a)), subsequent practice<sup>61</sup> (VCLT art 31(3)(b)) and relevant rules of international law applicable between the parties (VCLT art 31(3)(c)). The central relevance of these provisions has been affirmed by the Court — most explicitly in cases since the 1990s<sup>62</sup> — as well as the International Law Commission ('ILC'). For example, in its Study Group on Fragmentation, chaired by Martti

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<sup>56</sup> Greg Hunt, Minister for the Environment, 'Australia to Take Part in Southern Ocean Whale Research Voyage' (Media Release, 15 December 2014) <<http://perma.cc/RZP7-3P4P>>. Australia also continued its support for IWC's Southern Ocean Research Partnership. See also Emma Jukić and Margaret A Young, 'Country Report: Australia' (2014) 25 *Yearbook of International Environmental Law* (forthcoming).

<sup>57</sup> International Whaling Commission, 'Report of the Expert Panel to Review the Proposal by Japan for NEWREP-A, 7–10 February 2015, Tokyo, Japan' (Report No SC/66a/Rep/6, 7–10 February 2015).

<sup>58</sup> *Ibid.* 2. See also at 35.

<sup>59</sup> Andrew S Brierley, 'Correspondence: No Case for Japan to Kill Minke Whales' (2015) 520 *Nature* 157.

<sup>60</sup> VCLT art 31(3)(a) allows the treaty-interpreter to take into account '[a]ny subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions'.

<sup>61</sup> VCLT art 31(3)(b) allows the treaty-interpreter to take into account '[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'.

<sup>62</sup> Eirik Bjorge notes that in the 1970s and 1980s, the Court did not refer to VCLT art 31; he cites the judgments that have referred to it since: Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (Oxford University Press, 2014) 82.

Koskenniemi,<sup>63</sup> the ILC considered *VCLT* art 31(3)(c) to be an important aspect of the principle of ‘systemic integration’,<sup>64</sup> through which treaties are understood to be inseparable from the general international legal system. In its ongoing study on ‘Treaties over Time’, chaired by Georg Nolte,<sup>65</sup> the ILC is engaging specifically with *VCLT* art 31(3)(a) and (b), and has noted that such means of interpretation ‘may assist in determining whether or not the presumed intention of the parties upon the conclusion of a treaty was to give a term used a meaning which is capable of evolving over time’.<sup>66</sup>

The *Whaling* case provided the Court with an opportunity to use tools of treaty interpretation to allow for an incorporation of major developments within the whaling regime and in international environmental law. For example, although Australia did not press its claims relating to alleged breaches of the *CITES* and the *CBD*, some of the provisions of those treaties could have been relevant in interpreting the *ICRW*: the precautionary principle enshrined in the *CBD* and other instruments could be shown to support a restrictive interpretation of the art VIII exception.<sup>67</sup> For Japan, on the other hand, the *CBD*’s endorsement of the *sustainable use* of biological resources sanctioned a broad interpretation of any authorisation to kill take and treat whales for both commercial exploitation and scientific research.<sup>68</sup> Both parties made much of the *VCLT* methodologies in their submissions on the *ICRW*.<sup>69</sup>

However, the Court was conspicuously light-handed in its use of established techniques of treaty interpretation to adjudicate on the evolution of the whaling regime. We review its interpretation of the treaty’s object and purpose and its use of subsequent practice, subsequent agreement and rules applicable in the relations between the parties in turn.

#### A Object and Purpose of the *ICRW*

The Court interpreted art VIII of the *ICRW* as creating circumstances in which whaling would not be subject to the obligations set out in the *ICRW* and its Schedule, including the 1982 amendments relating to the moratorium and the

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<sup>63</sup> *Fragmentation of International Law*, UN Doc A/CN.4/L.702.

<sup>64</sup> Ibid 13–14 [17]: ‘Article 31(3)(c) ... gives expression to the objective of “systemic integration” according to which, whatever their subject matter, treaties are a creation of the international legal system and their operation is predicated upon that fact’.

<sup>65</sup> See Georg Nolte, Special Rapporteur, *Second Report on Subsequent Agreements and Subsequent Practice in relation to the Interpretation of Treaties*, UN GAOR, 66<sup>th</sup> sess, UN Doc A/CN.4/671 (26 March 2014) (*‘Nolte Report’*).

<sup>66</sup> International Law Commission, *Report of the International Law Commission on the Work of Its Sixty-Fifth Session*, UNGAOR, 68<sup>th</sup> sess, Supp No 10, UN Doc A/68/10 (2013), ch IV(C)(1), ch IV(C)(2) 24–30 [1]–[18].

<sup>67</sup> ‘Memorial of Australia’, *Whaling in the Antarctic (Australia v Japan)*, International Court of Justice, General List No 148, 9 May 2011, [4.83].

<sup>68</sup> ‘Counter-Memorial of Japan’, *Whaling in the Antarctic (Australia v Japan)*, International Court of Justice, General List No 148, 9 March 2012, [6.17]–[6.22].

<sup>69</sup> See especially ‘Memorial of Australia’, *Whaling in the Antarctic (Australia v Japan)*, International Court of Justice, General List No 148, 9 May 2011, [4.33]–[4.122]; *ibid* 305–71.

earlier and later amendments establishing the Sanctuary.<sup>70</sup> It did not refer to the article as an ‘exception’, however, and it rejected Australia’s and New Zealand’s submissions that it should be read restrictively.

The Court asserted that it would interpret art VIII ‘in light of the object and purpose of the *Convention* and taking into account other provisions ... including the Schedule’.<sup>71</sup> Yet the Court refused to adjudicate on whether the object and purpose should be evaluated as pursuing conservation (as Australia submitted) or sustainable exploitation (as Japan submitted), instead citing the spectrum of the *Convention*’s preambular goals, which refer inter alia to ‘safeguarding for future generations the great natural resources represented by the whale stocks’, the exploitation of whales and the orderly development of the whaling industry. At least superficially, the Court adopted a neutral position on whether art VIII should be read restrictively or expansively and did not consider the broader context of developments within the whaling regime and in international environmental law. While it did not begrudge the status as ‘subsequent practice or subsequent agreement’<sup>72</sup> of certain IWC resolutions adopted by consensus (as discussed below), it found little substantive interpretative guidance from those resolutions, instead drawing upon them in assessing Japan’s conduct.<sup>73</sup> The Court’s statement that ‘[a]mendments to the Schedule and recommendations by the IWC may put an emphasis on one or the other objective pursued by the *Convention*, but cannot alter its object and purpose’<sup>74</sup> is difficult to reconcile with its ruling that the IWC’s functions ‘have made the *Convention* an evolving instrument’.<sup>75</sup>

The separate and dissenting opinions took different views of the *ICRW*’s object and purpose. For example, writing in dissent, Judge Owada pronounced upon the object and purpose as the pursuit of ‘the twin purposes of the sustainability of the maximum sustainable yield (“MSY”) of the stocks in question and the viability of the whaling industry’.<sup>76</sup> Taking issue with the Court’s view of the *ICRW* as an evolving instrument, which he considered to be a ‘laconic statement’, Judge Owada stated that the *ICRW* ‘is not malleable as such in the legal sense, according to the changes in the ... socio-economic environments’.<sup>77</sup>

Judge Cañado Trindade’s separate opinion took the opposite view and read art VIII restrictively so as to take into account its position in ‘a system of collective guarantee and collective regulation oriented towards the conservation

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<sup>70</sup> The separate opinion of Judge Cañado Trindade notes that the IWC has adopted three whale sanctuaries: ‘[F]irst, the Southern Ocean Sanctuary (1948–1955); secondly, the Indian Ocean Sanctuary (1979, renewed in 1989, and indefinitely as from 1992); thirdly the new Southern Ocean Sanctuary (from 1994 onwards)’. *Judgment* (International Court of Justice, General List No 148, 31 March 2014) [36] (Judge Cañado Trindade).

<sup>71</sup> *Ibid* [55].

<sup>72</sup> See *VCLT* arts 31(3)(a)–(b).

<sup>73</sup> See also below n 123 and accompanying text.

<sup>74</sup> *Judgment* (International Court of Justice, General List No 148, 31 March 2014) [56].

<sup>75</sup> *Ibid* [45]. See also Malgosia Fitzmaurice, ‘The *Whaling Convention* and Thorny Issues of Interpretation’ in Malgosia Fitzmaurice and Dai Tamada (eds), *Whaling in the Antarctic: The Judgment and Its Implications* (Brill, forthcoming).

<sup>76</sup> *Judgment* (International Court of Justice, General List No 148, 31 March 2014) [9] (Judge Owada).

