REGULATING COLLECTIVE RESOURCES UNDER MULTILATERAL TREATIES: THE DECISION IN *WHALING IN THE ANTARCTIC (AUSTRALIA V JAPAN)*

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With Japan's recent announcement of its withdrawal from the International Whaling Commission, it is timely to reconsider what can be learned from the International Court of Justice's decision in Whaling in the Antarctic (Australia v Japan) ('Whaling') on the regulation of collective resources. The Court's approach to the collective resources issue in Whaling may indicate a more activist role for the Court, beyond the traditional sphere of bilateral dispute resolution. This article considers whether Whaling demonstrates a move towards providing a mechanism for regulation of state conduct under multilateral treaties, moving towards a more domestic style of administrative review, by analysing certain aspects of the Court's procedural and evidential approach. In light of the parties' submissions, previous jurisprudence of the Court as well as other international tribunals' jurisprudence, the analysis of this dispute suggests that the Court may be willing to move to a more 'regulatory' role in reviewing state decision-making. However, the Court missed an opportunity to clearly define its role in reviewing state decisions that affect collective resources. The Court failed to provide clear reasoning for its developing a 'review' role, likely as a result of its reliance on the parties' agreement on the approach. As such, Whaling provides only limited guidance on whether the Court will continue to provide such a role in the regulation of collective resources.

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I INTRODUCTION

In his separate opinion to the International Court of Justice's ('ICJ') decision in *Whaling in the Antarctic (Australia v Japan)* ('*Whaling*'), Judge Cançado Trindade provided an optimistic view of the relevance of the decision for the development of international dispute resolution:

> The present case has provided a unique occasion for the Court to pronounce upon a system of collective regulation of the environment for the benefit of future generations. The notion of *collective guarantee* has been developed, and put in practice, to date in distinct domains of contemporary international law. The Court's present Judgment in the *Whaling in the Antarctic* case may have wider implications than solely the peaceful settlement of the present dispute between the contending Parties, to the benefit of all.[1]

This article delves into two aspects of the Court's decision that are most likely to live up to Judge Cançado Trindade's expectations of wider implications for collective regulation, namely the issue of standing and standard of review.

The ICJ has traditionally been a mechanism for the settlement of bilateral disputes between states. This role arises from the Court's contentious jurisdiction,[2] which is adversarial in nature, exhibited through 'confrontation' between the parties.[3] However, the recent case of *Whaling* may indicate a widening of this traditional function of the Court to disputes that affect no single state in particular.

Australia invoked the Court's contentious jurisdiction to settle a multilateral dispute concerning common environmental interests. For its part, Japan was concerned about this invocation of the contentious jurisdiction for such disputes:

> [Japan] therefore regrets that what is in reality a matter of multilateral marine resource management has been disguised as a bilateral legal dispute and brought before the Court while efforts are being made through the proper forum (the [International Whaling Commission]) to overcome differences among the Contracting Governments.[4]

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1 *Whaling in the Antarctic (Australia v Japan) (Judgment)* [2014] ICJ Rep 226, 381 [87] (Judge Cançado Trindade) ('*Whaling*').

2 *Statute of the International Court of Justice* arts 36(2), 38(1). See also Christian Tomuschat, 'Article 36' in Andreas Zimmermann et al (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, 3rd ed, 2019) 712, 720. The Court also has advisory jurisdiction which is not limited to 'disputes' between states, but the Court's contentious jurisdiction is the only jurisdiction that the Court has to make decisions that are legally binding upon the parties: Robert Jennings, Rosalyn Higgins and Peter Tomka, 'General Introduction' in Andreas Zimmermann et al (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, 3rd ed, 2019) 3, 8, 13–14.

3 Jennings, Higgins and Tomka (n 2) 17.

4 'Counter-Memorial of Japan', *Whaling in the Antarctic (Australia v Japan)* (International Court of Justice, General List No 148, 9 March 2012) 4–5 [13].

It is certainly not the first time that the Court has had to deal with cross-border environmental concerns. However, *Whaling* is unique and should be distinguished from those prior cases based on the relevant treaty and relationship of the parties to the disputes. *Pulp Mills on the River Uruguay (Argentina v Uruguay)* ('*Pulp Mills*')[5] and *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* ('*Gabčíkovo-Nagymaros*')[6] both concerned bilateral treaties governing the usage of rivers on the territories of the parties to the disputes — no other states were affected by the implementation of the treaties or the environmental damage that may be caused. In contrast, *Whaling* concerns a 'collective enterprise', beyond the scope of a bilateral treaty.[7] The treaty in dispute is multilateral, protecting a migratory species that is not capable of 'ownership' by a single state.

In comparison to the traditional role of the Court and the previous decisions of *Pulp Mills* and *Gabčíkovo-Nagymaros*, *Whaling* could be considered to reimagine the concept of an inter-state dispute before the Court. Rather than limiting its judicial function to bilateral treaties or disputes which affect only the interests of the parties to the dispute, the Court may be stepping into a different role.

This article considers whether *Whaling* demonstrates a move towards providing a mechanism for review of state decisions and actions taken under multilateral treaties by analysing certain aspects of the Court's procedural and evidential approach: standing and standard of review. The article analyses these aspects in light of the parties' submissions and previous jurisprudence of the Court as well as other international tribunals to determine whether the Court in *Whaling* has strayed from traditional bilateral procedures and evaluation of evidence.[8] Part II considers the analogies from domestic and global administrative law that may be used to analyse the Court's approach to standing and standard of review. Parts III and IV consider the Court's reasoning (or, perhaps, lack thereof) on standing and standard of review, respectively. Based on the inferences and implications of the Court's reasoning discussed in Parts III and IV, the article goes on to consider, in Part V, whether there are common links between the Court's approach to both issues that provide guidance on how the Court considers its judicial role in a dispute concerning collective interests.

The analysis of these two aspects of the dispute suggests that the Court may be willing to move to a more 'regulatory' role in reviewing state decision-making. However, the Court missed an opportunity to clearly define its role in reviewing state decisions that affect collective resources. The Court failed to provide clear reasoning for its developing 'review' role, likely as a result of its reliance on the parties' agreement on the approach. As such, *Whaling* provides only limited guidance on whether the Court will continue to provide a mechanism to review state actions in relation to collective interests in subsequent cases. It is perhaps not possible to be as optimistic as Judge Cançado Trindade on the wider implications

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5 *Pulp Mills on the River Uruguay (Argentina v Uruguay) (Judgment)* [2010] ICJ Rep 14 ('*Pulp Mills*').

6 *Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 7 ('*Gabčíkovo-Nagymaros*').

7 'Verbatim Record 2013/19', *Whaling in the Antarctic (Australia v Japan)* (International Court of Justice, General List No 148, 10 July 2013) 65 (Crawford).

8 This article does not attempt to analyse the ultimate factual findings of the Court; rather, the analysis is limited to the procedural and evidential steps taken prior to the ultimate findings of the Court.

of *Whaling*; however, the Court has certainly opened the door for such action in the future.

II REGULATION AND REVIEW OF COLLECTIVE INTERESTS

We can draw inspiration from the theory of global administrative law to frame our understanding of whether the ICJ has stepped into a 'review' function, beyond the realm of traditional bilateral disputes. This article does not attempt to enter the debate on global administrative law or the law of global governance, nor attempt to suggest that the Court falls within the global administrative law framework. Rather, the theory of global administrative law provides us with some useful ideas and analogies for characterising whether the Court has stepped into a 'review' role. In this way, global administrative law must be distinguished from 'adjudication in the form of episodic dispute settlement between states',[9] which traditionally characterises the role of the Court. Relevantly, review of administrative decisions by a court or other independent tribunals is one of the 'most widely accepted features of domestic administrative law'.[10] Participants in the administrative legal system have the right to both 'a decision that is reasonably justified by all relevant legal and factual considerations' as well as 'to have the validity of the decision tested in a court of law'.[11] Judicial review, in this validity testing, sets the limits on executive discretion, requiring judges to police the limits of a decision-maker's legal authority.[12]

In this respect, the 'decision' on standing and adoption of standard of review by the Court may be more akin to the type of administrative review envisioned by global administrative law. For example, standing for public interest litigation has been accepted by some domestic courts as an extended judicial role in administrative law where concerned citizens are permitted to raise public interest issues, as a supplement to orthodox political processes.[13] In relation to standard of review, while there is no single 'international' standard of review, 'global administrative law might be expected to embody substantive standards for administrative action, like those applied in a domestic context',[14] such as proportionality in the European Court of Human Rights, use of less restrictive means within the WTO context or legitimate expectations within investment law.[15] However, the most interesting point to consider for the legacy of *Whaling* to the regulation of collective interests and the Court's role is whether the Court was actively taking more of a 'review' function, or was simply directed by the parties' agreement on these issues. The subsequent parts of this article consider the

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9 Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68(3–4) *Law and Contemporary Problems* 15, 17.

