

## CHAPTER IV

### FACTORS AFFECTING ON THE CONTINUATION OF JAPANESE WHALING

The International Whaling Commission (IWC) was formed in 1946 in recognition of the fact that a certain species of whales were overexploited. IWC is the body recognized by the United Nations as having a responsibility to conserve the world's whales.<sup>85</sup> The role of IWC is to implement the International Convention for the Regulation of Whaling (ICRW) consisting of fifteen member states. The original signatories were: Argentina, Australia, Brazil, Canada, Chile, Denmark, France, the Netherlands, New Zealand, Norway, Peru, Union of South Africa, Union of Soviet Socialist Republics, United Kingdom and the United States. Afterwards, in 1972, Brazil, Chile, the Netherlands, New Zealand and Peru had been replaced by Iceland, Japan, Panama, and Mexico, putting membership at fourteen.<sup>86</sup>

The ICRW was established to stop the overexploitation of an endangered whales. The main purpose of the Convention is to provide the proper conservation of whale stocks and thus to make the possible orderly development of whaling industry.<sup>87</sup> Based on the purpose of ICRW, it indicates that IWC is not

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<sup>85</sup> Greenpeace, *Whaling in the Southern Ocean*. Retrieved from <http://www.greenpeace.org/usa/wp-content/uploads/legacy/Global/usa/planet3/PDFs/gortons-whaling-fact-sheet.pdf>, on November 30, 2017.

<sup>86</sup> Forest L. Gieves, *Leviathan, the International Whaling Commission and Conservation as Environmental Aspects of International Law*, (University of Utah on behalf of the Western Political Science Association, 1972), 711-725.

<sup>87</sup> Keiko Hirata, *Examining Japan's Rejection of an International Norm*, (Oxford University Press, 2004), 177-197.

originally a whale conservation regime, but instead, it is a whale regulation regime.

In the early of its establishment, IWC consisted of pro-whaling nations which concerned and gathered together to manage a serious depletion of certain whale stocks. The pro-whaling members were interested to maintain the whale stocks in order to develop whaling industry for commercialization, not for the permanent ban of whaling. Japan itself has joined the IWC since 1951 because of knowing a large scale of whales' depletion which could possibly affect its whaling industry.

Over the time, the main concern of IWC has shifted from the sustainable use of whales (developing the whaling industry) into the conservation of whales (banning the commercial whaling especially for an endangered species) and furthermore to the protection of the welfare of whales (ending the suffering whales).<sup>88</sup> The shift was corresponding with the change in the composition of IWC's member states. As in the 1970s, many non-whaling countries joined IWC. Moreover, some pro-whaling countries switched their position as well to the anti-whaling countries.<sup>89</sup>

The number of states increased from 14 (1972-1973) to 39 (1983-1984), including some anti-whaling states such as New Zealand and Netherlands.<sup>90</sup> Then in 1983, 28 of 39 member states were non-whaling states.<sup>91</sup> Thus, it makes anti-whaling countries become dominant within the IWC. Japan and other pro-whaling countries have faced mounting pressure from these anti-whaling opposition to abolish any kind of whaling practice completely.

Some Western environmentalist have tried to influence the IWC decision-making. In the 1960s, Western environmentalist NGOs started to take action and spread 'save-the-whales'

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<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

campaigns, voicing the moratorium for any kind of whaling and whale sanctuaries as well. These NGOs were Greenpeace, World Wide Fund for Nature and many others. In 1978, the IWC got the US-backed resolution to allow the environmentalist groups to attend IWC meetings as non-voting members. Afterwards, these anti-whaling environmental groups have used the opportunity to participate, to demonstrate the position papers, to present the results of their research, to advise the delegations, even to send their delegations to the IWC meetings.

The goal of these NGOs was trying to influence the anti-whaling delegates in each meeting to vote for a complete ban on whaling. Based on their data, these NGOs argued that there was a significant depletion of whale population and it needed to be recovered. The numerous number of NGOs participating in the IWC meeting increased during the 1970s until 1980s.<sup>8</sup> The NGOs have also been known in contributing the expansion of IWC membership, by footing the membership fees and by requiring membership documents for small and poor non-whaling countries to become the member of the IWC. This action has taken in the hope for increasing the percentage of anti-whaling states within the IWC as well as to support their campaigns.

Many anti-whaling states made a coalition such as US, Britain, Australia, New Zealand, Germany, and France. This coalition was aiming at commanding more than a half of IWC members by picking up many swing votes, so that they are able to control the IWC decision. The coalition works with many environmental groups to influence voting at IWC.