<sup>77</sup> *Ibid* [12] (Judge Owada).

of living species'.<sup>78</sup> Rejecting the view that art VIII set up a self-contained regime allowing whaling, Judge Cañado Trindade cited evidence of unilateralism yielding to collective regulation towards conservation as evolved through the work of the Commission and its 1982 general moratorium and through other treaties such as the 1982 *UNCLOS*,<sup>79</sup> the *CBD*<sup>80</sup> and the *CITES*.<sup>81</sup>

Judge ad hoc Charlesworth held that 'treaties dealing with the environment should be interpreted whenever possible in light of the precautionary approach, regardless of the date of their adoption'.<sup>82</sup> Her Honour's approach is consistent with the Court's earlier statement — also made without express reference to a particular heading of the *VCLT* — that 'an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation'.<sup>83</sup>

For Judge Bennouna, writing in dissent, the spirit of the *Convention* 'aims at strengthening co-operation between States parties for the purposes of managing a shared resource',<sup>84</sup> while for Judge Yusuf, the Court should have assessed whether the evolving regulatory framework of the *ICRW* in setting zero catch limits and establishing the Sanctuary should have demonstrated that the object and purpose had evolved to reflect a conservationist approach.<sup>85</sup> Judge Greenwood, however, supported the Court's view that art VIII should be read 'without any predisposition towards a restrictive or an expansive interpretation'.<sup>86</sup>

#### B Context to the *ICRW*: Subsequent Practice, Subsequent Agreement and Relevant Rules of International Law

As mentioned above, the Court did consider IWC resolutions to be relevant for the interpretation of the *ICRW* or its Schedule in certain circumstances, although this did not appear to have any great bearing on its decision-making. The Court acknowledged that recommendations made by the Commission according to art VI of the *ICRW*, while not binding, could be used in interpreting the *ICRW* where adopted as resolutions by consensus or unanimous vote.<sup>87</sup> Resolutions adopted without the support of all states parties (particularly Japan), however, were expressly stated *not* to have the status of subsequent agreement or

<sup>78</sup> Ibid [59] (Judge Cañado Trindade).

<sup>79</sup> Ibid [35] (Judge Cañado Trindade).

<sup>80</sup> Ibid [57] (Judge Cañado Trindade).

<sup>81</sup> Ibid [25] (Judge Cañado Trindade).

<sup>82</sup> Ibid [8]–[9] (Judge ad hoc Charlesworth), citing *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14, 71 [164], 83 [204] ('*Pulp Mills*').

<sup>83</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16, 31 [53], cited in *Judgment* (International Court of Justice, General List No 148, 31 March 2014) [9] (Judge ad hoc Charlesworth).

<sup>84</sup> *Judgment* (International Court of Justice, General List No 148, 31 March 2014) 7 (Judge Bennouna).

<sup>85</sup> Ibid [46] (Judge Yusuf).

<sup>86</sup> Ibid [8] (Judge Greenwood).

<sup>87</sup> Ibid [83]. See also at [46]: '[W]hen they are adopted by consensus or by a unanimous vote, [IWC resolutions] may be relevant for the interpretation of the *Convention* or its Schedule'. Recall that resolutions are passed if they attract a simple majority of those members voting: *ICRW* art III(2).

subsequent practice.<sup>88</sup> Moreover, the Court did not entertain arguments that it should interpret art VIII according to the precautionary approach, and it also did not comment upon *VCLT* art 31(3)(c) and the *CITES* or the *CBD*.

Although meeting the character of subsequent agreement or subsequent practice, the unanimous or consensus-driven IWC resolutions were found not to add anything to the Court's interpretation of art VIII and specifically the term 'scientific research': resolutions relating to non-lethal methods for scientific research, for example, did not establish a requirement that only when such methods were unavailable could lethal methods be used.<sup>89</sup>

Judge ad hoc Charlesworth's separate opinion drew upon the *VCLT* in more detail. While she agreed with the Court's view that for IWC recommendations to have the status of subsequent practice or agreement according to *VCLT* arts 31(3)(a) and (b), they need to be adopted as resolutions by consensus or unanimity, she considered resolutions adopted by majority vote to also have 'some consequence'.<sup>90</sup> Such consequence relates particularly to a duty of cooperation, which we discuss in Part IV below. In leaving open the question of whether majority resolutions may be relevant for interpretative methodologies outside of *VCLT* art 31(3), Judge ad hoc Charlesworth can be said to be acting consistently with the views of Rosalyn Higgins and other learned authority on the status of resolutions as sources of international law.<sup>91</sup> Judge ad hoc Charlesworth also perhaps implicitly acknowledges that the normative power of 'soft law' may sometimes be positive for the international legal system, as she has discussed elsewhere.<sup>92</sup> For Judge Greenwood, however, the procedure distinguishing resolutions endorsing recommendations of the Commission (the art III(2) procedure requiring simple majority) from resolutions making amendments to the Schedule (the art III(2) procedure requiring a three-fourths majority) meant that only the latter set of resolutions should be considered as adapting the *ICRW* to changing circumstances.<sup>93</sup> Taking into account the former set of resolutions would be to allow for changes to be introduced 'through the back door'.<sup>94</sup>

Like the majority decision, Judge ad hoc Charlesworth drew expressly on the resolutions adopted by consensus or unanimous vote as 'subsequent agreement' or 'subsequent practice' relevant to the interpretation of art VIII. Yet while the majority had not made much of these resolutions, which related inter alia to the

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<sup>88</sup> *Judgment* (International Court of Justice, General List No 148, 31 March 2014) [83].

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid* [4] (Judge ad hoc Charlesworth).

<sup>91</sup> See Rosalyn Higgins, *Problems & Process: International Law and How We Use It* (Oxford University Press, 1994) 22–5, citing *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion)* [1971] ICJ Rep 16, 50. See also I A Shearer, *Starke's International Law* (Butterworths, 11<sup>th</sup> ed, 1994) 32, citing *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174.

<sup>92</sup> Hilary Charlesworth has commented on the tensions inherent in giving normative power to resolutions of international organisations and other soft law: Hilary Charlesworth, 'Law-Making and Sources' in James Crawford and Martti Koskeniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press, 2012) 187, 198–9.

<sup>93</sup> *Judgment* (International Court of Justice, General List No 148, 31 March 2014) [7] (Judge Greenwood).

<sup>94</sup> *Ibid* (Judge Greenwood).

primacy of non-lethal methods for scientific research, Judge ad hoc Charlesworth considered them to have a substantive impact on the meaning of the provision, concluding that art VIII requires that lethal methods must be essential to the objectives of the scientific research program.<sup>95</sup> This interpretation was supported by Judge ad hoc Charlesworth's findings relating to the precautionary principle, which she saw as interpretative context for any treaty dealing with the environment.<sup>96</sup> Judge ad hoc Charlesworth did not invoke *VCLT* art 31(3)(c) as the basis for incorporation of the precautionary principle. This was perhaps because she confined her observations to the interpretation of treaties 'dealing with the environment', which arguably dispensed with the requirement that the precautionary principle be assessed as a 'relevant rule of international law' — either through custom or general principle — an assessment that has been rejected elsewhere as 'still await[ing] authoritative formulation'.<sup>97</sup>

The separate opinion of Judge Cançado Trindade contained an open endorsement of external sources relevant to an evolving interpretation of the *ICRW*, but this was not cast within the express methodology of *VCLT* Art 31(3). As mentioned above, Judge Cançado Trindade considered a range of international environmental treaties to represent a 'systemic outlook',<sup>98</sup> which has a similar ring to the principle of 'systemic integration' upheld by the ILC as a useful interpretative technique under *VCLT* art 31(3)(c) to address the fragmentation of international law.<sup>99</sup> For Judge Cançado Trindade, the system has evolved to guarantee collective regulation for the conservation of living species and a parallel acknowledgement of the need to take protective measures in the face of risks, thus requiring interpretation according to a precautionary approach.<sup>100</sup> Thus, unlike the ILC, Judge Cançado Trindade's version of the system of international law is imbued with a meta-narrative.

### C *Contrasting Methodologies*

In sum, the Court was reluctant to engage in the methodologies that seem to allow an evolving interpretation of treaty norms: *VCLT* art 31(1) on object and purpose and good faith; and *VCLT* art 31(3) on subsequent practice, subsequent agreement and relevant rules of international law applicable between the parties. It declined to pronounce definitively upon the *ICRW*'s object and purpose or upon the relevance of historic developments within and outside the *ICRW* (including in international environmental law), although the separate and dissenting opinions were less reticent. The Court's methodology contrasts with

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<sup>95</sup> Ibid [5] (Judge ad hoc Charlesworth).

<sup>96</sup> See above n 82 and accompanying text.

<sup>97</sup> See Appellate Body Report, *EC Measures concerning Meat and Meat Products (Hormones)*, WTO Docs WT/DS26/AB/R and WT/DS48/AB/R, AB-1997-4 (16 January 1998) [123] ('*EC — Hormones*').

<sup>98</sup> *Judgment* (International Court of Justice, General List No 148, 31 March 2014) [25] (Judge Cançado Trindade).

<sup>99</sup> See above n 64. See also Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the *Vienna Convention*' (2005) 54 *International and Comparative Law Quarterly* 279.