10 Ibid 39.

11 David Dyzenhaus, 'The Rule of (Administrative) Law in International Law' (2005) 68(3–4) *Law and Contemporary Problems* 127, 129.

12 Ibid 131.

13 David Feldman, 'Public Interest Litigation and Constitutional Theory in Comparative Perspective' (1992) 55(1) *Modern Law Review* 44, 48. Examples of acceptance by domestic courts include New Zealand and India: at 52–4. See also Francis Xavier Rathinam and AV Raja, 'Courts as Regulators: Public Interest Litigation in India' (2011) 16(2) *Environment and Development Economics* 199, 203–5.

14 Kingsbury, Krisch and Stewart (n 9) 40.

15 Ibid 40–1.

implications in this regard, based on the analogy to domestic administrative law and the framework of global administrative review.

III STANDING AND COLLECTIVE INTERESTS

A *Rules of Locus Standi in the ICJ*

Standing, or *locus standi*, refers to the 'right of appearance in a court of justice'.[16] In most legal systems, this generally requires an assessment of 'whether the claim can be made in the circumstances, by reason of its relationship with the claimant'.[17] If the claimant does not have the required relationship, the claimant will lack *locus standi* and the claim would be inadmissible.

For the ICJ, the *Statute of the International Court of Justice* is silent on the matter: neither the Statute nor the *Rules of Court*[18] require any particular relationship between the claim and the applicant state.[19] Historically, the requirement of standing has received little attention, which may be in part due to the traditional narrow view of state responsibility as 'a reciprocal relationship between pairs of States'.[20] However, the governing principle appears to require the applicant state to have a 'legal right or interest'.[21] This requirement arises from the Court's decision in *South West Africa (Ethiopia v South Africa)* ('*South West Africa*'), where the Court held that 'the manifest scope and purport of the provisions [of the Mandate] indicate that the Members of the League were understood to have a *legal right or interest* in the observance by the Mandatory of its obligations'.[22] While the *South West Africa* cases have been subsequently criticised for other reasons, commentators accept the proposition that the applicant state must establish 'a subjective right involved' or 'some direct concern in the outcome of the case'.[23] This is also confirmed by *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* ('*Barcelona Traction*'), in that, although it adopts a different position on what constitutes a legally protected position, the Court still refers to 'a legal interest'.[24] As observed by the third Special Rapporteur on State Responsibility, Willem Riphagen, the type of interest is significant for standing:

> In the long run every State has an interest in the observance of any rule of international law … But this by no means authorizes … every State to demand the

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16 Tomuschat (n 2) 790, quoting *Black's Law Dictionary* (6th ed, 1990) 941.

17 Robert Kolb, *The International Court of Justice* (Hart Publishing, 2013) 215.

18 International Court of Justice, *Rules of Court* (adopted 14 April 1978).

19 Malcolm N Shaw, *Rosenne's Law and Practice of the International Court: 1920–2015* (Brill Nijhoff, 5th ed, 2016) vol 3, 1203.

20 Christian J Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press, 2005) 27 ('*Enforcing Obligations*').

21 Juan José Quintana, *Litigation at the International Court of Justice: Practice and Procedure* (Brill Nijhoff, 2015) 16.

22 *South West Africa (Ethiopia v South Africa) (Preliminary Objections)* [1962] ICJ Rep 319, 343 (emphasis added).

23 See Quintana (n 21) 19; Shaw (n 19) 1213.

24 *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Judgment)* [1970] ICJ Rep 3, 32 [33]–[35] ('*Barcelona Traction*').

> performance by every other State of its international obligations, let alone to take countermeasures in case of non-performance of those obligations.[25]

Whether the applicant state has the required 'interest' is to be determined according to the factual analysis of the case, based on the rules of general international law, the title of jurisdiction and the law governing the jurisdiction and procedure of the Court.[26] If such an interest is not held by the applicant state, then the Court may rule that the claim is inadmissible.

B *Standing in Whaling*

The issue of whether Australia had standing to enforce compliance with obligations under the *International Convention for the Regulation of Whaling* ('*ICRW*')[27] was not given much attention by the parties or the Court. Australia's claim was based on Japan's conduct in breach of its obligations under international law, namely whether Japan had breached the *ICRW* during the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic ('JARPA II').[28] However, neither party addressed the issue of standing during the written proceedings. Japan briefly raised concern that Australia had made 'no attempt to explain its *jus standi*'[29] but instead focused on a jurisdictional argument based on Australia's optional clause declaration.[30]

The issue of standing was implicitly raised through a question of Judge Bhandari: 'What injury, if any, has Australia suffered as a result of Japan's alleged breaches of the *ICRW* through JARPA II?'[31] In response, Australia made it clear that it was not claiming to be an injured state. Rather, Australia was seeking to uphold the 'collective interest'.[32] The 'collective interest' was elaborated by Professor Laurence Boisson de Chazournes — representing Australia — referring to the Court's 1951 advisory opinion, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*,[33] and quoting its finding that the parties to that Convention 'do not have any interests of their own; they merely have, one and all, a common interest'.[34] She explained:

> Australia, like all the other States parties to the [*ICRW*], has a common interest in maintaining the integrity of the régime deriving from the Convention … '[I]n view of their shared values', as set forth in the [*ICRW*], all States parties to that Convention have a common interest in each State complying with its obligations

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25 Willem Riphagen, Special Rapporteur, 'Fourth Report on the Content, Forms and Degrees of International Responsibility (Part 2 of the Draft Articles)' [1983] II(1) *Yearbook of the International Law Commission* 3, 21 [113].

26 Shaw (n 19) 1205.

27 *International Convention for the Regulation of Whaling*, opened for signature 2 December 1946, 161 UNTS 72 (entered into force 10 November 1948) ('*ICRW*').

28 'Memorial of Australia', *Whaling in the Antarctic (Australia v Japan)* (International Court of Justice, General List No 148, 9 May 2011) 3 [1.7].

29 'Counter-Memorial of Japan' (n 4) 52–3 [1.55].

30 See ibid ch 1.

31 'Verbatim Record 2013/13', *Whaling in the Antarctic (Australia v Japan)* (International Court of Justice, General List No 148, 3 July 2013) 73.

32 'Verbatim Record 2013/18', *Whaling in the Antarctic (Australia v Japan)* (International Court of Justice, General List No 148, 9 July 2013) 28.

33 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep 15.

34 'Verbatim Record 2013/18' (n 32) 34.

> under the Convention and the régime deriving from it. In the words of this Court, '[t]hat common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention. All the States parties "have a legal interest" in the protection of the rights involved'.[35]

This was a rather unusual approach by Australia as, in previous Court proceedings where applicants were seeking to enforce a collective interest, the applicants also relied on an alternative argument of 'special interest'.[36] Such a 'dualist' argument on standing was likely open to Australia as JARPA II had been partly conducted within the 'Australian Whale Sanctuary', offshore from the Australian Antarctic Territory, providing Australia with a potential legal and national interest.[37]

During oral proceedings, Japan did not refer to issues of standing. This is perhaps surprising given Japan's suggestion that Australia was not acting in the public interest. Japan suggested, in light of the fact that Australia was not disputing the Japanese Whale Research Program under Special Permit in the western North Pacific ('JARPN'), which takes place in the North Pacific 'where Australia has no particular interests to safeguard', that Australia was 'not acting altruistically to defend international law but rather to protect its maritime claims'.[38] However, likely for strategic considerations on how to present its case, Japan did not take the possible absence of *locus standi* any further.[39]

The judgment itself did not elaborate on whether Australia had *locus standi* to bring a claim for Japan's breach of the obligations under the *ICRW*. Even Judge Bhandari, who raised the question of injury during oral proceedings, or Judge Xue, who dissented on this issue in *Obligation to Prosecute or Extradite (Belgium v Senegal)* ('*Belgium v Senegal*')[40] (discussed below), did not refer to standing in their separate opinions. The majority and some of the separate opinions refer to the common interest reflected in the object and purpose of the *ICRW*.[41] However, the Court did not discuss *locus standi* for common interest obligations or, indeed, Japan's suggestion that Australia's claim was not in the public interest, since Australia did not dispute the JARPN programme.

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35 Ibid 33–4.

36 See, eg, *Obligation to Prosecute or Extradite (Belgium v Senegal) (Judgment)* [2012] ICJ Rep 422, 449 [66] ('*Belgium v Senegal*'); 'Reply of the Government of the Portuguese Republic', *East Timor (Portugal v Australia)* (International Court of Justice, General List No 84, 1 December 1992) [8.01]–[8.17]; 'Memorial on Jurisdiction and Admissibility Submitted by the Government of New Zealand', *Nuclear Tests (New Zealand v France)* (International Court of Justice, General List No 59, 29 October 1973) 204 [191]–[192].