The anti-whaling norm formed after the establishment of IWC was threatening Japan and other pro-whaling countries for conducting their whaling programs. The IWC voted for the moratorium in 1982, then it began in 1986. However, Japan did not stop. Japan switched their commercial whaling into scientific whaling immediately one year after the moratorium. Under the Article VIII of the Convention, it states that a

particular country could possibly conduct whaling for scientific purposes.

Finally, as it was mentioned in the previous chapter, Japan has established the Institute of Cetacean Research (ICR) and ran its Japanese Whale Research Program under Special Permit in the Antarctic (JARPA). In 2005, the Japanese government doubled their quota for minke whales equal to 935, and expanded their hunt including the endangered fin whales.<sup>92</sup> From December 2005 to March 2006, Japan hunted 866 whales in the Southern Ocean and 10 of them were fin whales.<sup>93</sup> During that time, it has been reported as one of the biggest whale hunting in the history.

For decades, started since the moratorium took effect in 1986, the whaling remain conducted by the members of IWC. Even until today, the IWC has still failed in implementing its purpose to conserve the whale stocks. Thus, in this chapter, the author would analyze the reason why the IWC was failed in tackling Japan's whaling in the Antarctic Ocean. The data and information collected in the second and third chapter would be used as the main resources. Meanwhile, the theoretical framework formed in the first chapter would be used as a tool to formulate the analysis.

### **A. The IWC's Lack of Power**

The membership of IWC is genuinely voluntary, and all the institutional rules that govern decision-maker need the three-fourths approval of any regulation.<sup>94</sup> It means that supermajority vote is required to force the serious ban on whaling. However, because membership is voluntary, no enforcement mechanism is made into the IWC charter. In case, a particular country violates the regulations, enforcement is only relatively effective to what individual state would impose

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<sup>92</sup> Greenpeace, Loc. Cit.

<sup>93</sup> Greenpeace, Loc. Cit.

<sup>94</sup> Patrick M. Regan, *The Politic of Global Climate Change*, (New York: Routledge, 2016).

to the violator.<sup>95</sup> About half of the IWC's members are small island nations that lack power when they come to the individual enforcement efforts. Nonetheless, the rest of the members are more industrialized countries that could impose costs for noncompliance.<sup>96</sup>

The majority cannot enforce the rules on Japan. Sanctions do not work well, because the target is a strong ally, becoming one of the world largest economies and a major trading partner. Another attempts has been done by involving the US to give their individual sanctions to the IWC's members. The US is the creator of the moratorium. It helps IWC to implement the moratorium which took effect in 1986, by utilizing US domestic law to enforce the moratorium, thus IWC has succeeded to ban commercial whaling activities.

The US threats on economic sanction against pro-whaling countries seems working in order to enforce the members to the IWC's decision. Under the Pelly Amendment, US has issued two statutes addressing the Convention. Section 1978(a)(2) states that if any members are violating the Convention, the US may impose sanctions: "When the Secretary of Commerce determines that the nationals of a foreign country are diminishing the effectiveness of an international fishery conservation program (including the IWC's program), the Secretary shall certify this fact to the President".<sup>97</sup> The sanctions states in the Section 1978(a)(4):

Upon receipt of any certification made under paragraph (1) or (2), the President may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of any products from the offending country for

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<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

<sup>97</sup> David D. Caron, *The International Whaling Commission and the North Atlantic Marine Mammal Commission: The Institutional Risks of Coercion in Consensual Structures*, (American Society of International Law, 1995), 154-174

any duration as the President determines appropriate [as allowed by the World Trade Organization and other applicable trade law].<sup>98</sup>

Meanwhile, the Packwood-Magnuson Amendment requires denial of access for fishing in waters under U.S. fisheries jurisdiction to states whose actions diminish the effectiveness of the IWC.<sup>99</sup> The amendment enforces a sanction, and when the members are violating the IWC's decision, the Secretary of State must reduce the country's fishing allocation in U.S. waters by at least 50%.<sup>100</sup> Finally, Japan and other nations agreed to comply the IWC's moratorium about the commercial whaling.

The theory of International Regimes elaborates an obedience of each member state against international regimes in order to embody their interests. A regime is organized by a multinational agreement, which could be the main source of international law. Furthermore, the regime could create and influence a state behavior within. Regime undertakes an important function needed in international relations and as an independent actor in international politics. According to Krasner, Theory of International Regimes is defined as:

“...a set of explicit or implicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given issue-area of international relations. Principles are beliefs of fact, causation, and rectitude. Norms and standards of behavior defined in terms of rights and obligations. Rules are specific proscriptions of action.

