Title

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Journal

Journal of International Wildlife Law & Policy, 18(1)

ISSN

1388-0292

Author

Wandesforde-Smith, Geoffrey

Publication Date

2015-01-02

DOI

10.1080/13880292.2015.1010913

Peer reviewed

Journal of International Wildlife Law & Policy, 18:xxx-xxx, 2015 (forthcoming)

ISSN: 1388-0292 print/1548-1476 online

PERSPECTIVE

On the Life and Death of Wildlife Treaties

GEOFFREY WANDESFORDE-SMITH*

The great conundrum at the heart of the 1946 whaling regime[1] story has always been how an international agreement originally framed to save the whaling industry became the international instrument of choice for saving the whales, or at least for framing what is turning out to be an almost indefinite moratorium on the taking of most whales. It is, on the surface, an extraordinary *volte-face*, so extraordinary that the behavior of the states involved is deeply puzzling and the longevity of the regime – going on seventy years now – hard to understand.

So, how *is* it to be understood?

In one of the most interesting but provocative pieces ever written about this problem a leading scholar dismisses the history of the 1946 whaling regime as "not very important."[2] It is a story, he writes, of interest only to "a small and shrinking audience,"[3] and it has almost nothing of significance to teach us about the power of law to solve substantial international conservation

The author thanks Rachelle Adam, Eirik Bjorge, Kurk Dorsey, Sidney Holt, Marc Mangel, Geoffrey Palmer, Don Rothwell, Jeffrey Smith, and Nicholas Watts for comments on an earlier version.
* Emeritus Professor of Political Science, University of California, Davis, CA 95616, USA. Email: gawsmith@ucdavis.edu

[1] The key institutions of the regime are the International Convention for the Regulation of Whaling (ICRW) [161 U.N.T.S, 72, signed 2 December 1946 and entered into force 10 November 1948], the International Whaling Commission (IWC), established by Article III of the Convention, and the Schedule, an attached, integral part of the Convention, establishing the regulations and obligations contracting parties agree to respect. It takes a three-fourths vote of the IWC to amend the Schedule. The best, very short introduction to the history of the whaling regime and the major controversies that have swirled around it is DALE D. GOBLE & ERIC T. FREYFOGLE, WILDLIFE LAW: CASES AND MATERIALS (2d ed. 2010), at 606-626 and the references cited therein. Close analyses of the dynamics of the whaling regime rest on painstaking analysis of the proceedings of the IWC and the documentation prepared in advance of its meetings. The methodology was pioneered by PATRICIA W. BIRNIE, INTERNATIONAL REGULATION OF WHALING: FROM CONSERVATION OF WHALING TO CONSERVATION OF WHALES AND REGULATION OF WHALE-WATCHING, 2 vols. (1985). The documentation is now accessible through the IWC website: http://www.iwc.int (accessed 30 December 2014). The notion that the ICRW is a "wildlife treaty" does not enjoy universal acceptance or approval, but it is the position taken here, based on the presumption that the ICRW has evolved from what it was in 1946. *See infra*, text accompanying notes 42-53.

[2] David G. Victor, *Whale Sausage: Why the Whaling Regime Does Not Need to Be Fixed*, in TOWARD A SUSTAINABLE WHALING REGIME 292-310 at 308 (Robert L. Friedheim ed. 2001).

[3] *Id*. at 307.

problems. The whaling regime rests on "faulty premises"[4] and has sustained itself for as long as it has only through a tacit understanding among all concerned that "law should be side-stepped."[5]

The situation would be entirely absurd were it not for the fact that the regime has a certain morbid efficiency; no-one is quite ready to jettison the existing whaling regime in favor of something radically different or no regime at all.[6] The clear implication, however, is that if the life of the whaling regime cannot be made more meaningful it ought to be allowed to die. And serious students of effective international wildlife law and policy should direct their attention somewhere else.

1. NEW LIFE FOR AN OLD WATCHDOG: THE WHALING REGIME

In fact, neither the eighty-nine sovereign states parties to the whaling convention[7] nor the intensely interested band of activists and scholars[8] who follow the ins and outs of the International Whaling Commission's always tempestuous meetings[9] can tear themselves away from the still unfolding story. Far from lapsing into a well-deserved obscurity as a freak and inconsequential regime that no self-respecting observer of international wildlife law would waste time analyzing, the whaling regime has in recent years become more fascinating than ever.

Most notably and most recently the International Court of Justice published its decision in *Whaling in the Antarctic (Australia v. Japan; New Zealand intervening)*.[10] And this was preceded by the publication of no less than three books, all of which find, albeit for somewhat

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[4] *Id*. at 308. The faulty premises of the regime are also explored in a second, well-remembered essay at the end of the volume: Christopher D. Stone, *Summing Up: Whaling and Its Critics*, in *id*. at 269-291.

[5] Victor (2001), *supra* note 2, at 308.

[6] Victor argues in somewhat fanciful language that the regime may be "Pareto optimal." *Id*. at 293-294. The blunter and more widespread assessment is that "the IWC is broken and needs to be fixed" [GEOFFREY PALMER, REFORM: A MEMOIR (2013), at 661], although views differ greatly about whether and how this might be done.

[7] For a list, *see* http://www.iwc.int/members (accessed 30 December 2014).