37 Donald R Rothwell, 'The Whaling Case: An Australian Perspective' in Malgosia Fitzmaurice and Dai Tamada (eds), *Whaling in the Antarctic: Significance and Implications of the ICJ Judgment* (Brill Nijhoff, 2016) 269, 290.

38 'Verbatim Record 2013/12', *Whaling in the Antarctic (Australia v Japan)* (International Court of Justice, General List No 148, 2 July 2013) 35.

39 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: Significance and Implications of the ICJ Judgment* (Brill Nijhoff, 2016) 193, 207–8 ('Roads Not Taken').

40 *Belgium v Senegal* (n 36).

41 *Whaling* (n 1) 251 [56], quoting *ICRW* (n 27) Preamble para 1; *Whaling* (n 1) 371 [59] (Judge Cançado Trindade), 431 [3] (Judge Sebutinde), 457 [13] (Judge ad hoc Charlesworth).

C *Whaling and the Jurisprudence of the ICJ*

Australia's reference to the 'common interest' invokes the concept of obligations *erga omnes*, being obligations owed 'toward all'. In fact, Professor James Crawford (who later appeared as one of the counsel for Australia) indicated that Australia invoked an obligation *erga omnes partes*, despite basing the jurisdiction of the Court on art 36(2) of the *Statute of the International Court of Justice*.[42] It is beyond the scope of this article to consider the history of the application of obligations *erga omnes* or community interest in international law.[43] However, the following brief analysis of the Court's jurisprudence illustrates that standing to enforce such obligations does not appear to be clearly established. In particular, the jurisprudence indicates that each case must be assessed based on its particular context and whether the required 'communal interest' is established.

The Court first took a restrictive approach on this issue of standing in the 1966 *South West Africa* judgment. One of the alternative arguments of the applicant states was that the relevant provision of the Mandate for South West Africa ought to be interpreted broadly based on a 'necessity' argument, namely that it was essential 'as an ultimate safeguard or security for the performance of the sacred trust' of the mandate system, 'that each member of the League should be deemed to have a legal right or interest'.[44] The Court rejected the existence of a 'right resident in any member of a community to take legal action in vindication of a public interest' under international law.[45] This decision created at least a presumption 'against the existence of treaty-based enforcement rights irrespective of individual injury'.[46]

However, *Barcelona Traction* has been seen as an attempt to reverse the effects of the Court's decision in *South West Africa*.[47] The Court held that, for obligations of a state towards the international community as a whole, '[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*'.[48] The Court went on to explain:

> Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law … others are conferred by international instruments of a universal or quasi-universal character.[49]

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42 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.

43 For detailed analysis of the Court's jurisprudence on jurisdiction for collective interests, *erga omnes* or *actio popularis*, see, eg, Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Collected Courses of the Hague Academy of International Law* 217, 285–321; Tams, *Enforcing Obligations* (n 20) 162–96; Farid Ahmadov, *The Right of Actio Popularis before International Courts and Tribunals* (Brill Nijhoff, 2018) ch 5.

44 *South West Africa (Ethiopia v South Africa) (Judgment)* [1966] ICJ Rep 6, 46 [85].

45 Ibid 47 [88].

46 Tams, *Enforcing Obligations* (n 20) 69.

47 Ibid 163.

48 *Barcelona Traction* (n 24) 32 [33].

49 Ibid 32 [34].

The Court ultimately concluded that the Belgian government did not have *jus standi* for the protection of the rights of the shareholders of the company.[50] However, this dictum of the Court has been considered to provide 'an exception to the general bilateralist rule in the case of severe violations of the most important community interests'.[51]

The Court's approach in the later cases of *Nuclear Tests (Australia v France)* ('*Nuclear Tests*') and *East Timor (Portugal v Australia)* ('*East Timor*') provides slightly ambiguous support for standing for enforcing the community interest.[52] The separate and dissenting opinions in *Nuclear Tests* illustrate the degree of controversy provoked by the *erga omnes* concept. For example, Judge de Castro considered that the *Barcelona Traction* dictum had to be taken '*cum grano salis*' (with a grain of salt) and an applicant had to show the existence of a 'right of its own' (*un droit propre*).[53] In comparison, Judge ad hoc Barwick seemed to be more positively inclined towards the applicant's reliance on the *Barcelona Traction* dictum, noting that he was of the opinion that the applicant would have had the 'requisite legal interest' if the applicant's submissions had been accepted.[54] Ultimately, the question was not decided by the Court since the dispute had become moot upon France announcing its intention not to carry out any further atmospheric nuclear tests.[55]

Comparatively, the Court's consideration of *erga omnes* in *East Timor* may provide even less support for the *Barcelona Traction* dictum. The Court recognised that the right of peoples to self-determination 'has an *erga omnes* character'.[56] However, the *erga omnes* character of the right was not sufficient to overcome the principle of the indispensable third party, which prevented the Court from entertaining the case. As such, the Court held that 'the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things',[57] subjecting the *erga omnes* concept to 'the procedural rigours of traditional bilateralism'.[58] Given the operation of the indispensable third-party rule in the jurisdictional phase, the Court was not required to decide the standing issue in this case. Most recently, the advisory opinion in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* ('*Chagos Islands*') confirmed the *Barcelona Traction* dictum as well as the recognition of the right to self-determination as an obligation *erga omnes*, as originally recognised in *East Timor*.[59] However, the Court simply went on to confirm that states must cooperate with the United Nations to decolonise Mauritius, without

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50 Ibid 50 [101].

51 Simma (n 43) 295.

52 *Nuclear Tests (Australia v France) (Judgment)* [1974] ICJ Rep 253 ('*Nuclear Tests*'); *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90 ('*East Timor*').

53 *Nuclear Tests* (n 52) 387.

54 Ibid 437. However, Judge Barwick considered that this was 'not a matter which ought to be decided as a question of an exclusively preliminary character' and so did not conclude whether the submissions of the applicant were in fact correct.

55 Ibid 271 [56].

56 *East Timor* (n 52) 102 [29].

57 Ibid.

58 Simma (n 43) 298.

59 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* (International Court of Justice, General List No 169, 25 February 2019) [180] ('*Chagos Islands*').

commenting on the legal interest for *erga omnes* obligations that could be relevant to future judicial proceedings.

The Court's more recent consideration in *Belgium v Senegal* appears to provide the most unequivocal support of the *Barcelona Traction* dictum. Senegal did not challenge the admissibility of the claim on the basis of Belgium's standing[60] until oral questions by the Court.[61] The Court then determined that the parties to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('*Convention against Torture*')[62] had a common interest in compliance with the obligations in relation to prosecution of offenders, such that 'the obligations in question are owed by any State party to all the other States parties to the Convention'.[63] Consequently, each state party is entitled 'to make a claim concerning the cessation of an alleged breach by another state party'.[64] However, there was still resistance by some members of the Court to recognise *locus standi* for obligations *erga omnes*. Judge Xue critiqued the misuse of the *Barcelona Traction* dictum, which in her view 'only spelt out the conditions for the breach of obligations in bilateral relations and stopped short of the question of standing in respect of obligations *erga omnes*'.[65] Further, Judge Xue considered that the conclusion on *erga omnes partes* was not in conformity with the rules of state responsibility.[66]

The analysis of the Court's jurisprudence appears to confirm that the *Barcelona Traction* dictum is accepted as a general principle of international law. The Court has seemed to move away from its cautious approach to *erga omnes* that it initially took in the *Nuclear Tests* case. However, the circumstances in which the Court has considered the *erga omnes* nature of certain obligations has been fairly limited. The Court has only clearly accepted *erga omnes* obligations in prior cases relating to torture in *Belgium v Senegal* and the right to self-determination in *East Timor* and *Chagos Islands*,[67] as discussed above. In light of continuing resistance by some members of the Court to *erga omnes* obligations,[68] it remains questionable whether we can extend the principle beyond these limited circumstances to the enforcement of collective interests more generally.

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60 Serena Forlati, *The International Court of Justice: An Arbitral Tribunal or a Judicial Body?* (Springer, 2014) 160, citing 'Counter-Memorial of the Republic of Senegal', *Obligation to Prosecute or Extradite (Belgium v Senegal)* (International Court of Justice, General List No 144, 23 August 2011).

61 Forlati (n 60) 160, citing 'Verbatim Record 2012/5', *Obligation to Prosecute or Extradite (Belgium v Senegal)* (International Court of Justice, General List No 144, 16 March 2012) 41 (Judge Abraham) and 'Verbatim Record 2012/7', *Obligation to Prosecute or Extradite (Belgium v Senegal)* (International Court of Justice, General List No 144, 21 March 2012) 25–7 (Thiam).

62 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('*Convention against Torture*').

63 *Belgium v Senegal* (n 36) 449 [68].