<sup>100</sup> *Judgment* (International Court of Justice, General List No 148, 31 March 2014) [57]–[58] (Judge Cançado Trindade). His Honour also took note of the substantial reliance on the precautionary principle by the parties. See at [60]–[71].



other international rulings, where the relevant tribunal has invoked multilateral environmental and other treaties when interpreting the object and purpose of a treaty. For example, the Appellate Body of the World Trade Organization in *United States — Import Prohibition of Certain Shrimp and Shrimp Products* ('*US — Shrimp*')<sup>101</sup> noted that words in the *General Agreement on Tariffs and Trade* ('*GATT*')<sup>102</sup> art XX(g) were 'crafted more than 50 years ago' and interpreted the relevant provision by drawing on *UNCLOS*, the *CBD* and other instruments as well as relevant WTO agreements.<sup>103</sup> While some of its reasoning on procedural obligations mirrored the ICJ decision in *Pulp Mills on the River Uruguay (Argentina v Uruguay)* ('*Pulp Mills*'),<sup>104</sup> as we discuss below,<sup>105</sup> it did not follow that decision's approval of presumptive interpretations relating to evolving treaty terms.<sup>106</sup> In *Pulp Mills*, the ICJ found that the relevant treaty obligation had to be interpreted in accordance with a practice 'which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law [regarding environmental impact assessment]',<sup>107</sup> but the Court in the *Whaling* case did not take an analogous stance on the changing assumptions among states about whaling. Nor did the Court take an expressly restrictive stance on these issues (as a WTO panel did when it interpreted the meaning of *VCLT*'s art 31(3)(c)'s 'relevant rules of international law applicable in the relations between the parties', and found there a requirement of unanimity of membership between the relevant rule and the core treaty).<sup>108</sup> The Court did not refer to *VCLT* art 31(3)(c) at all.

We have demonstrated that the interpretation of the *ICRW*, initially thought by the parties to be fundamental to the outcome of the case, was approached very conservatively by the Court. Observers hopeful for an example of how interpretative methodologies can allow the system of international law — or at least the whaling regime — to evolve might be disappointed. Yet the Court's

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<sup>101</sup> Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R, AB-1998-4 (12 October 1998) ('*US — Shrimp*').

<sup>102</sup> *General Agreement on Tariffs and Trade 1947*, opened for signature 30 October 1947, 55 UNTS 187 (entered into force 1 January 1948).

<sup>103</sup> Appellate Body Report, *US — Shrimp*, WTO Doc WT/DS58/AB/R, [129]. See generally at [123]–[134]. See also Margaret A Young, *Trading Fish, Saving Fish: The Interaction between Regimes in International Law* (Cambridge University Press, 2011) 189–240. The *US — Shrimp* dispute also referred to duties to cooperate. See below n 162 and accompanying text.

<sup>104</sup> *Pulp Mills* [2010] ICJ Rep 14.

<sup>105</sup> See also below Part IV.

<sup>106</sup> In *Pulp Mills*, the Court cited *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua) (Judgment)* [2009] ICJ Rep 213, 242 [64]. That case had ruled that the relevant parties' intention was to give the treaty terms a content 'capable of evolving ... so as to make allowance for, among other things, developments in international law': *Pulp Mills* [2010] ICJ Rep 14, 82–3 [204].

<sup>107</sup> *Pulp Mills* [2010] ICJ Rep 14, 83 [204].

<sup>108</sup> Panel Report, *European Communities — Measures Affecting the Approval and Marketing of Biotech Products*, WTO Docs WT/DS291/R, WT/DS292/R and WT/DS293/R (29 September 2006). See Margaret A Young, 'The WTO's Use of Relevant Rules of International Law: An Analysis of the *Biotech* Case' (2007) 56 *International and Comparative Law Quarterly* 907. See also Appellate Body Report, *European Communities and Certain Member States — Measures Affecting Trade in Large Civil Aircraft*, WTO Doc WT/DS316/AB/R, AB-2010-1 (18 May 2011) [843].

reticent attitude to questions of subsequent agreements, subsequent practice and relevant rules of international law did not expunge issues of time and change. These questions found greater expression in the Court's assessment of Japan's conduct, to which we now turn.

#### IV EVOLUTION THROUGH THE DUTY TO COOPERATE

Many modern treaty regimes, especially those involving multilateral environment agreements, draw upon ongoing institutional mechanisms that require regular meetings of the parties (often termed 'Conferences of the Parties' or 'COPs'), the ongoing supervision or facilitation of compliance and changing understandings of obligations and objectives. In this Part, we consider how the institutional mechanisms of the whaling regime influenced the Court's findings with respect to Japan's breaches of the *ICRW*. We note that the Court did not dwell itself on the *ICRW*'s status as a 'regime': while many of the judges used the language of 'regime' in their characterisation of the *ICRW* and its associated institutions,<sup>109</sup> this was not given separate analysis or treatment. However, we consider the separate identification of institutions and treaty provisions — as well as professional practices and even 'vocabularies'<sup>110</sup> — can be important in understanding the Court's analysis. We turn first to the Court's assessment of the standard of conduct expected of all states parties to the whaling regime and its findings with respect to Japan's duty 'to give due regard'. We then turn to similar developments in other selected regimes: the law of the sea regime, headed by *UNCLOS* and associated agreements, and the *UNFCCC*.

##### A *The Standard of Conduct in the Whaling Regime*

As we discussed in Part III, the Court engaged in a relatively short interpretation of the *ICRW*. Its interpretation of art VIII led it to conclude that '[a state's determination of] whether the killing, taking and treating of whales pursuant to a requested special permit is for purposes of scientific research cannot depend simply on that State's perception'.<sup>111</sup>

Instead of a subjective determination, or an inquiry as to whether Japan had acted in 'good faith', the assessment of means and ends rested on an objective standard.<sup>112</sup> According to this standard, art VIII does not allow for lethal sampling 'on a larger scale than is reasonable in relation to achieving the programme's stated research objectives'.<sup>113</sup> As such, the Court sought to determine whether the design and implementation of JARPA II was 'reasonable in relation to achieving its stated objectives'.<sup>114</sup>

The Court stated this standard of review to be an objective one.<sup>115</sup> This characterisation, said to be the first time in which the term 'standard of review'

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<sup>109</sup> See, eg, *Judgment* (International Court of Justice, General List No 148, 31 March 2014) [63], [5] (Judge Owada), [48] (Judge Cançado Trindade), [19] (Judge Yusuf), [7] (Judge Xue), [5] (Judge Bhandari).

<sup>110</sup> For definition of 'regimes' in the academic literature, see above n 3 and accompanying text.

<sup>111</sup> *Judgment* (International Court of Justice, General List No 148, 31 March 2014) [61].

<sup>112</sup> *Ibid* [97].

<sup>113</sup> *Ibid*.

<sup>114</sup> *Ibid* [98].

<sup>115</sup> *Ibid* [67].

has been used by the ICJ,<sup>116</sup> was not supported by all members of the bench. For example, Judge Owada considered it to be an out-of-context application of the ‘reasonableness’ test that the WTO Appellate Body had previously developed in cases related to scientifically controversial issues.<sup>117</sup> His Honour’s opinion that art VIII gave a state party discretion in exercising its power<sup>118</sup> was also emphasised in the dissent of Judge Bennouna, who noted that this power was constrained by the supervisory role of the Commission and Scientific Committee.<sup>119</sup> Judge Yusuf considered that the characterisation of the Court’s task misconstrued the law applicable to the case, and especially the legal criteria contained not only in *ICRW* art VIII but also the guidelines adopted by consensus at the IWC: these should have informed an ‘analysis [of] the lawful use by Japan of its discretionary power under Article VIII’.<sup>120</sup>

The Court noted that JARPA II used non-lethal methods such as biopsy sampling, satellite tagging and whale sighting surveys, as well as lethal methods.<sup>121</sup> Although the Court accepted that JARPA II activities could broadly be characterised as ‘scientific research’,<sup>122</sup> it had difficulty in accepting that JARPA II was *for purposes of* scientific research, especially when it compared Japan’s previous research programme. That programme, known as JARPA, operated before JARPA II expanded the use of lethal methods.

The Court considered that JARPA II should have included some analysis of the feasibility of non-lethal methods. One of the reasons for this was the substance of certain IWC resolutions and recommendations: the Court emphasised that ‘IWC resolutions and Guidelines call upon States parties to take into account whether research objectives can be achieved using non-lethal methods’ and ‘Japan has accepted that it is under an obligation to give due regard to such recommendations’.<sup>123</sup> We discuss the substance of this obligation below.