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<sup>98</sup> Kristina Alexander, *The International Whaling Convention (IWC) and Legal Issues Related to Aboriginal Rights*, (Congressional Research Service, 2013), 1-13.

<sup>99</sup> David D. Caron, Loc. Cit.

<sup>100</sup> David D. Caron, Loc. Cit.

Decision-making procedures are prevailing practice for making and implementing collective choice.”<sup>101</sup>

Based on this case, the IWC as an international regime has set up the principles, norms, rules, and decisions regarding to the whaling issue. Nevertheless, even though it succeeded to apply the ban on commercial whaling, the whaling conducted by Japanese still continues. One year after the moratorium, Japan has shifted its position from commercial whaling into scientific research. Furthermore, Japan under its special permit is allowed to conduct the scientific research in Antarctic Ocean.

Japanese scientific program has raised international condemnation, either from the anti-whaling countries or non-state actors such as NGOs, media, and academics. Japan states that the shifting of IWC’s purpose on the ban of commercial whaling is contradictory to the purpose of ICRW which is originally providing the conservation of whale stocks for the future whaling industry. The Japanese Fisheries Agency has criticized the anti-whaling members within the IWC as follows:

It [ICRW] is not a treaty for the total protection of whales. It is a treaty whose purpose is to ensure the sustainable use of whale resources ... Those members of the IWC who are opposed to the sustainable use of whale resources and who try to impose their views on the rest of the world are subverting the purpose of the treaty and have caused the IWC to become dysfunction.<sup>102</sup>

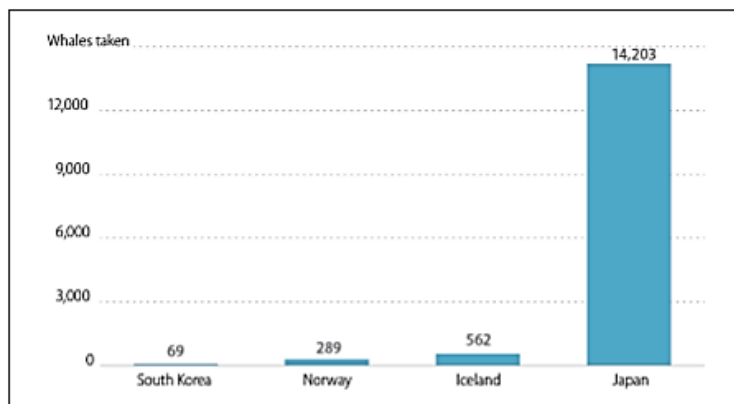
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<sup>101</sup> Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, International Organization 36/2 (Spring), Reprinted in Stephen D. Krasner, ed., *International Regimes*, Ithaca, (NY: Cornell University Press, 1983).

<sup>102</sup> Keiko Hirata, Loc. Cit.

Only four countries have used the permits since the moratorium on commercial whaling took effect in 1986. They were Japan, Iceland, Norway, and South Korea. In fact, only Japan continues to use scientific permits for their whaling activities. Since 1985, Japan has killed more than 14,000 whales under the scientific permits.<sup>103</sup> The following figure shows how massive Japanese whaling is, compared to that of other states.

*Figure 4.1. Catches of Whales Taken Under Scientific Permit (1986-2011)*



Source: Kristina Alexander, *The International Whaling Convention (IWC) and Legal Issues Related to Aboriginal Rights*, (Congressional Research Service, 2013), 1-13.

The authority of IWC as an international regime is weak, even after US has taken its part supporting IWC by its individual pressure to the member states, the Convention has no power in bounding all the member states because the Commission is voluntary. The difficulty of IWC in regulating the whaling industry is attributed to the immunity granted to each member by using the objection (opt-out) clause when a

<sup>103</sup> Kristina Alexander, Loc. Cit.



particular state disagrees. As well as its inability to impose sanction towards noncomplying nations, it would make any contracting state possible to avoid the provisions by voicing an objection. It was proven when Norway filed an objection at the time the moratorium was proposed and so was not bound by it.<sup>104</sup> The other fact was when Iceland quit the IWC after the ban took into place, but it returned as a member in 2002, filling a reservation to comply with the ban.<sup>105</sup>