64 Ibid 450 [69].

65 Ibid 574–5 [15].

66 Ibid 575 [17].

67 Judge Cançado Trindade went so far as to call upon the Court to elaborate its reasoning on *jus cogens* (from which obligations *erga omnes* ensue) in relation to self-determination: *Chagos Islands* (n 59) [200] (Judge Cançado Trindade).

68 See, eg, *Belgium v Senegal* (n 36) (Judge Xue). Although Vice-President Xue accepts the right to self-determination as an obligation *erga omnes* in *Chagos Islands*: *Chagos Islands* (n 59) [19].

D *Implications for the 'Decision' on Standing for the Role of the ICJ*

The preceding discussion highlights the ongoing uncertainty surrounding standing to enforce collective interests, which makes it difficult to draw any general conclusions about the principle.[69] In *Whaling*, the Court was presented with an opportunity to consider standing for collective interests in an environmental context. However, the Court provides us with very little guidance on the application of the principle of *erga omnes* or enforcement of collective interests to the case. This article proceeds to analyse the Court's decision (or perhaps more accurately, the lack of any decision) in relation to whether:

1 the Court's decision can be seen as following previous jurisprudence on standing, without directly referring to such jurisprudence;
2 we can draw inferences from the Court's silence in relation to the Court's perception of its role in multilateral disputes; and
3 the decision is likely to impact the Court's reasoning in subsequent cases.

1 *Whaling as Merely Reflecting Previous Jurisprudence on Standing?*

Following *Belgium v Senegal*, it could be argued that the Court has clearly articulated its view that applicants have standing to enforce obligations *erga omnes*. However, the relevance of that decision to the particular circumstances of *Whaling* must be distinguished. As *Barcelona Traction* indicates, the 'importance of the rights' determines the *erga omnes* character of the obligation.[70] Therefore, it is not possible to simply apply precedents on other rights to environmental obligations, particularly in circumstances where those rights are humanitarian. *Belgium v Senegal* dealt with obligations under the *Convention against Torture*, a treaty clearly concerned with the protection of human rights.[71] The protection of human rights would likely be the clearest example of an obligation *erga omnes* in which any state would have standing to enforce such obligations. Human rights were provided as an example by the Court in *Barcelona Traction* as the basis for obligations *erga omnes*, with the Court stating that '[s]uch obligations derive, for example … from the principles and rules concerning the basic rights of the human person'.[72] In fact, the Court has not applied the concept of obligations *erga omnes* outside human rights or humanitarian law.[73]

Comparatively, whether the collective interest in the environment is an obligation *erga omnes*, or otherwise capable of enforcement by parties not directly affected by the breach, has received very little attention: only the separate opinion of Vice-President Weeramantry in *Gabčíkovo-Nagymaros* considers environmental obligations as *erga omnes*. Vice-President Weeramantry

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69 Malgosia Fitzmaurice, *Whaling and International Law* (Cambridge University Press, 2015) 110; Tams, *Enforcing Obligations* (n 20) 51.

70 *Barcelona Traction* (n 24) 32 [33].

71 *Convention against Torture* (n 62) Preamble paras 1–4.

72 *Barcelona Traction* (n 24) 32 [34].

73 See the discussion in Part III(C) above. See also Simone Borg, 'The Influence of International Case Law on Aspects of International Law Relating to the Conservation of Living Marine Resources beyond National Jurisdiction' (2012) 23 *Yearbook of International Environmental Law* 44, 71.

questioned whether the rules on inter-state litigation could be applied in cases involving 'the greater interests of humanity and planetary welfare':[74]

> The Court, in the discharge of its traditional duty of deciding *between the parties*, makes the decision which is in accordance with justice and fairness *between the parties*. The procedure it follows is largely adversarial. Yet this scarcely does justice to rights and obligations of an *erga omnes* character — least of all in cases involving environmental damage of a far-reaching and irreversible nature … can momentous environmental issues be decided on the basis of such *inter partes* conduct? In cases where the *erga omnes* issues are of sufficient importance, I would think not.[75]

While *Gabčíkovo-Nagymaros* raised environmental issues in the management of waterways, it was solely a bilateral dispute: no other states intervened in the proceedings or appeared to be affected by the decision. In this context, it is difficult to see Vice-President Weeramantry's separate opinion providing much to future decisions. Although not specifically in relation to environmental disputes, Judge Crawford in *Obligations concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)* ('*Nuclear Arms Race*') also recently accepted 'that States can be parties to disputes about obligations in the performance of which they have no specific material interests', in the context of concern about nuclear issues.[76] The Seabed Disputes Chamber of the International Tribunal for the Law of the Sea ('ITLOS') has also affirmed the *erga omnes* character of obligations respecting the preservation of the environment of the high seas.[77] However, *Whaling* is the first case before the Court that has squarely raised the issue of animal welfare.[78] The Court had never before considered whether environmental obligations more generally are obligations *erga omnes*.

It is perhaps too difficult to determine within the scope of this article whether environmental protection and protection of natural resources are obligations *erga omnes*. However, the preceding discussion indicates a significant degree of uncertainty as to the state of this principle in relation to environmental law. International jurisprudence does suggest a general trend towards recognising responsibilities in relation to common resources as obligations *erga omnes*,[79] yet, this jurisprudence has, so far, been solely limited to humanitarian issues. The extremely limited number of instances where standing for collective interests for issues outside of humanitarian concerns has been raised, even in separate opinions of individual judicial members, provides no foothold for the Court to simply adopt standing for a state with no special legal interest in the protection of the environment. While statements made in separate and dissenting opinions have

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74 *Gabčíkovo-Nagymaros* (n 6) 118.

75 Ibid 117–18 (emphasis in original).

76 *Obligations concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom) (Preliminary Objections)* [2016] ICJ Rep 833, 1102 [22] ('*Nuclear Arms Race*').

77 *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion)* [2011] ITLOS Rep 10, 59 [180].

78 Malgosia Fitzmaurice, 'The International Court of Justice and International Environmental Law' in Christian J Tams and James Sloan (eds), *The Development of International Law by the International Court of Justice* (Oxford University Press, 2013) 353, 373.

79 Borg (n 73) 71; Ahmadov (n 43) 121–2.

come to reflect evolving issues in international law in the past, there is yet no general indication that the Court has formed the same view as Vice-President Weeramantry and Judge Crawford. In the face of such uncertainty in relation to extending this general trend towards environmental obligations, it would be fraught with danger to simply infer the Court's silence as an affirmation of standing to enforce an obligation *erga omnes* in an environmental context.

2 *Inferring from the Silence*

As the Court has not provided any indication on its view of obligations *erga omnes* and standing in this decision, we need to consider whether we can draw any inferences from the Court's silence as to the implications for the Court's role in regulating collective interests. A number of commentators have attempted to identify possible implications of the silence. However, none of these implications provide us with a sufficient understanding of the Court's approach. Christian J Tams has identified two possible implications of the silence.[80] First, Tams argues that 'the silence could be read as representing an unwillingness on the part of the Court to expressly recognise a right of treaty parties to raise treaty violations'.[81] If we accept this inference, the corollary inference is that the Court was not willing to expressly regulate collective resources on a general basis. However, if the Court was not willing to make any general recognition, then perhaps it would have been more appropriate for the Court to actually specify such an unwillingness. As such, this first inference encounters some logical issues. Secondly, Tams suggests that the Court, 'after decades of equivocation, has now embraced the idea of public interest standing, at least on the basis of multilateral treaties protecting collective interest'.[82] This second inference seems unlikely, based on the preceding discussion of the Court's jurisprudence on obligations *erga omnes*. Without any prior consideration of standing to enforce collective environmental interests, it would be unlikely that the Court would 'embrace' such a principle in the absence of any discussion in this case.

Another possible implication of the silence is provided by Margaret Young and Sebastián Rioseco: that the silence in *Whaling* 'simply affirms that there is no separate standing requirement for states in invoking the Court's jurisdiction'.[83] Again, this would appear to be a rather radical inference based on the Court's previous jurisprudence on standing. In light of the Court's lengthy consideration of standing *proprio motu* in *Belgium v Senegal* and Judge Bhandari's question to Australia's counsel in *Whaling*, we cannot simply infer from silence that the requirement of standing, which is a fundamental jurisdictional requirement for almost all legal disputes, has been nullified.

A more likely inference from the Court's silence is that the Court is reluctant to deal with issues not specifically raised by parties. As Farid Ahmadov has suggested, the silence of the Court may have simply resulted from the lack of any

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80 Tams, 'Roads Not Taken' (n 39) 209–11.