The Court referred to evidence that Japan appeared to prefer lethal sampling because it provided ‘a source of funding to offset the cost of the research’.<sup>124</sup> Its consideration of the scale of the use of lethal methods in JARPA II (indicated by the setting of sample sizes for minke, fin and humpback whales),<sup>125</sup> and its

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<sup>116</sup> Shotaro Hamamoto, ‘From the Requirement of Reasonableness to a “Comply and Explain” Rule: The Standard of Review in the *Whaling* Judgment’ in Malgosia Fitzmaurice and Dai Tamada (eds), *Whaling in the Antarctic: The Judgment and Its Implications* (Brill, forthcoming). See also Hironobu Sakai, ‘After the *Whaling in the Antarctic* Judgment: Its Lessons and Prospects from a Japanese Perspective’ in Malgosia Fitzmaurice and Dai Tamada (eds), *Whaling in the Antarctic: The Judgment and Its Implications* (Brill, forthcoming). Hironobu Sakai argued that the Court applied the standard of review too strictly to the conduct of the Japanese authorities.

<sup>117</sup> *Judgment* (International Court of Justice, General List No 148, 31 March 2014) [33]–[40] (Judge Owada).

<sup>118</sup> *Ibid* [44] (Judge Owada).

<sup>119</sup> *Ibid* 2 (Judge Bennouna).

<sup>120</sup> *Ibid* [11]–[17] (Judge Yusuf).

<sup>121</sup> *Ibid* [124]–[125].

<sup>122</sup> *Ibid* [127].

<sup>123</sup> *Ibid* [137].

<sup>124</sup> *Ibid* [144].

<sup>125</sup> JARPA’s sample size was around 400 minke whales, as compared to JARPA II’s sample size of 850 minke whales plus the two additional species of fin and humpback whales: *Judgment* (International Court of Justice, General List No 148, 31 March 2014) [148].

comparison with the smaller, minke whale-only sample size of JARPA,<sup>126</sup> led the Court to doubt that JARPA II's design was motivated strictly by scientific objectives.<sup>127</sup>

In making these findings, the Court treaded the difficult tightrope of legal analysis in a scientific context and emphasised that it was not 'pass[ing] judgment on the scientific merit of the JARPA II objectives' but 'seek[ing] here only to evaluate whether the evidence supports a conclusion that the sample sizes are reasonable in relation to achieving JARPA II's stated objectives'.<sup>128</sup> For some members of the bench, the Court lost its footing here, as stated above.<sup>129</sup> But others consider that the Court's model of setting a logical standard for determining whether whaling under art VIII was for the 'purposes of scientific research' can provide a useful precedent for how judges might assess scientific principles when resolving technical disputes.<sup>130</sup>

The Court drew on the expert testimony of scientists in examining elements of JARPA II's design and implementation. The scientists who gave evidence were called by the parties;<sup>131</sup> the Court did not entertain a more proactive procedure for the seeking of advice from independent scientific experts, which is formally available under *ICJ Statute* art 50.<sup>132</sup> This departed from academic calls for such a procedure<sup>133</sup> after the preceding ICJ decision of *Pulp Mills*,<sup>134</sup> in which the majority commented upon its inability to cross-examine experts because they were appointed by the parties,<sup>135</sup> and in which the dissenting judges expressly preferred a procedure for Court-appointed independent experts based on art 50.<sup>136</sup>

The Court instead evaluated Japan's conduct through a standard of reasonableness that drew on scientific testimony as well as logic.<sup>137</sup> In addition to its concerns about the design of JARPA II, the Court found that the implementation of JARPA II was not always consistent with its characterisation as a programme for purposes of scientific research.<sup>138</sup> The Court commented especially upon the significant gap between the target sample sizes and the actual

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<sup>126</sup> Ibid [147]–[156].

<sup>127</sup> Ibid [156], [181], [198].

<sup>128</sup> Ibid [172].

<sup>129</sup> See above n 117 and accompanying text.

<sup>130</sup> William de la Mare, Nick Gales and Marc Mangel, 'Applying Scientific Principles in International Law on Whaling: The Approach Might Address Disputes beyond Whaling and the Courtroom' (2014) 345 *Science* 1125.

<sup>131</sup> These were Nick Gales and Marc Mangal called by Australia (who co-authored the commentary cited in footnote 130) and Lars Walløe called by Japan. See *Judgment* (International Court of Justice, General List No 148, 31 March 2014) [20]–[21].

<sup>132</sup> See also Makane Moïse Mbengue, 'Between Law and Science: A Commentary on the Whaling in the Antarctic Case' (2015) 14 *Questions of International Law — Zoom In* 3 <<http://perma.cc/U5ZV-GE77>>.

<sup>133</sup> Caroline E Foster, 'New Clothes for the Emperor? Consultation of Experts by the International Court of Justice' (2014) 5 *Journal of International Dispute Settlement* 139.

<sup>134</sup> [2010] ICJ Rep 14.

<sup>135</sup> Ibid 62 [167]. See also at 121–7 [2]–[15] (Judge Keith), 190–1 [148]–[151] (Judge Cançado Trindade), 216–20 [1]–[14] (Judge Yusuf), 230–1 [27]–[28] (Judge Greenwood), 280–1 [92]–[97] (Judge Vinuesa).

<sup>136</sup> Ibid 109–17 [2]–[17] (Judges Al-Khasawneh and Simma).

<sup>137</sup> de la Mare, Gales and Mangel, above n 130.

<sup>138</sup> *Judgment* (International Court of Justice, General List No 148, 31 March 2014) [212].

numbers killed.<sup>139</sup> While the permits issued for JARPA II authorised the take of humpback whales, for example, no humpback whales had been taken, while for fin whales the take had drastically reduced after 18 fin whales were taken over the first seven seasons of JARPA II. The annual sample size of 850 minke whales had been met during the 2005–06 season but had fallen short in subsequent years, sometimes quite considerably.<sup>140</sup> Japan stated that sabotage activities by anti-whaling non-governmental organisations such as the Sea Shepherd Conservation Society was one of the reasons for the disparity,<sup>141</sup> while Australia submitted that the actual take was a ‘function of the commercial market for whale meat in Japan’.<sup>142</sup> The Court took the opportunity to emphasise an IWC resolution, adopted by consensus, which noted dangerous activities of Sea Shepherd and condemned ‘any actions that are a risk to human life and property in relation to the activities of vessels at sea’.<sup>143</sup> However, it concluded that the actual take was ‘largely, if not entirely, a function of political and logistical considerations’, and that this weakened the argument that the decision to engage in lethal sampling on a relatively large scale was for scientific purposes.<sup>144</sup> Other factors indicating that JARPA II was designed and implemented for purposes other than scientific research, namely its open-ended time frame, its relatively limited scientific output and its lack of cooperation, were also noted by the Court.<sup>145</sup> The Court concluded that while JARPA II involved activities that could be broadly characterised as scientific research, the evidence of JARPA II’s design and implementation did not establish that it was ‘for purposes of scientific research’ pursuant to *ICRW* art VIII.<sup>146</sup> As such, in granting permits for JARPA II, Japan had violated the moratorium on commercial whaling in Schedule para 10(e),<sup>147</sup> the factory ship moratorium in Schedule para 10(d)<sup>148</sup> and the prohibition on whaling in the Southern Ocean Sanctuary.<sup>149</sup>

#### B *The Duty to ‘Give Due Regard’ to IWC Resolutions and Guidelines*

As discussed above, the Court considered that JARPA II should have included analysis of the feasibility of non-lethal methods because, inter alia, resolutions and guidelines of the IWC had called upon states parties to ‘take into account’ whether research objectives could be achieved using non-lethal methods.<sup>150</sup> Here, the Court drew no distinction between resolutions adopted by consensus and recommendations and guidelines that did not find support of all *ICRW* states parties: unlike its earlier consideration of subsequent practice or subsequent agreement, the Court found substantive guidance from these instruments because

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<sup>139</sup> Ibid [199].

<sup>140</sup> Ibid [202].

<sup>141</sup> Ibid [203].

<sup>142</sup> Ibid [205].

<sup>143</sup> Ibid [206].

<sup>144</sup> Ibid [212].

<sup>145</sup> Ibid [213]–[222].

<sup>146</sup> Ibid [227].

<sup>147</sup> Ibid [231].

<sup>148</sup> Ibid [232].

<sup>149</sup> Ibid [233].

<sup>150</sup> Ibid [137].

of the obligation of Japan ‘to give due regard’ to them.<sup>151</sup> This obligation came from Japan’s duty to cooperate with the IWC and Scientific Committee, an obligation that was incumbent upon all states parties to the *ICRW* and that was not disputed by the parties.<sup>152</sup>

The Court’s articulation of a duty of states parties to cooperate with the IWC and the Scientific Committee can be traced to the terms of art VIII itself, which require that a state party granting a permit for whaling ‘shall report at once to the Commission all such authorizations which it has granted’. Judge ad hoc Charlesworth emphasised that the monitoring role of the IWC was newly introduced in art VIII (its predecessor treaty, whilst including a provision for scientific research, did not provide for such oversight), and reflects the *ICRW*’s object and purpose to create ‘a system of international regulation’ for the conservation and management of whale stocks.<sup>153</sup> Judge ad hoc Charlesworth observes that the concept of a duty of cooperation ‘is the foundation of legal régimes dealing (inter alia) with shared resources and with the environment’.<sup>154</sup>

The Court was modest in its exposition of the duty to cooperate. Rather than pronounce upon the nature of modern international law, or refer to similar concepts in other treaties or case law,<sup>155</sup> or a ‘good faith’ standard,<sup>156</sup> it tied the source of the duty to cooperate to the provisions and procedures of the *ICRW*. Yet the concept is of great importance in ensuring the participation of states in the evolution of international law, even if that participation does not entail direct consent to rules. The concept also gives a special role to international organisations and provides a further justification for the concept of ‘regimes’ in international law. Before we provide further reflections on this point, we turn to similar developments in other regimes.