### **B. Japan's Loophole of the Moratorium**

Japan has aggressively lobbied the IWC to continue its scientific whaling. One year after the IWC's moratorium, Japan's Institute of Cetacean Research was established in 1987. However, many environmental groups thought it looked like a loophole for Japan to continue the commercial whaling under the scientific research. Then, based on the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA I) commenced in the 1987-1988 and (JARPA II) commenced in the 2005-2006, they started to continue whaling for hundreds of whales each year. Basically, JARPA II did not have the duration of research. In 2005, Japan has the biggest number of whaling in the Antarctic when the JARPA II has just started.<sup>106</sup>

The issue of Japanese whaling still continues, caused by the statement in the Convention. The moratorium states that any kind of commercial whaling is prohibited, nevertheless, the scientific research whaling is allowed based on the Article VIII. Since the imposition of the ban on commercial whaling, many parties, most prominently, Japan, have continued whaling under scientific research provision. The Article VIII of the ICRW states that:

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<sup>104</sup> Kristina Alexander, Loc. Cit.

<sup>105</sup> Kristina Alexander, Loc. Cit.

<sup>106</sup> Whale and Dolphin Conservation, *Whaling in Japan*. Retrieved from <http://us.whales.org> on January 31, 2017.

1. Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, to take and to treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted.
2. Any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted.
3. Each Contracting Government shall transmit to such body as may be designated by the Commission, in so far as practicable, and at intervals of not more than one year, scientific information available to that Government with respect to whales and whaling, including the results of research conducted pursuant to paragraph 1 of this Article and to Article IV.
4. Recognizing that continuous collection and analysis of biological data in connection with the operations of factory ships and land stations are indispensable to sound and constructive management of the whale fisheries, the Contracting Governments will take all practicable measures to obtain such data.<sup>107</sup>

The Article VIII gave an opportunity for Japan to take part in the Scientific Committee to help the proper conservation of whales by shifting its position from commercial whaling to

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<sup>107</sup> International Convention for the Regulation of Whaling, Loc. Cit.

scientific research. Japan's whale research program has two main components. They are lethal and non-lethal. The lethal component aims at providing the biological data by capturing and by taking the whales. Meanwhile, the non-lethal component includes sighting surveys in order to collect scientific data for abundance estimation. In obtaining the scientific data, capturing whales is necessary such as resource age composition and breeding stocks. The constant accumulation of biological data would provide high accuracy of forecast of the resource fluctuations, and thus lead to the sustainable utilization of whale resources.

For decades, the implementation of Japanese Scientific Research in the Antarctic Ocean has been triggering the international attention. Australia brought up the issue of Japan's whaling in the Antarctic to the International Court of Justice. Thus, the Remedies section of the ICJ's ruling letter states that "Japan should revoke any extant authorization, permit or licence to kill, to take or to treat whales in relation to JARPA II, and refrain from granting any further permits under Article VIII, paragraph 1, of the Convention, in pursuance of that programme."<sup>108</sup>

Japanese special permit or JARPA II, founded by the ICJ was not in accordance with the three provisions in the Schedule of ICRW paragraph 7 (b), 10 (d), and 10 (e). First, in paragraph 7 (b), the ICRW has assigned to prohibit any whaling activity in the Southern Hemisphere. Meanwhile, Japan did a commercial whaling, taking from the Southern Ocean Sanctuary in each season during fin whales have been taken. Secondly, paragraph 10 (e) states about the moratorium of factory ships to refrain any kind of whaling to certain species such as sperm whales, killer whales, and baleen whales, except minke whales. JARPA II violated the factory ship moratorium in each season during when fin whales

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<sup>108</sup> International Court of Justice, *Judgments, Advisory opinions and Orders by chronological order*. Retrieved from <http://www.icj-cij.org> on January 31, 2017.

(categorized as baleen whales or whalebone in the mouth) were killed and taken advantage of. The last according to the paragraph 10 (d) the catch limits for the commercial whaling should be zero for any kind of whale stocks. Whereas, Japan did commercial whaling. JARPA II has sold the meat of the whales to their national market during its scientific research.<sup>109</sup> Furthermore, the court's chair Peter Tomka also added that the results of scientific research (JARPA II) were not much.<sup>110</sup>

In the first chapter, the author has mentioned the roles and functions of International Organization stated by Harold K. Jacobson. In the rulemaking section, he states that:

“It relates to the role of an international organization to create a new rule or regulation, an agreement that has been agreed, signed as well as ratified that could bind the parties whom directly involved.”<sup>111</sup>

Based on the functions of rulemaking, the IWC has made a set of regulations formed in the ICRW and has imposed to the whole member states. However, as a voluntary regime, the regulations are not completely binding the members. The members might voice an objection which would not bind the contracting country involved. A particular country could easily join and quit the IWC as well. Moreover, the IWC has no power to enforce its regulation and to impose sanctions on the violator state. On the other hand, the US has provided its

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<sup>109</sup> International Court of Justice, *The Court finds that Japan's whaling programme in the Antarctic (JARPA II) is not in accordance with three provisions of the Schedule to the International Convention for the Regulation of Whaling*, (The Hague: Press Release, 2014), 3-4.