81 Ibid 209–10.

82 Ibid 210.

83 Margaret A Young and Sebastián Rioseco Sullivan, 'Evolution through the Duty to Cooperate: Implications of the *Whaling* Case at the International Court of Justice' (2015) 16(2) *Melbourne Journal of International Law* 311, 318.

argument from Japan on this point.[84] This could suggest judicial conservatism and the Court adopting a strict adjudicatory role, rather than broader review and regulation of state conduct. This could be considered to be in line with the Court's traditional deferential attitude towards states where sensitive legal issues are involved.[85] However, many commentators have espoused the benefits of the Court taking an active and exhaustive role in its judicial pronouncements. Early in the Court's existence, Hersch Lauterpacht considered that 'there are compelling considerations of international justice and of development of international law which favour a full measure of exhaustiveness of judicial pronouncements of international tribunals'.[86]

Indeed, in earlier jurisprudence, the Court has proved willing to provide guidance for future cases, rather than strictly adhering to the parties' submissions.[87] For example, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, the Court referred to being bound to raise and examine jurisdiction *ratione personae*, even if the question had not been raised by the parties.[88] As suggested by Judge Donoghue in *Belgium v Senegal*, the Court should be reluctant to confine itself to the legal conclusions of the parties before it on 'far-reaching' legal issues which have implications for other states.[89] This encouragement of the willingness to be judicially active stands in contrast to the role of arbitrators, which is more strictly controlled by the compromise agreement between the parties, a control which Robert Jennings suggest 'finds no place in the situation of the ICJ or in any other permanently established court'.[90] The possible adoption of a more arbitration type of decision-making, rather than judicial activism, counts against the potential for the Court to take on an administrative review framework.

Whaling is surprising for the fact that the Court did not take the opportunity to provide guidance on standing for protection of environmental common interests. The adherence to the issues raised by the parties seems at odds with the activist role that the Court took in bringing the issue to the attention of the parties in *Belgium v Senegal*. The complete lack of consideration of *locus standi* suggests a more traditional 'bilateralist' approach by the Court, limiting consideration of issues to consent of the parties. Such a 'private-type' litigation, resting on consent of the parties, can be seen in the early jurisprudence of the Court, such as the *Asylum (Request for Interpretation) Case*, in which the Court considered that 'it is the duty of the Court … to abstain from deciding points not included in those

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84 Ahmadov (n 43) 124.

85 Ibid 201.

86 Hersch Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons, 1958) 37.

87 Forlati (n 60) 158–62, 174.

88 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43, 94 [122].

89 *Belgium v Senegal* (n 36) 590 [21] (Judge Donoghue), referring to the issue of *ratione temporis* of the *Convention against Torture*.

90 Sir Robert Jennings, 'The Differences between Conducting a Case in the ICJ and in an ad hoc Arbitration Tribunal: An Inside View' in Nisuke Ando, Edward McWhinney and Rüdiger Wolfrum (eds), *Liber Amicorum: Judge Shigeru Oda* (Kluwer Law International, 2002) vol 2, 893, 894.

submissions'.[91] However, this approach stands in contrast to the more recent active judicial role of the Court.

The silence of the Court on standing seems unlikely to indicate that the Court is openly moving towards a regulatory role and general recognition of standing for collective interests. It is difficult to go as far as some commentators have and consider the silence of the Court as an implicit endorsement of the concept.[92] Based on the previous jurisprudence of the Court, it is difficult to infer evolutionary steps forward on obligations *erga omnes* or common interest standing. Rather, the Court's silence suggests an aversion to pronouncing general principles in cases where it is not necessary based on the parties' agreement on the approach.

3 *Implications for Subsequent Cases*

Regardless of any possible motivation of the Court in not referring to standing, the Court has left the door open for subsequent cases to enforce environmental common interests. Several commentators have considered that the decision in *Whaling* will enable a wide scope for establishing standing where obligations *erga omnes* are applicable.[93] However, the Court has clearly missed an opportunity to cement its role in regulating such collective interests. As Hironobu Sakai commented, standing was an 'important issue in relation to characterizing the Court's treatment of this case as a kind of judicial control by the Court over violations of international law'.[94] The Court has silently acknowledged standing to enforce collective interests, beyond the realm of the established human rights obligations *erga omnes*, but stops short of illustrating that the 'international State system has evolved into an international society, capable of protecting its avowedly shared values'.[95] As suggested by Judge Tomka in *Nuclear Arms Race*, the Court's jurisdictional makeup is ill-suited to handle multilateral disputes in relation to collective interests.[96] The silence of the Court in relation to recognising an important evolution in standing to enforce collective interests does not provide sufficient grounds to overcome standing issues in future cases; rather, it merely 'opens the door to ambivalence'.[97] The Court's unwillingness to pronounce general principles in this regard limits the potential for the Court to properly test the validity of state decision-making in future cases, rather than being in line with a more administrative review role.

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91 *Request for Interpretation of the Judgment of November 20th, 1950, in the Asylum Case (Colombia v Peru) (Judgment)* [1950] ICJ Rep 395, 402 ('*Asylum (Request for Interpretation) Case*').

92 See, eg, Tams, 'Roads Not Taken' (n 39) 209–11; Ahmadov (n 43) 124–5.

93 See, eg, Malgosia Fitzmaurice and Dai Tamada, 'Introduction' in Malgosia Fitzmaurice and Dai Tamada (eds), *Whaling in the Antarctic: Significance and Implications of the ICJ Judgment* (Brill Nijhoff, 2016) 1, 3; Tams, 'Roads Not Taken' (n 39) 210–11.

94 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: Significance and Implications of the ICJ Judgment* (Brill Nijhoff, 2016) 308, 314.

95 Crawford (n 42) 240.

96 *Nuclear Arms Race* (n 76) 899 [40] (Judge Tomka).

97 Ahmadov (n 43) 122.

IV STANDARD OF REVIEW

The ICJ's adoption of a 'standard of review' to assess the conduct of Japan in granting the special permit under art VIII(1) of the *ICRW* was one of the more controversial aspects of *Whaling*, particularly in relation to the Court's judicial function within the traditional bilateral international legal system. The Court's approach raises two intertwined issues for the appropriateness of the use of such a methodology: the adoption of the 'standard of review' terminology itself, and the 'objectively reasonable' standard that was adopted.

A *Review of Discretionary Powers under International Law*

The concept of 'standard of review' refers to 'the degree of deference that a court grants to institutional decisions taken by other authorities' and originates from domestic administrative legal systems.[98] At the heart of the concept of 'standard of review' at the international level is the question of state sovereignty in a judicial context and the adjudicator's function.[99] As Steven P Croley and John H Jackson have explained in relation to the standard of review in WTO disputes, the adoption of the standard of review involves tension between international and national concerns:

> [E]ffective international cooperation depends in part upon the willingness of sovereign states to constrain themselves by relinquishing to international tribunals at least minimum power to interpret treaties and articulate international obligations. Recognizing the necessity of such power does not lessen the importance at the national level of decision-making expertise, democratic accountability or institutional efficiency.[100]

Two political extremes of review of discretionary powers outline the approaches under international law: fully-fledged scrutiny of administrative action, such as employment decisions by international organisations (which is similar to review by domestic judicial bodies); and scrutiny of resolutions of the United Nations Security Council, where a court must exercise self-restraint.[101] The level of deference by an international court to the national decision-maker affects the allocation of power between states and the international level of governance: the more intrusive the standard of review, the more power to the international judiciary and the international level of governance.[102] However, the applicable

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98 Chiara Ragni, 'Standard of Review and the Margin of Appreciation before the International Court of Justice' in Lukasz Gruszczynski and Wouter Werner (eds), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (Oxford University Press, 2014) 319, 319.

99 Guillaume Gros, 'The ICJ's Handling of Science in the Whaling in the Antarctic Case: A Whale of a Case?' (2015) 6(3) *Journal of International Dispute Settlement* 578, 591.

100 Steven P Croley and John H Jackson, 'WTO Dispute Procedures, Standard of Review, and Deference to National Governments' (1996) 90(2) *American Journal of International Law* 193, 211.

101 Robert Kolb, 'Short Reflections on the ICJ's Whaling Case and the Review by International Courts and Tribunals of "Discretionary Powers"' (2014) 32 *Australian Year Book of International Law* 135, 140 ('Short Reflections').

102 Michael Ioannidis, 'Beyond the Standard of Review: Deference Criteria in WTO Law and the Case for a Procedural Approach' in Lukasz Gruszczynski and Wouter Werner (eds), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (Oxford University Press, 2014) 91, 92–3.

standard of review is rarely expressly articulated in statutes of international adjudicating bodies or other relevant treaties,[103] creating significant difficulty for tribunals in determining the appropriate deference.