### C Similar Developments in Other Regimes

The duty to cooperate can be tied theoretically to Wolfgang Friedman’s idea that international law has changed from a law of coexistence to a law of cooperation.<sup>157</sup> It also has links to the ‘good faith’ standard and even a concept of ‘public trust’.<sup>158</sup> It has broad support in *Charter of the United Nations*

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<sup>151</sup> Ibid.

<sup>152</sup> Ibid [83]. See also at [240].

<sup>153</sup> Ibid [13] (Judge ad hoc Charlesworth).

<sup>154</sup> Ibid (Judge ad hoc Charlesworth).

<sup>155</sup> Generally, the very limited analysis of case law in the Court’s judgment has been noted. Sonia Rolland observes that the Court cites only three cases, all in its jurisdictional analysis: Sonia E Rolland, ‘Whaling in the Antarctic (*Australia v Japan: New Zealand Intervening*)’ (2014) 108 *American Journal of International Law* 496, 499.

<sup>156</sup> While Australia submitted that Japan had not acted in good faith, the Court did not entertain these arguments. See also *ibid* 502.

<sup>157</sup> Wolfgang Friedman, *The Changing Structure of International Law* (Stevens & Sons, 1964).

<sup>158</sup> Peter H Sand, ‘Principle 27: Cooperation in a Spirit of Global Partnership’ in Jorge E Viñuales (ed), *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press, 2015) 617. Principle 27 of the *Rio Declaration* states that ‘States and people shall cooperate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development’: *Report of the United Nations Conference on the Human Environment*, UN Doc A/CONF.151/26 (Vol. 1) (12 August 1992) annex 1 (*Rio Declaration on Environment and Development*) principle 27.

provisions for international economic and social cooperation.<sup>159</sup> Drawing on the *Declaration on Principles of International Law concerning Friendly Relations and Co-Operation among States in accordance with the Charter of the United Nations*, Rüdiger Wolfrum offers the definition of cooperation as ‘the voluntary co-ordinated action of two or more States which takes place under a legal regime and serves a specific objective’.<sup>160</sup> Wolfrum distinguishes between a general obligation to cooperate (which has fairly limited support as a norm of customary international law) and the obligation to cooperate in specific areas of international law (especially as to spaces beyond national jurisdiction, international environmental law, the protection of human rights and international economic law). A preference for international cooperation to address commons-type problems over unilateral trade measures has been recorded in environmental instruments such as the *Rio Declaration on Environment and Development*<sup>161</sup> as well as in trade law and associated jurisprudence.<sup>162</sup>

Wolfrum makes special mention of multilateral agreements having the character of framework agreements, where the obligation to cooperate ‘is meant to serve as the driving force for the progressive development of such legal regimes through additional instruments such as protocols and measures’.<sup>163</sup> The *UNFCCC* is the exemplar here, as we discuss below, but regard could also be had to the *Montreal Protocol on Substances that Deplete the Ozone Layer*,<sup>164</sup> the *International Treaty on Plant Genetic Resources for Food and Agriculture*<sup>165</sup> and the Antarctic Treaty Consultative Meeting.<sup>166</sup> The relevant conferences of

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<sup>159</sup> *Charter of the United Nations* ch IX. See especially at art 56: ‘All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55’.

<sup>160</sup> Rüdiger Wolfrum, ‘Cooperation, International Law of’ (April 2010) *Max Planck Encyclopedia of Public International Law* [2].

<sup>161</sup> Margaret A Young, ‘Principle 12: Trade and the Environment’ in Jorge E Viñuales (ed), *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press, 2015) 325.

<sup>162</sup> In the *US — Shrimp* case, ‘serious, good faith efforts made by the United States to negotiate an international agreement’ were evidence that its unilateral trade measures meet the requirements of *General Agreement on Tariffs and Trade* art XX: Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*, WTO Doc WT/DS58/AB/RW, AB-2001-4 (22 October 2001) [134]. See also Robert Howse, ‘The Appellate Body Rulings in the *Shrimp/Turtle* Case: A New Legal Baseline for the Trade and Environment Debate’ (2002) 27 *Columbia Journal of Environmental Law* 491.

<sup>163</sup> Wolfrum, above n 160, [31].

<sup>164</sup> The *Montreal Protocol* is a protocol to the *Vienna Convention for the Protection of the Ozone Layer*. Article 2(9) of the *Montreal Protocol* grants its Conference of Parties (‘COP’) the authority to make significant changes to the obligations of the parties to reduce consumption and production of controlled substances by way of simple COP decisions: *Montreal Protocol on Substances that Deplete the Ozone Layer*, opened for signature 16 September 1987, 1522 UNTS 28 (entered into force 1 January 1989).

<sup>165</sup> The *International Treaty on Plant Genetic Resources for Food and Agriculture* establishes a multilateral system for facilitated access to a specified list of plant genetic resources for food and agriculture: *International Treaty on Plant Genetic Resources for Food and Agriculture*, opened for signature 3 November 2001, 2400 UNTS 303 (entered into force 29 June 2004). Decisions taken by the governing body relate to the terms of standard material transfer agreement.

<sup>166</sup> The Antarctic Treaty Consultative Meeting makes measures, decisions and resolution to give effect to the principles of the *Antarctic Treaty* and the *Environmental Protocol*. See also Secretariat of the Antarctic Treaty, *The Antarctic Treaty Consultative Meeting (ATCM)* (2011) <<http://perma.cc/P8S2-5G6U>>.

the parties provide for explicit and implicit authority to take legally binding decisions, and demonstrate the types of practice that supports Judge ad hoc Charlesworth's observation of the relevance of majority resolutions.<sup>167</sup> We point to regimes that demonstrate how the duty to cooperate is situated within environmental or shared-resource contexts: the law of the sea, selected bilateral river or dam management regimes and the *UNFCCC*.

### 1 *The Law of the Sea*

A duty to cooperate is contained in various provisions of the *UNCLOS*. These include, most pertinently for the present article, the provision in art 65 that '[s]tates shall co-operate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations'. There are cooperative duties relating to the prevention of pollution to the marine environment as well as relating to the conservation and management of marine living resources.<sup>168</sup> Article 56(2) requires coastal states, in exercising their rights and performing their duties in the exclusive economic zone, to have 'due regard to the rights and duties of other States', acting in a 'manner compatible with the provisions of this *Convention*'; conflicts relating to this provision are to be resolved 'taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole'.<sup>169</sup> Article 118 defines cooperation as the entering into of 'negotiations with a view to taking the measures necessary for the conservation of the living resources concerned'. Article 119 requires that all relevant and available scientific data shall be communicated to other interested states via competent international organisations. These duties are further elaborated in the *Food and Agriculture Organization Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas*<sup>170</sup> (see especially the obligation to share information on fishing vessels suspected of IUU fishing) and the *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* ('*UN Fish Stocks Agreement*')<sup>171</sup> (which compels interested states to become members of regional fisheries management organisations, or 'RFMOs').

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<sup>167</sup> See above n 91 and accompanying text.

<sup>168</sup> See, eg, *UNCLOS* art 64 (states are obliged to cooperate, as between fishing states and coastal states, either directly or through 'appropriate international organization[s]'). See also at arts 65–7, 117: 'States have the duty to take, or to co-operate with other States in taking, such measures ... as may be necessary for the conservation of the living resources of the high seas'.

<sup>169</sup> *Ibid* art 59. Phillip Allott saw in this provision a sign of legal relations articulated in terms of social objectives: Philip Allott, '*Mare Nostrum: A New International Law of the Sea*' (1992) 86 *American Journal of International Law* 764.

<sup>170</sup> *Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas*, opened for signature 24 November 1993, 2221 UNTS 91 (entered into force 24 April 2003).

<sup>171</sup> *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, opened for signature 4 August 1995, 2167 UNTS 3 (entered into force 11 December 2001).