<sup>110</sup> Deutsche Welle, *Mahkamah Internasional Larang Jepang Berburu Ikan Paus*. Retrieved from <http://www.dw.com/id/mahkamah-internasional-larang-jepang-berburu-ikan-paus/a-17532310> on January 31, 2017.

<sup>111</sup> Harold K. Jacobson, *Networks of Interdependence: International Organization and The Global Political System*, (New York: Alfred A. Knopf, Inc, 1979), 88-90.

domestic law to enforce the compliance of the members, but the effect is limited. The permission of scientific research in the Article VIII is becoming a loophole for Japan to continue its commercial whaling.

Because of the decision within, the IWC needs the members vote. Japan is also known for using Fisheries Aid to buy IWC votes. In the 1994, when the IWC meeting was held in Mexico, Japan was the only country to vote against Southern Ocean Sanctuary. Meanwhile, twelve years later, a proposal to remove the Southern Ocean Sanctuary obtained from 28 votes. In 1998, Liberal Democratic Party represented by Hiroaki Kameda visited several Caribbean nations, in which some of them have been identified as targets for the IWC membership and the rest have already voted for Japan. After his returned, he held a press conference and revealed “a plan for Japan to use its official development assistance (ODA) program as a measure to promote fisheries, for example, increasing the number of countries that favor whaling.”<sup>112</sup>

### **C. The IWC's Supervision**

As mentioned by Harold K. Jacobson, the function of supervision is related to take action or to ensure the enforcement of a regulation by the international actors.<sup>113</sup> The IWC has set some rules in order to ensure the compliance of the Convention. Firstly, the insufficient coverage with national inspectors becomes the factor of the overexploitation of whales. Inspectors have an important role to prevent or to reduce illegal catches. The necessity of Inspectors is stated in Paragraph 21 of the Schedule and in the Revised Management Scheme (RMS) draft text, which obliges Parties to ensure

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<sup>112</sup> International Fund for Animal Welfare, *The Economic of Japanese Whaling*, (Massachusetts: International Fund for Animal Welfare, Inc, 2013), 14.

<sup>113</sup> Harold K. Jacobson, *Loc. Cit.*

“appropriate inspection on each whaling vessel and at each point of landing/primary processing site.”<sup>114</sup>

Secondly, it is about hampering the inspectors and observers.<sup>115</sup> The history of whaling operations advocates the need to protect inspectors and observers from any obstruction. Whalers have been enormously creative in inhibiting independent controllers, e.g. by keeping them away from the landing stations, from the hunt itself or from the documentation procedure afterward.<sup>116</sup> Accordingly, any such attempt to prevent inspectors or observers from properly conducting their job, as well as the failure of the Party itself to ensure inspection or observation must be treated as an infraction.<sup>117</sup>

Moreover, the IWC’s limited authority to collect reliable scientific data also become another obstruction. The IWC has no ability to monitor its regulations against countries which violated the quotas also weakened its effectiveness. All of these factors have made Japan easily continue its commercial whaling while the infractions are undiscovered. The issue seems to be untouched, even though the IWC has held a meeting in every two years. For decades, it was counted since the special permit of Japan has started in Antarctic Ocean. Finally, Australia was reported the Japan’s violation towards the ICRW, and then, it brought the issue to ICJ. Surprisingly, the whaling conducted by Japan is still continued by the New Scientific Whale Research Program in the Antarctic Ocean (NEWREP-A) started since the austral season in 2015/16.<sup>118</sup>

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<sup>114</sup> Sandra Altherr, *NON-COMPLIANCE WITHIN THE IWC: Requirements for an Effective IWC Compliance Review Committee*, (Germany: PRO WILDLIFE, Switzerland: OCEAN CARE, 2006), 1-23.

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid.

<sup>118</sup> The Institute of Cetacean Research, Loc. Cit.