B *Standard of Review in Whaling*

Whaling was the first time that the ICJ expressly applied a 'standard of review'. The parties' arguments on 'standard of review' can be considered in light of their position on domestic or common interests. Initially, Australia did not refer to the term 'standard of review'. Australia's position in its memorial was that Japan did not have any discretion in the determination of whether a whaling operation was carried out 'for purposes of scientific research'.[104] As 'standard of review' is usually used to describe the degree of deference to the primary decision-maker, it would have been meaningless for Australia to refer to the term based on its initial arguments.[105] The first time the term was employed was by Japan in reply to New Zealand.[106] The parties' positions on 'standard of review' were then elaborated during oral submissions. Counsel for Australia, Professor Crawford, cautioned the Court against applying a subjective standard of bad faith. Rather, referring to *Southern Bluefin Tuna (Australia v Japan)*,[107] Professor Crawford argued that

> judicial review, notably in relation to resources in the public domain which do not belong even prima facie to any individual State, and which are a matter of collective interest, should not be regulated by the Court wholly or primarily on the basis of such fluctuating and subjective notions as bad faith. The normal criterion for breach of treaty is whether the terms of the treaty, or any obligations reasonably to be inferred from them, are to be applied fairly and objectively.[108]

Professor Vaughan Lowe, counsel for Japan, also agreed that the Court had to ask itself 'what the proper standard of review is'.[109] Japan did not initially agree with Australia on the applicable standard of review and argued that the Court's power of review is limited to determining whether the issuing of the permit was 'arbitrary or capricious', 'manifestly unreasonable' and that the role of the Court was 'to secure the integrity of the process by which the decision is made, [but] not to review the decision itself'.[110] However, by the end of the oral submissions, Japan expressed its agreement with the test as 'whether a State's decision is

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103 Ragni (n 98) 319.

104 'Memorial of Australia' (n 28) 186 [4.116].

105 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: Significance and Implications of the ICJ Judgment* (Brill Nijhoff, 2016) 38, 39–40.

106 Japan states that, '[l]ike Australia, New Zealand does not address the standard of review that is applicable by the Court': 'Written Observations of Japan on New Zealand's Written Observations', *Whaling in the Antarctic (Australia v Japan)* (International Court of Justice, General List No 148, 31 May 2013) [55].

107 'Verbatim Record 2013/19' (n 7) 64–5 (Crawford), citing *Southern Bluefin Tuna (Australia v Japan) (Jurisdiction and Admissibility)* (2000) 23 RIAA 1, 46 [64].

108 'Verbatim Record 2013/19' (n 7) 65 (Crawford).

109 'Verbatim Record 2013/22', *Whaling in the Antarctic (Australia v Japan)* (International Court of Justice, General List No 148, 15 July 2013) 60.

110 *Whaling* (n 1) 253–4 [65].

objectively reasonable, or "supported by coherent reasoning and respectable scientific evidence and … in this sense, objectively justifiable"'.[111]

The Court ultimately applied an 'objectively reasonable' standard of review, which required a two-step test. The Court's 'objectively reasonable' standard was subject to significant criticism in the dissenting opinions. The relevant differences between the dissenting judges in relation to the Court's 'objectively reasonable' standard concerned: whether the test should be objective; and whether the Court should venture into ascertaining what is meant by scientific research under the *ICRW*.[112] Judge Owada considered that the majority had erroneously applied WTO jurisprudence out of context, resulting in a de novo assessment of the activities of Japan, in circumstances where Japan had been given the primary power to grant the special permit.[113] Judge Abraham dissented, finding that Australia's plea essentially amounted to an allegation that Japan acted in bad faith by concealing the pursuit of commercial interests behind the outward appearances of a scientific research programme. In Judge Abraham's view, Japan's good faith should be presumed and Australia had not shown that Japan was not genuinely pursuing the scientific aims that it claimed to be pursuing.[114] Judge Abraham went on to identify two scenarios which he considered would justify a programme not falling within the terms of art VIII of the *ICRW*. First, where there is 'clearly no reasonable relationship between the stated objectives and the means used, such that those means are manifestly unsuitable for achieving those objectives', and secondly, 'where the sample size set by the programme is manifestly excessive in light of research needs'.[115] Judge Yusuf criticised the majority for referring to 'some extraneous and undefined standard of review' which negated 'the relevance of the specific provisions of the treaty which constitute the law applicable to this dispute'.[116] Rather, in Judge Yusuf's view, the parameters to determine the legality of the issuance of the special permits should be found in the treaty itself.[117]

C *Adopting a 'Standard of Review'*

The Court's adoption of a standard of review primarily arose from the requirement to interpret the expression '"for purposes of" scientific research'.[118] The interpretation of this provision involved two intertwined problems: 'first, the margin of discretion of state parties to determine whether a whaling permit complies with this criterion; second, the limits of the Court's judicial review'.[119] Some commentators have criticised the Court for adopting the standard of review approach, suggesting the approach 'does not reflect orthodox judicial methodology' and 'is a reference point extraneous to the legal materials under

111 'Verbatim Record 2013/22' (n 109) 60.
112 Kolb, 'Short Reflections' (n 101) 139.
113 *Whaling* (n 1) 314–16 [33]–[38] (Judge Owada).
114 Ibid 326 [21], 327–8 [28] (Judge Abraham).
115 Ibid 330–1 [35] (Judge Abraham).
116 Ibid 383–4 [3] (Judge Yusuf).
117 Ibid.
118 Ibid 254 [67].
119 Asier Garrido-Muñoz, 'Managing Uncertainty: The International Court of Justice, "Objective Reasonableness" and the Judicial Function' (2017) 30(2) *Leiden Journal of International Law* 457, 465.

consideration'.[120] Prior to *Whaling*, the concept of a 'standard of review' was not 'readily apparent' to the Court, which generally does not undertake an examination of domestic decisions that are administrative in character (a process similar to judicial review).[121] The *Statute of the International Court of Justice* and the *Charter of the United Nations* do not expressly provide for a separate power of judicial review. These constitutive documents primarily entrust the Court with contentious jurisdiction over inter-state disputes regarding questions of application or interpretation of international law.[122] As such, it is generally uncommon for the Court to be required to deal with questions of 'whether it must defer in any way to the decision-making process of a State'.[123]

There is some limited jurisprudence of the Court dealing with the discretion for state decision-making. In *Oil Platforms (Iran v United States of America)*, the Court was required to consider the discretion of a state on the matter of application of security exceptions.[124] The Court assumed a restrictive approach to state discretion.[125] Similarly, in *Gabčíkovo-Nagymaros*, the Court considered that while necessity was an exception to an international legal obligation, provided for by customary rules, 'the State concerned is not the sole judge of whether those conditions have been met'.[126] The Court then went on to determine whether the substantive elements of necessity were met and whether Hungary's reaction was objectively necessary, without reference to the decision-making of Hungary itself.[127] These cases suggest that the Court is willing to judicially review legal determinations made by states in cases where the provision invoked to validate its conduct refers to standards governed by customary international law.[128] As such, *Whaling* does, to some extent, fit within the previous jurisprudence of the Court. However, the point at which *Whaling* departs from previous jurisprudence is that 'for the purposes of scientific research' does not refer to any standards under customary international law. Rather, the Court could be seen to have expanded the judicial review available to it by explicitly referring to the terminology of 'standard of review'. The implications of this potential expansion will be discussed further below.

D *Adopting an 'Objectively Reasonable' Standard*

The 'objectively reasonable' standard was instrumental in determining an inter-state dispute before the Court about the review of state discretionary powers in the implementation of a treaty for, arguably, the first time.[129] However, the

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120 See Stephen R Tully, '"Objective Reasonableness" as a Standard for International Judicial Review' (2015) 6(3) *Journal of International Dispute Settlement* 546, 553–4.

121 Ross Becroft, *The Standard of Review in WTO Dispute Settlement: Critique and Development* (Edward Elgar, 2012) 24.

122 Ragni (n 98) 320.

123 Becroft (n 121) 24. However, the Court may be required to exercise a power akin to judicial review in circumstances where the domestic decision-making process is relevant to deciding whether the state's conduct is in breach of international law: Ragni (n 98) 322.

124 *Oil Platforms (Iran v United States of America) (Judgment)* [2003] ICJ Rep 161.

125 Ibid 196 [73].

126 *Gabčíkovo-Nagymaros* (n 6) 40 [51].