ITLOS had occasion to rule upon the duty to cooperate in a request for provisional measures by Ireland, which concerned a nuclear reprocessing plant planned by the UK. In granting provisional measures, the Tribunal stated that ‘the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the *Convention* and general international law’.<sup>172</sup>

This statement was cited with approval in a recent ITLOS advisory opinion, the *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*.<sup>173</sup> In determining the obligations of the flag state in cases where IUU fishing activities are conducted within the exclusive economic zone of third party states, the Tribunal held that the duty to cooperate ‘extends also to cases of alleged IUU fishing activities’.<sup>174</sup> The Tribunal also expressed the view that the Sub-Regional Fisheries Commission member states could hold liable the flag state of a vessel conducting IUU fishing activities in their exclusive economic zones for a breach of such international obligations.<sup>175</sup>

In *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*,<sup>176</sup> an arbitral tribunal constituted under annex VII of *UNCLOS* ruled on alleged failures by the UK in consulting and cooperating with Mauritius in establishing a MPA around the Chagos Archipelago. On the particular legal question of whether the MPA was incompatible with the UK’s substantive and procedural obligations under *UNCLOS* and the *UN Fish Stocks Agreement*, the UK sought to give a restrictive meaning to those obligations, submitting that ‘the meaning of “due regard” in Article 56(2) [on rights and duties of coastal states in the exclusive economic zone] does not mean to “give effect to” the rights of other States’.<sup>177</sup> It also distinguished precedents requiring consultation (said to be shared natural resources or common property resources, or circumstances

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<sup>172</sup> *MOX Plant (Ireland v United Kingdom) (Order)* (2001) ITLOS Rep 89, 110 [82] (*‘MOX Plant’*). The matter was heard by separate arbitration under the *Convention for the Protection of the Marine Environment of the North-East Atlantic (‘OSPAR Convention’)*, and the majority of the tribunal gave a restrictive interpretation of the United Kingdom’s obligation to provide certain information to Ireland under the *OSPAR Convention: Dispute concerning Access to Information under Article 9 of the OSPAR Convention (Ireland v United Kingdom) (Final Award)* (2003) 23 RIAA 59 (but note dissenting opinion of Gavan Griffith QC). As Donald Rothwell and Tim Stephens have noted, the latter case may be decided differently now that the 1998 *Convention on Access to Information, Public Participation and Decision-Making and Access to Justice in Environmental Matters* has entered into force. See Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (Hart, 2010) 468.

<sup>173</sup> (International Tribunal for the Law of the Sea, Case No 21, 2 April 2015) [140].

<sup>174</sup> *Ibid.* See also the obligation noted to be one of ‘due diligence’. At [219]: ‘The flag State and the SRFC Member States are under an obligation to cooperate in cases relating to IUU fishing by vessels of the flag State in the exclusive economic zones of the SRFC Member States concerned’.

<sup>175</sup> *Ibid* [147].

<sup>176</sup> *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom) (Award)* (Arbitral Tribunal Constituted under Annex VII of the *United Nations Convention on the Law of the Sea*, 18 March 2015). See also Permanent Court of Arbitration, *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* <<http://perma.cc/VA89-ETPH>>. The members of the Tribunal were Ivan Shearer, Christopher Greenwood, Albert Hoffmann, James Kateka and Rüdiger Wolfrum.

<sup>177</sup> *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom) (Award)* (Arbitral Tribunal Constituted under Annex VII of the *United Nations Convention on the Law of the Sea*, 18 March 2015) [458].

relating to transboundary harm).<sup>178</sup> In any event, it stated that its public consultations with Mauritius had satisfied the relevant obligations.

The Tribunal declined to find ‘any universal rule of conduct’ in the obligation to give ‘due regard’, but drawing on the ordinary meaning of the terms found that the obligation required the UK to have ‘such regard for the rights of Mauritius as is called for by the circumstances and by the nature of those rights.’<sup>179</sup> The degree of ‘due regard’ was high given the significant effect on Mauritius’s rights of the establishment of a MPA.<sup>180</sup> After reviewing the UK’s efforts at consultation, the Tribunal found that it did not have sufficient ‘due regard’,<sup>181</sup> and concluded that the proclamation of the MPA was incompatible with *UNCLOS*.<sup>182</sup>

In their joint dissenting and concurring opinion, Judges Wolfrum and Kateka would have gone further, expressing doubt that the UK had not acted under an ulterior motive, and finding that it violated the standard of good faith. The judges stated that ‘the way in which the MPA was established and the negotiations leading up to the MPA leave a lot to be desired on the part of the United Kingdom’,<sup>183</sup> and, citing the *Nuclear Tests* case,<sup>184</sup> emphasised that ‘[t]rust and confidence are inherent in international co-operation’. In what might be seen as a nice irony to the current article’s inquiry into socio-legal evolution, the judges saw in the UK’s conduct a similar disregard of Mauritius’ rights that had continued from colonial times.

## 2 *Bilateral River and Dam Management Regimes*

In *Pulp Mills*,<sup>185</sup> the ICJ was asked to rule on a complaint by Argentina that Uruguay had breached a 1975 *Statute of the River Uruguay*<sup>186</sup> by authorising and constructing pulp mills on the River Uruguay. The 1975 bilateral statute established, inter alia, the Administrative Commission of the River Uruguay (‘CARU’). In finding that Uruguay had breached its obligation of ‘due diligence’, the Court stated that:

An obligation to adopt regulatory or administrative measures ... and to enforce them is an obligation of conduct. Both Parties are therefore called upon, under Article 36 [of the *Statute of the River Uruguay*], to exercise due diligence in acting through the [CARU] Commission for the necessary measures to preserve the ecological balance of the river.<sup>187</sup>

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<sup>178</sup> Ibid [468].

<sup>179</sup> Ibid [519].

<sup>180</sup> Ibid [521].

<sup>181</sup> Ibid [524].

<sup>182</sup> Ibid [536].

<sup>183</sup> Ibid [90] (Judges Wolfrum and Kateka).

<sup>184</sup> *Nuclear Tests Case (Australia v France)* [1974] ICJ Rep 253, 269 [46].

<sup>185</sup> [2010] ICJ Rep 14.

<sup>186</sup> *Statute of the River Uruguay*, Uruguay–Argentina, 1295 UNTS 339 (signed and entered into force 26 February 1975).

<sup>187</sup> *Pulp Mills* [2010] ICJ Rep 14, 77 [187].

The duty to cooperate was therefore tied to both the procedures and the object and purpose of the treaty underlying the regime,<sup>188</sup> and was found by the Court to encompass ongoing monitoring duties.<sup>189</sup> In addition to the specifics of the River Uruguay regime, the Court found that the preparation of a transboundary environmental impact assessment was required by custom, a point that Donald Anton notes is of particular interest to international environmental lawyers.<sup>190</sup>

In the *Gabčíkovo–Nagymaros Project (Hungary v Slovakia)* case,<sup>191</sup> the ICJ was asked to determine 1977 bilateral treaty obligations<sup>192</sup> as they operated in 1997. Relevant provisions of the treaty required the parties, in carrying out their obligations, to have regard to issues such as water quality in the Danube, fishing interests and the protection of nature.<sup>193</sup> The Court found that these provisions were ‘evolving’, and enabled the parties to incorporate newly developed norms of environmental law in the necessary adaptation of Project requirements, as implemented through consultation and negotiation by the parties.<sup>194</sup> Although the Court did not use the language of a ‘duty to cooperate’, its recognition that parties would be expected ‘to discuss in good faith actual and potential environmental risks’<sup>195</sup> in the implementation of the relevant treaty provisions is prefigurative.

### 3 The UN Framework Convention on Climate Change

While there are no decisions of courts and tribunals relating to the conduct of states party to the *UNFCCC* — we leave to one side the Compliance Committee established under the *Kyoto Protocol*<sup>196</sup> — its heavy reliance on updating understandings and decisions by way of its Conference of the Parties (‘COP’) makes it a significant regime for analysis. The *UNFCCC* provides that its COP shall

keep under regular review the implementation of the *Convention* and any related legal instruments that the Conference of the Parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the *Convention*.<sup>197</sup>

International lawyers question the legal status and authority of COP decisions: while they are not treaties (unless they serve to amend the *UNFCCC*<sup>198</sup> or create

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<sup>188</sup> See also Donald K Anton, ‘Case concerning Pulp Mills on the River Uruguay (*Argentina v Uruguay*) (Judgment) [2010] ICJ Rep 20 April 2010’ (2010) 17 *Australian International Law Journal* 213.

<sup>189</sup> *Pulp Mills* [2010] ICJ Rep 14, 95 [281].

<sup>190</sup> Anton, above n 188, 214.

<sup>191</sup> *Gabčíkovo–Nagymaros Project (Hungary v Slovakia)* (Judgment) [1997] ICJ Rep 7 (‘*Gabčíkovo–Nagymaros Project*’).

<sup>192</sup> *Treaty concerning the Construction and Operation of the Gabčíkovo–Nagymaros System of Locks*, Czechoslovakia–Hungary, signed 16 September 1977, 1109 UNTS 235 (entered into force 30 June 1978).

<sup>193</sup> *Ibid* arts 15, 19, 20.

<sup>194</sup> *Gabčíkovo–Nagymaros Project* [1997] ICJ Rep 7, 67 [112].

<sup>195</sup> *Ibid*.

<sup>196</sup> *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998, 2303 UNTS 162 (entered into force 16 February 2005).

<sup>197</sup> *UNFCCC* art 7(2).

<sup>198</sup> *Ibid* art 15.

or amend a *Protocol*<sup>199</sup>), they may well amount to ‘subsequent practice’<sup>200</sup> relevant to interpreting the *UNFCCC*. They have also been argued to be autonomous institutional arrangements subject to international institutional law.<sup>201</sup> It is the latter concept that is most relevant to a duty to ‘give due regard’ to COP decisions.

Exploring the boundaries of the duty to cooperate and the normative impact of COP decisions is of great current importance as the parties aim to produce a new ‘post-2020’ agreement on climate change mitigation obligations at the Paris COP in December 2015. Of special note is the improbability of unanimous decision-making under the COP’s auspices.<sup>202</sup> In addition, the regime is proceeding by way of ‘intended nationally determined contributions’ — where states nominate their intended cuts to greenhouse gas emissions — rather than the earlier ‘top-down’ Kyoto targets based on aggregate scientific data. A duty to cooperate may well lead to a stronger set of obligations — both procedurally and substantively — than might otherwise be the case, giving rise to implications not only for states but for international organisations and other actors.

#### D *Implications for States, International Organisations and Other Actors*

The Court in the *Whaling* case conceived of a duty of cooperation that provided for an enhanced set of responsibilities for states party to the *ICRW*. The duty to cooperate with the IWC and Scientific Committee meant that Japan could not simply ignore guidelines issued about the use of non-lethal methods. Whilst the guidelines did not bind Japan per se, Japan should have given due consideration to them and appropriate reasons as to why it chose to diverge from suggested practice.<sup>203</sup> This endorsement of an administrative law concept — which requires decision-makers to apply procedural fairness to their decisions, including in giving reasons — is a useful technique for courts seeking to navigate the separation of powers in a domestic system, because it allows the judicial branch to review a decision without entering into conclusions on its merits. In cases of scientific complexity, it is especially opportune. It can also be conceptualised as part of ‘global administrative law’, where intergovernmental regimes develop ‘administrative law standards and mechanisms to which national administrations must conform in order to assure their compliance and accountability with the international regime’.<sup>204</sup>

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<sup>199</sup> Ibid art 17.

<sup>200</sup> *VCLT* art 31(3)(b).

<sup>201</sup> Robin R Churchill and Geir Ulfstein, ‘Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law’ (2000) 94 *American Journal of International Law* 623, 633.

<sup>202</sup> On how this played out in an earlier COP, see Lavanya Rajamani, ‘The Making and Unmaking of the Copenhagen Accord’ (2010) 59 *International and Comparative Law Quarterly* 824.

<sup>203</sup> See also *Judgment* (International Court of Justice, General List No 148, 31 March 2014) [10] (Judge Keith): ‘I see as critical the failure of Japan to provide any evidence of any studies which it undertook of the use of non-lethal methods’. For Judge ad hoc Charlesworth, the duty to cooperate gave even more content to Japan’s obligations and led her to dissent from the majority order that Japan had complied with its obligations under para 30 of the Schedule to the *ICRW*.

<sup>204</sup> Benedict Kingsbury, Nico Krisch and Richard B Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law and Contemporary Problems* 15, 16.

In this system, the conduct of states is responsive, transparent, procedurally fair and cooperative, even with respect to matters to which it has not formally consented. Although the Court did not use the language of ‘good faith’, the Court’s endorsement of ‘reasonableness’ is very much like a good faith standard. The Court’s expectations of states parties could even be said to have overtones of the rule of law, which requires ‘accountability to the law, fairness in the application of the law ... participation in decision-making ... and procedural and legal transparency’.<sup>205</sup> While discussions of the rule of law within the UN system are usually focused on corruption, foreign investment and conflict, the possible whisper of the rule of law here, in a joint judgment that left a lot more to individual opinions, is significant.

Rather than threatening sovereignty, the Court’s expectation that states have ‘due regard’ allows for a more nuanced and sophisticated understanding of it. It is part of the ‘new sovereignty’ that exists when states enter into agreements that require ongoing management and cooperative problem solving.<sup>206</sup> For example, it may be the flip-side to arguments that states should be excluded from particular treaty procedures if they are shown to be ‘holding-out’.<sup>207</sup> It is also related to the idea that norms from different regimes can apply to one another without having parallel or uniform membership of states.<sup>208</sup>

Could this concept of the state go further? The duty to cooperate as formulated by the Court resonates with, but does not meet, Rawlsian accounts of states as trustees of humanity.<sup>209</sup> Eyal Benvenisti, for example, argues that international law contains obligations for states to ‘take other-regarding considerations seriously into account in formulating and implementing policies, even absent specific treaty obligations’.<sup>210</sup> Benvenisti argues: ‘The sovereign as trustee must ensure meaningful opportunities to have the voices of affected stakeholders — both foreign governments and individuals — heard and considered, and must offer them reasons for its policy choices’.<sup>211</sup>

Yet the Court’s conception of the duty to cooperate is more limited to the direct subjects of the whaling regime: the states and the IWC (and its scientists). There is no wider conception of duties to have due regard to the interests of non-state actors, such as individuals and non-governmental organisations. Those other actors arguably could be included in the definition of a regime,<sup>212</sup> but doing so would widen the procedural obligations of a state immeasurably. It would be especially controversial given that the only recognition by the Court of the involvement of non-state actors in the whaling regime was overwhelmingly

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<sup>205</sup> *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies — Report of the Secretary-General*, UN SCOR, 59<sup>th</sup> sess, UN Doc S/2004/616 (23 August 2004).

<sup>206</sup> Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press, 1995).

<sup>207</sup> Timothy Meyer, ‘From Contract to Legislation: The Logic of Modern International Lawmaking’ (2014) 14 *Chicago Journal of International Law* 559.

<sup>208</sup> See also Margaret A Young, ‘Fragmentation, Regime Interaction and Sovereignty’ in Christine Chinkin and Freya Baetens (eds), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (Cambridge University Press, 2015) 71, 80.

<sup>209</sup> Eyal Benvenisti, ‘Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders’ (2013) 107 *American Journal of International Law* 295, 318.

<sup>210</sup> *Ibid* 300.

<sup>211</sup> *Ibid* 318.

<sup>212</sup> See above n 110 and accompanying text.

critical<sup>213</sup> and the absence of a procedure for the filing of amicus briefs perhaps leaves the Court already predisposed against this kind of extension.<sup>214</sup> Notwithstanding that the Court restricts the duty of cooperation to states parties and the Commission, we consider that a reviewable obligation of states parties to ‘give due regard’ will lead to a more responsive and adaptive system of law.

For international organisations, the Court’s judgment is equally significant. The lawmaking influence of international organisations has been of growing note,<sup>215</sup> as is the importance of epistemic communities in building and bridging regimes.<sup>216</sup> The judgment is a partial vindication of these observations. Requiring states parties to ‘give due regard’ to non-binding recommendations of the IWC, even if they had not been adopted with consensus or unanimity, shows that soft law has consequences. Here, the normative influence attached to the monitoring and reviewing role of international organisations means that the evolution of international law is never strictly dependent upon the consent of states, but is instead a multiplicitious process.

Could this concept of international organisations go further? Arguably it needs to. At the WTO, for example, where resolutions of international standard-setting bodies continue to have relevance in trade disputes even when they do not have the consensus of the parties,<sup>217</sup> WTO members have laid down certain principles to be expected from such bodies.<sup>218</sup> These principles emphasise the need for transparency; openness; impartiality and consensus;

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<sup>213</sup> See *Judgment* (International Court of Justice, General List No 148, 31 March 2014) [206]. See also above n 143 and accompanying text. For a broader discussion of the role of non-governmental organisations (‘NGOs’) in the whaling regime, including with respect to domestic litigation in Australia, see Rothwell, ‘Litigation in the International Court’, above n 29.

<sup>214</sup> There is no provision for amicus briefs in the *ICJ Statute*, although we note that the ICJ considered NGO material which was adopted by Hungary as part of its own submission in the *Gabčíkovo–Nagymaros Project*. See also Anna-Karin Lindblom, *Non-Governmental Organizations and International Law* (Cambridge University Press, 2005) 304. Contrast the ability of panels and the Appellate Body to receive such briefs at the WTO. See *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 2 (‘*Understanding on Rules and Procedures Governing the Settlement of Disputes*’) art 13; Appellate Body Report, *US — Shrimp*, WTO Doc WT/DS58/AB/R, [107]–[110]; Appellate Body Report, *United States — Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Products Originating in the United Kingdom*, WTO Doc WT/DS138/AB/R, AB-2000-1 (10 May 2000) [39].