127 Ibid 40–6 [52]–[57].

128 Ragni (n 98) 325.

129 Garrido-Muñoz (n 119) 458.

methodology may not be as revolutionary as some commentators may suggest. As early as 1958, the concept of 'reasonableness' was considered by Judge Lauterpacht in *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v Sweden)*, stating that '[t]he Court is competent to decide not only whether the [national law] falls within the notion of *ordre public*, but also whether it has been applied *reasonably* and so as not to defeat the true objects of the Convention'.[130] This has been confirmed by later cases. In *Barcelona Traction*[131] and *Gabčíkovo-Nagymaros*,[132] the Court referred to the international law in issue as needing to be applied reasonably. Similarly, in *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, the Court stipulated that state powers must be exercised properly, for the purpose for which they have been given.[133] The Court went on to note that it is not enough 'in a challenge to a regulation simply to assert in a general way that it is unreasonable'.[134] The Court also approved the principle of effectiveness in *Territorial Dispute (Libyan Arab Jamahiriya v Chad)*, in which the Court stated that exercise of a power must not undermine the object and purpose of the power-granting treaty.[135] The previous jurisprudence of the Court demonstrates that the Court has referred to 'reasonableness' in determining a dispute. However, the Court has not previously applied it as a concrete standard of review.[136] The interesting point to note for the Court's adoption of an 'objectively reasonable' standard is its similarity to the standard of review applied by the WTO, rather than its own previous jurisprudence. Instead, the Court could have relied on a good faith test, which is a more lenient standard of review that has been used in previous Court decisions. However, the adoption of the WTO-style 'reasonableness' may suggest a more regulatory role for the Court, since this standard indicates less deference to the original decision-maker.

1 *Reasonableness before the WTO*

The standard of review applied by the WTO is perhaps more reflective of the Court's attempt to examine the administrative actions of Japan. The WTO standard of review tries to balance the autonomy of WTO members against the effective enforcement of WTO law.[137] Judge Owada traced the submissions of the parties on the standard of review to the jurisprudence of the Appellate Body of the

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130 *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v Sweden) (Judgment)* [1958] ICJ Rep 55, 99 (Judge Lauterpacht) (emphasis added).

131 The Court stated that 'in the field of diplomatic protection as in all other fields of international law, it is necessary that the law be applied reasonably': *Barcelona Traction* (n 24) 48 [93].

132 The Court considered that the 'principle of good faith obliges the Parties to apply [the treaty] in a reasonable way and in such a manner that its purpose can be realized': *Gabčíkovo-Nagymaros* (n 6) 79 [142].

133 *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua) (Judgment)* [2009] ICJ Rep 213, 241 [61].

134 Ibid 253 [101]. Judge Owada considered that this dictum of the Court should be applied in *Whaling*: *Whaling* (n 1) 317 [40].

135 The Court referred to this as the principle of effectiveness: *Territorial Dispute (Libyan Arab Jamahiriya v Chad)* [1994] ICJ Rep 6, 25 [51].

136 See *Whaling* (n 1) 316–17 [39] (Judge Owanda).

137 Jan Bohanes and Nicolas Lockhart, 'Standard of Review in WTO Law' in David Bethlehem et al (eds), *The Oxford Handbook of International Trade Law* (Oxford University Press, 2009) 378, 381.

WTO,[138] particularly the decision in *United States — Continued Suspension of Obligations in the EC — Hormones Dispute*.[139] The Appellate Body has confirmed in multiple proceedings that the applicable standard of review is neither de novo review nor total deference to the state authority; rather, the Panel should undertake an 'objective assessment of the facts'.[140] In doing so, the Panel will consider whether the conclusions reached by the domestic authority are reasoned and adequate.[141] This jurisprudence of the WTO is perhaps more reflective of the Court's attempt to review the domestic act of Japan than previous ICJ jurisprudence. The adoption of an approach similar to the WTO may suggest a more review-like process than the traditional bilateral approach, given the WTO and its dispute settlement bodies are often hailed as promoting global administrative justice.[142] Yet, at the same time, the adoption of a similar standard of review as the WTO is perhaps illustrative of the tension in the Court's role in relation to collective interests: the WTO dispute settlement itself must balance bilateral settlement of specific disputes with 'a more legalized, regulation-oriented and cosmopolitan approach'.[143]

2 *Good Faith?*

Good faith is a more lenient standard of review since it defers the balancing of conflicting rights and interests to the state's own resolution, the only proviso being that the state resolves the conflict in good faith.[144] Such a good faith review could be available based on the Court's previous jurisprudence. In *Pulp Mills*, the Court was required to consider whether Uruguay had breached its obligations when it authorised the construction of pulp mills on the shared river with Argentina and failed to provide for the environmental impact of these activities on the surrounding area. In determining the 'equitable and reasonable utilization of a shared resource',[145] the Court considered that

> it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed

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138 *Whaling* (n 1) 314 [33]–[34] (Judge Owada).

139 Appellate Body Report, *United States — Continued Suspension of Obligations in the EC — Hormones Dispute*, WTO Doc WT/DS320/AB/R (16 October 2008) [590].

140 Appellate Body Report, *EC Measures concerning Meat and Meat Products (Hormones)*, WTO Docs WT/DS26/AB/R and WT/DS48/AB/R (16 January 1998) [117].

141 Appellate Body Report, *United States — Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WTO Doc WT/DS399/AB/R (5 September 2011) [280].

142 See, eg, Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R (12 October 1998) [180]–[184]; Kingsbury, Krisch and Stewart (n 9) 18, 21–2, 36–9, 44.

143 Richard B Stewart and Michelle Ratton Sanchez Badin, 'The World Trade Organization and Global Administrative Law' (Working Paper No 2009/7, Institute of International Law and Justice, 14 October 2009) 12.

144 William Burke-White and Andreas von Staden, 'The Need for Public Law Standards of Review in Investor-State Arbitrations' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) 689, 705.

145 *Pulp Mills* (n 5) 74–5 [177].

> development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment.[146]

This conclusion by the Court suggests that a state's good faith will be established and 'any further review of its decision to grant the permission should, in principle, be excluded' in circumstances where the state had conducted a well-reasoned environmental impact assessment.[147] In other words, the assessment of 'reasonableness' is only concerned with appropriate procedural safeguards and, then, the state's good faith would be presumed.

Comparatively, *Whaling* does not adopt a good faith test, rather relying on a purely objective standard that appears to re-make Japan's decision, regardless of any procedural safeguards in the *ICRW* or Japan's domestic system. Japan's earlier position, prior to its acceptance of the test of 'objectively reasonable', is perhaps closer to the procedural safeguards and good faith approach in *Pulp Mills* when Japan asserted that 'the role of the Court therefore is "to secure the integrity of the process by which the decision is made, [but] not to review the decision itself"'.[148] However, the Court ultimately looked past the decision-making process to the decision itself — considering whether 'the programme's design and implementation are reasonable in relation to achieving its stated objectives'.[149] Many commentators have suggested that the Court's adoption of an objectively reasonable standard allowed the Court to avoid 'delicate questions' or 'thorny issue[s]' as to the state of mind of Japan and Japan's intentions.[150] The Court's clear rejection of a subjective standard and a strong presumption of good faith may suggest a greater power of review than the *Pulp Mills* procedural safeguards approach, discussed in more detail below.

E *Implications for the Decision on Standard of Review for the Role of the ICJ*

Similar to the issue of standing, the Court was relatively silent on its reasoning for adopting this rather controversial version of standard of review. As such, we must consider what we can infer from the Court's adoption of this standard. The implications of the Court's adoption of an objectively reasonable standard of review requires inferring whether the adoption represents a greater willingness to review governmental discretion or whether the Court was largely directed by the parties' approach to the dispute. The consideration of this dichotomy will impact on whether the Court is likely to apply the methodology in subsequent cases or, indeed, whether it is appropriate to do so.

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146 Ibid 83 [205].

147 Ragni (n 98) 331.

148 *Whaling* (n 1) 253–4 [65] (square brackets in original). This was, however, in relation to Japan's initial argument that the Court should be limited to review of the determination as 'arbitrary or capricious', 'manifestly unreasonable' or made in bad faith: at 254 [65].

149 Ibid 254 [67].

150 Kolb, 'Short Reflections' (n 101) 138; Gros (n 99) 600. See also Anastasia Telesetsky, Donald K Anton and Timo Koivurova, 'ICJ's Decision in *Australia v Japan*: Giving up the Spear or Refining the Scientific Design?' (2014) 45(4) *Ocean Development and International Law* 328, 334.

1 *Inferring from the Silence*

The discussion above highlights that *Whaling* does push the boundaries of the previous jurisprudence of the Court by more clearly indicating that the Court will not simply defer to the sovereignty of a state party, but rather it is willing to review the domestic decisions to a similar level of judicial scrutiny as that under domestic law.[151] However, the Court's activist approach to judicial review in *Whaling* must be considered in light of the parties' agreement on the standard of review, or at least the Court's view that the parties agreed.[152] As Judge Yusuf points out, the Court does not explain the need to resort to such a standard.[153] Such limited discussion by the Court of its reasoning for the adoption of the standard of review may indicate a certain deference to the parties' arguments.