<sup>215</sup> José Alvarez, *International Organizations as Law-Makers* (Oxford University Press, 2005).

<sup>216</sup> Peter M Haas, ‘Introduction: Epistemic Communities and International Policy Coordination’ (1992) 46 *International Organization* 1.

<sup>217</sup> See Appellate Body Report, *European Communities — Trade Description of Sardines*, WTO Doc WT/DS231/AB/R, AB-2002-3 (26 September 2002) [225] (relating to a Codex standard for the description of ‘sardines’); Appellate Body Report, *EC — Hormones*, WTO Docs WT/DS26/AB/R and WT/DS48/AB/R (relating to a Codex hormone-treated beef standard, which had been adopted by secret vote given the lack of agreement between the United States and the European Union).

<sup>218</sup> *Second Triennial Review of the Operation and Implementation of the Agreement on Technical Barriers to Trade*, WTO Doc G/TBT/9 (13 November 2000) annex 4 (‘*Decision of the Committee on Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement*’), reproduced in *Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade since 1 January 1995*, WTO Doc G/TBT/1/Rev.9 (8 September 2008) 37–9; *Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade since 1 January 1995*, WTO Doc G/TBT/1/Rev.10 (9 June 2011) 46–8.

relevance and effectiveness; coherence; and the development dimension (including facilitating developing countries' participation in international standards development). The Appellate Body considers these principles to be relevant to the interpretation of the *Agreement on Technical Barriers to Trade*<sup>219</sup> (because the underlying committee decision has the status of 'subsequent agreement' according to *VCLT* art 31(3)(a)).<sup>220</sup> Within the European Union, too, the European Court of Justice scrutinises standard-setting procedures, particularly with regard to transparency and access to documents.<sup>221</sup> Jutta Brunnée argues that at the *UNFCCC*, a Fuller-inspired conception of 'interactional' international law, with attendant procedures for clarity and consistency, gives legitimacy to COP decisions.<sup>222</sup>

The Court did not ask such questions of the IWC. In fact, although the IWC was notified about the proceedings, in the procedure developed pursuant to the *ICJ Statute* and the *Rules of Court*,<sup>223</sup> the IWC indicated that it did not intend to submit any observations in writing according to this process.<sup>224</sup> Certain aspects of the IWC's functions were mentioned by the Court, including how the functions led to the *ICRW*'s status as an evolving instrument.<sup>225</sup> In addition, Judge ad hoc Charlesworth showed sensitivity to these issues when she noted certain aspects of the *ICRW*, such as the fact that membership is open to all states, and that its intention is to create 'a system of international regulation'.<sup>226</sup> We consider that accessibility is an important factor if IWC resolutions are to be taken into account in the way proposed by the Court. Other factors, however, deserve exploration. These could relate to the way in which the resolutions and guidelines are developed, drawing upon the same administrative law-type concepts of transparency that animated the Court's concept of the state. This is particularly important for cases involving scientific complexity and will involve difficult issues if scientists perceive that the independence of their role is under threat.<sup>227</sup> It is also important for cases involving the incorporation of norms from

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<sup>219</sup> *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on Technical Barriers to Trade*').

<sup>220</sup> Appellate Body Report, *United States — Measures concerning the Importation, Marketing, and Sale of Tuna and Tuna Products*, WTO Doc WT/DS381/AB/R, AB-2012-2 (16 May 2012) [372].

<sup>221</sup> Joanne Scott, 'International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO' (2004) 15 *European Journal of International Law* 307, 317.

<sup>222</sup> Jutta Brunnée, 'COPing with Consent: Law-Making under Multilateral Environmental Agreements' (2002) 15 *Leiden Journal of International Law* 1. See also Jutta Brunnée and Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press, 2010).

<sup>223</sup> *ICJ Statute* art 34(3). See also International Court of Justice, *Rules of Court* (adopted 14 April 1978) art 69(3).

<sup>224</sup> *Judgment* (International Court of Justice, General List No 148, 31 March 2014) [3].

<sup>225</sup> *Ibid* [45].

<sup>226</sup> *Ibid* [12]–[13] (Judge ad hoc Charlesworth).

<sup>227</sup> See Brierley, above n 59 and accompanying text.

other regimes,<sup>228</sup> which, because of choices of the parties, was not the way the *Whaling* dispute was framed.<sup>229</sup>

## V CONCLUSION

The Court's reasoning in the *Whaling* case led it to find breaches by Japan without needing to provide an overarching interpretation of the *ICRW*. Based on the established standard of conduct expected of parties undertaking research pursuant to art VIII, the Court found that Japan failed to meet the requisite standard, and consequently had not complied with the obligation to respect the zero catch limits for the killing of whales, the prohibition on whaling in a region designated as the Southern Ocean Sanctuary and the moratorium on commercial whaling.<sup>230</sup> A key deficiency in Japan's conduct was its failure to give due regard to decisions of the IWC, which have emerged over time as part of the decision-making procedure of the whaling regime.

This article has concentrated on the implications of the Court's decision for the evolution of international law, which we consider to be quite profound. Contrary to expectations, this is not because of any creative use of interpretative methodologies, nor in the application of norms of environmental management such as the precautionary approach. Instead, the ICJ allowed for the evolution of international law through its conception of the standard of conduct expected of states party to the whaling regime. A duty to 'give due regard' to decisions of the IWC places international organisations and their procedures at the heart of state obligations. The Court's decision also implicitly shows that the concept of 'regime' — which encompasses not only underlying treaties but also accompanying institutions and even professional practices and cultures — is useful: the duty to cooperate is dependent on the precise context that the notion of 'regime' specifies.

As regards treaty interpretation, we have demonstrated that the Court in the *Whaling* case rejected the parties' formulation of the dispute as revolving around an interpretation determining whether the *ICRW* had evolved towards a conservationist, rather than (sustainably) exploitative, regime. The main ruling relating to treaty interpretation was the Court's finding that resolutions of the IWC that had been adopted by consensus or unanimous vote could be 'subsequent practice or subsequent agreement'; this has been noted by the ILC in its current study on subsequent agreements and subsequent practice in relation to the interpretation of treaties.<sup>231</sup> Yet the Court found little interpretative guidance from those resolutions. Even the recognition that the IWC's functions 'have made the *Convention* an evolving instrument'<sup>232</sup> did not amount to much at the interpretative stage.

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<sup>228</sup> See also Young, *Trading Fish, Saving Fish*, above n 103, 237.

<sup>229</sup> As noted above in footnote 20, Australia's initial claim that included *CITES* and the *CBD* was not pursued.

<sup>230</sup> *ICRW* Schedule paras 10(e) (zero catch limit), 10(d) (moratorium on killing whales, except minke whales), 7(b) (Sanctuary), 30 (obligation to provide Commission with proposed scientific permits before they are issued).

<sup>231</sup> *Nolte Report*, UN Doc A/CN.4/671, 40 [85].

<sup>232</sup> *Judgment* (International Court of Justice, General List No 148, 31 March 2014) [45].



In contrast, the Court's findings relating to Japan's duty of cooperation signal that the conduct of states will be evaluated with due consideration to evolution and change, with consequent implications for the concept of the state, of international organisations and of international regimes. Even though Japan had voted against key resolutions of the IWC, it was required to 'give due regard' to those resolutions, including by providing adequate justification for its scientific methodologies and practices. Similar findings have been made by other international courts and tribunals, and we have noted relevant cases including: the UK's duties to cooperate with Ireland in its establishment of a nuclear reprocessing plant, as part of *UNCLOS* provisions relating to the prevention of pollution and general international law;<sup>233</sup> the UK's duties to cooperate and consult with Mauritius in establishing a MPA in the Chagos Archipelagos;<sup>234</sup> and Uruguay's duties of due diligence over environmental threats in the River Uruguay, including a customary law requirement for the preparation of a transboundary environmental impact assessment.

In the *Whaling* case, the standard to which Japan was held to account provides a nuanced understanding of the evolution of the whaling regime. By implication, this understanding will apply to other regimes in international law, or at least those regimes that are aiming for collective management of the environment or natural resources. As such, the judgment is heavy with consequences for the future conduct of states, especially with respect to the duty to give reasons when states divert from established practices, even if those practices are not binding. Attendant questions about lawmaking within international organisations were not canvassed by the Court, and there is a need for a more fulsome account of the legitimacy of such actors within regimes. As part of this need, further regard must be had to the influence of other actors and participants, including non-state organisations, within the evolving legal order. Of course, given the international judicial function, the Court is never likely to be at the vanguard of such developments. However, the way in which the Court allowed the international legal system to evolve in its *Whaling* judgment is a step in this direction.

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<sup>233</sup> *MOX Plant* (2001) ITLOS Rep 89, 110 [82]. See above n 172 and accompanying text.

<sup>234</sup> *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom) (Award)* (Arbitral Tribunal Constituted under Annex VII of the *United Nations Convention on the Law of the Sea*, 18 March 2015). See above n 176 and accompanying text.