On the other hand, since the Court is not limited to consideration of the arguments of the parties, it was certainly open to the Court to have adopted a different approach (or terminology) if it did not consider that the parties' approach was appropriate. The further discussion in the separate opinions of the judges may provide some support to an argument that the Court was not solely directed by the parties' agreement. For example, Judge Keith refers to certain features of the *ICRW* regime which provide for limits on the power of the contracting government to grant a special permit, and thus provides the Court with an objective power of review.[154] Judge Keith continues on to adopt a similar formulation of the standard of review: namely, whether Japan's decision to award a special permit was 'objectively justifiable in the sense that the decision is supported by coherent scientific reasoning'.[155] However, no similar detailed reasoning appears in the judgment itself. We are left with silence on the extent of the Court's reliance on the parties' agreement. However, the most plausible inference from the Court's silence on this aspect of its reasoning is that the parties' agreement on the standard of review was the crucial factor in adopting the standard of review. Similar to the silence of the Court on standing, we could infer that the Court is not willing to deal with issues in depth if the issues have been accepted by the parties, even in circumstances where that issue is relatively revolutionary compared to previous jurisprudence. As such, it is unlikely that the Court's adoption of a standard of review suggests a regulatory, administrative role for the Court, similar to some domestic administrative bodies. Rather, we are simply left with the inference that the Court remained conservative in its approach to issues on which the parties agreed.

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151 Kolb, 'Short Reflections' (n 101) 144; Tully (n 120) 553.

152 Judge Owada queried whether the parties had actually agreed on the standard of review applicable, considering that there was a 'wide difference' between the parties and that the Judgment had grossly misrepresented what each party was prepared to accept as the common ground. As such, Judge Owada considered that the judgment 'seem[ed] to endorse the position of one of the Parties', namely Australia: *Whaling* (n 1) 313 [32].

153 Ibid 386 [12] (Judge Yusuf).

154 Ibid 338 [7] (Judge Keith). This can be seen to be similar to the wording used in WTO jurisprudence: see above Part IV(D)(1).

155 *Whaling* (n 1) 338–9 [8] (Judge Keith).

2 *Implications for Subsequent Cases*

A further issue for the significance of the Court's standard of review methodology is whether it is appropriate to apply in subsequent cases or whether the Court's methodology was too specific to the context of *Whaling*. The first obstacle to the application to subsequent cases is that the standard of review was envisaged by the parties. The Court was simply able to point to the agreement of the parties.[156] The lack of any reasoning by the Court for the adoption of this novel standard of review makes it particularly difficult to rely on this standard of review in subsequent cases. Secondly, the objectivity of the standard may only be applicable to the specific scientific context of *Whaling*.[157] The use of the terminology 'for the purposes of scientific research' may provide a peculiar opportunity to objectively review the actions of a state. Comparatively, the *Pulp Mills* 'equitable and reasonable' standard was derived from the treaty text referring to the 'obligation to contribute to the "optimum and rational utilization of the river"'.[158] For *Whaling*, 'for the purposes' suggests that there was supposed to be a review conducted elsewhere, rather than merely procedural safeguards within the state itself, as in *Pulp Mills*. As Stephen Tully suggests, the Court's reasoning in *Whaling* 'challenges the [International Whaling Commission] to credibly respond and remedy the mired processes of its Scientific Committee'.[159] By undertaking an objectively reasonable standard of review, the Court has attempted to step into the shoes of the Scientific Committee, which may be appropriate for the specific scientific context of *Whaling*, but not other cases in which the state remains the determiner of its review process.

Perhaps the most significant aspect of the Court's decision is that the Court used the terminology of 'standards of review' as if it was already an accepted principle before the Court.[160] As a result of the Court's silence, the applicability of the specific objectively reasonable test to subsequent cases may be limited. However, the Court's acceptance of the parties' agreement on standard of review, at the very least, indicates the Court's willingness to review discretionary state powers to ensure the international regime for the protection of common interests functions properly.[161] The Court's decision in *Whaling* provides some scope for future judicial review of state discretionary powers under multilateral treaties, suggesting an extension of the Court's role beyond bilateral concerns of state sovereignty. Yet, if parties do not agree that discretionary powers can be reviewed in subsequent cases, the Court could certainly find grounds not to follow the objectively reasonable standard of review set out in *Whaling*.

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156 Caroline E Foster, 'Methodologies and Motivations: Was Japan's Whaling Programme for Purposes of Scientific Research?' in Malgosia Fitzmaurice and Dai Tamada (eds), *Whaling in the Antarctic: Significance and Implications of the ICJ Judgment* (Brill Nijhoff, 2016) 11, 16.

157 See, eg, Gros (n 99) 606.

158 *Pulp Mills* (n 5) 73, quoting *Statute of the River Uruguay*, Uruguay–Argentina, signed 26 February 1975, 1295 UNTS 331 (entered into force 18 September 1976) art 1.

159 Tully (n 120) 565.

160 Foster (n 156) 16.

161 Kolb, 'Short Reflections' (n 101) 144.

V IMPACT OF *WHALING* ON FUTURE COLLECTIVE INTEREST DISPUTES

The ICJ's approach to standing and standard of review was quite novel when compared to the previous jurisprudence of the Court. Both of these issues could be considered using the framework and analogies from global administrative review. We can see similarities in the discussion and treatment of both standing and standard of review by the Court, which may allow us to draw links to whether the Court was truly considering the issues in light of administrative law principles. For both issues, the parties appeared to be in agreement. Japan did not object to Australia's standing and both parties appeared to accept that an objectively reasonable standard of review should be adopted in the decision. The Court, similarly, for both issues, provided very limited or little reasoning for its decision to recognise standing or adopt a standard of review. To truly understand whether the Court was willingly stepping into a review role, we need to consider whether the Court adopted these issues based on its own reasoning or was entirely directed by the parties' agreement.

Based on the silence of the Court, we have to infer the Court's intention in relation to the adoption of these two issues. For both standing and standard of review, the Court departs from its previous jurisprudence, albeit in a relatively evolutionary (rather than revolutionary) way. However, the complete lack of any discussion by the Court in relation to standing suggests an inference that the Court was guided by the parties, thereby avoiding pronouncing on general principles and entering into more sensitive political areas. In comparison, for standard of review, there was at least some discussion of the adoption of an objectively reasonable standard in the separate and dissenting opinions. This may suggest that the inference that the Court was entirely directed by the parties' agreement is not as applicable to the standard of review. On the other hand, without discussion in the judgment itself, we could similarly infer that the Court took the path of least resistance and avoided discussing general principles and areas of potential political sensitivity. However, the fact that the Court is silent on both of these issues supports a common inference that the Court relied on the parties' agreement and was not actively pursuing a new review role for itself.

Despite the silence of the Court on these important issues for the regulation of collective interests in future cases, the Court has at least left the door open for such litigation in the future. However, given that we can infer, for both standing and standard of review, a significant reliance on the parties' agreement on the issues, the relevance of *Whaling* for future regulation of collective interests is relatively limited. As such, we may be viewing a reluctant review function being adopted by the Court, but with only a limited stepping beyond its traditional bilateral dispute resolution role.

VI CONCLUSION

The regulation of states' decision-making under multilateral treaties affecting collective resources raises new issues concerning the ICJ's judicial function and role. The Court's traditional bilateral dispute settlement system may not be capable of addressing these common interest issues. As Vice-President Weeramantry noted in *Gabčíkovo-Nagymaros*,

> [w]e have entered an era of international law in which international law subserves not only the interests of individual States, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare. In addressing such problems, which transcend the individual rights and obligations of the litigating States, international law will need to look beyond procedural rules fashioned for purely *inter partes* litigation.[162]

The Court in *Whaling* took a relatively flexible and informal approach to the dispute. The Court's approach to standing and standard of review may indicate that the Court is opening the way for further regulation of multilateral treaties, akin to domestic administrative review. The Court appears to be relatively proactive and activist in comparison to some of its prior jurisprudence on these issues. Such an approach would enable the Court to continue its relevance in inter-state disputes that step away from the traditional breach of international obligations affecting only bilateral relations. The Court has taken an important step forward in setting out the limited deference to state decision-making under multilateral treaties, albeit with some recognition of the ongoing adversarial nature of its dispute settlement system.

However, the relevance of *Whaling* to subsequent cases dealing with regulation of multilateral treaties and collective resources is likely to be limited. The Court's approach in *Whaling* was clearly influenced by the parties' agreement on the procedure and evidence in the dispute. With the relative silence of the Court on these issues, it is difficult to draw any precedential value from *Whaling*. As such, there remains significant doubt that the Court will remain so proactive in reviewing decisions of state parties in circumstances where the parties are not in agreement in relation to difficult procedural issues and the appropriate determination of the dispute.

The Court has opened the door for regulation of state actions under multilateral treaties concerning collective resources but fails to fully embrace this role. We have perhaps not reached the level of optimism that Judge Cançado Trindade expresses on the future impact of *Whaling* for the collective regulation of the environment. The Court's silence could as easily be read as reticence to stepping outside the traditional bilateral dispute system as it could be read as embracing a review role.

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162 *Gabčíkovo-Nagymaros* (n 6) 118 (Vice-President Weeramantry).