[8] The parameters of the various constituencies with a sustained interest in the work of the IWC are still usefully captured in PETER J. STOETT, THE INTERNATIONAL POLITICS OF WHALING 61-102 (1997).

[9] "The IWC has two major meeting forums, the Commission Meeting and the Scientific Committee Meeting. The Scientific Committee Meeting is attended by up to 200 scientists, and the Commission Meeting is attended by around 400 people including government delegates, observers from non-member governments, other inter-governmental organisations, non-government organisations (NGOs) and representatives of the media. In 2012, the Commission agreed to move from annual to biennial Commission Meetings. The Scientific Committee continues to meet annually." *See* http://iwc.int/meetingsmain (accessed 30 December 2014).

[10] The judgment of the Court in *Whaling in the Antarctic (Australia v. Japan; New Zealand intervening)* (31 March 2014) is recorded at http://www.icj-cij.org/docket/files/148/18136.pdf. The full Court documentation of the case, including oral and written proceedings and dissents to the majority judgment, is accessible from http://www.icj-cij.org/docket/index.php?p1=3&p2=2&case=148&p3=0 (accessed 30 December 2014). Initial published commentary on the decision appears in Geoffrey Palmer, *A Victory for Whales*, [2014] N.Z.L.J. 124-126 (May 2014); Sonia E. Rolland, *International Decision: Whaling in the Antarctic (Australia v. Japan; New Zealand intervening)*, 108 AM. J. INT'L L. 496-502 (2014); Jeffrey J. Smith, *Evolving to Conservation? The International Court's Decision in the* Australia/Japan Whaling Case, 45 OCEAN DEV. & INT'L L. 301-327 (2014); Anastasia Telesetsky, Donald K. Anton & Timo Koivurova, *ICJ's Decision in* Australia v. Japan: *Giving Up the Spear or Refining the Scientific Design?* 45 OCEAN DEV. & INT'L L. 328-340 (2014). At the end of May 2014, the Centre for International Law at Kobe University in Japan held a symposium on the Court's judgment, and has since tracked both published and unpublished commentary on the judgment, including blog posts. See http://www.edu.kobe-u.ac.jp/ilaw/en/whaling_ICJ_decision_comments.html (accessed 30 December 2014). The Kobe website also archives papers given at the symposium, among them an account of the legal background to and history of the litigation by a principal Australian strategist, Donald R. Rothwell, The Whaling Case: Australian Perspectives, http://www.edu.kobe-u.ac.jp/ilaw/en/whaling_docs/paper_Rothwell.pdf (accessed 30 December 2014).

different reasons in each case, that the history of the whaling regime illuminates vital aspects not only of the origins of international wildlife law but also of its future.[11]

Any number of explanatory factors has been suggested and continues to be debated to explain the history of the whaling regime, ranging from political capture[12] to legal evolution[13] to bureaucratic entrepreneurship[14] within the regime's key institution, the International Whaling Commission (IWC). But no matter how ingeniously scholars have woven together these various explanatory factors they have always come to the conclusion that as a matter of international law the whaling regime is highly unsatisfactory.[15] And, furthermore, it will never amount to much unless it makes its mind up what it wants to be or, more precisely, until the contracting parties decide what they want it to be.[16]

On the one hand, it can be the agent of a complete and total cessation of the taking of whales.[17] On the other hand, it can be an instrument for resuming whaling and rehabilitating the whaling industry, albeit it on a demonstrably sustainable basis and on a very much smaller scale

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[11] D. GRAHAM BURNETT, THE SOUNDING OF THE WHALE: SCIENCE & CETACEANS IN THE TWENTIETH CENTURY (2012); KURKPATRICK DORSEY, WHALES & NATIONS: ENVIRONMENTAL DIPLOMACY ON THE HIGH SEAS (2013); ED COUZENS, WHALES & ELEPHANTS IN INTERNATIONAL CONSERVATION LAW & POLICY: A COMPARATIVE STUDY (2014). It is Couzens who refers to the ICRW as an "old watchdog" of international wildlife law. *See also* ALEXANDER GILLESPIE, WHALING DIPLOMACY: DEFINING ISSUES IN INTERNATIONAL ENVIRONMENTAL LAW (2005).

[12] The political explanation is the one most illuminated by DORSEY (2013), *supra* note 11. The political dynamics around adoption and extension of the moratorium are described in *id*., at 247-277; Elizabeth DeSombre, *Distorting Global Governance: Membership, Voting, and the IWC*, in TOWARD A SUSTAINABLE WHALING REGIME 183-199 (Robert L. Friedheim ed. 2001); Patricia W. Birnie, *The Role of Developing Countries in Nudging the International Whaling Commission from Regulating Whaling to Encouraging Nonconsumptive Uses of Whales*, 12 ECOLOGY L. Q. 937-975 (1985).

[13] The question of whether and how treaty law evolves is deeply controversial. *See* EIRIK BJORGE, THE EVOLUTIONARY INTERPRETATION OF TREATIES (2014). The view that the ICRW has evolved, and that it would be a good thing if it further evolved, in conjunction with other international wildlife and biodiversity conservation treaties, is treated in both GILLESPIE (2005), *supra* note 11, and COUZENS (2014), *supra* note 11.

[14] The essence of the history of the IWC, according to BURNETT (2012), *supra* note 11, is that it demonstrates the impacts entrepreneurial scientists can have on the welfare of wildlife populations when they act as "savvy political animals" (p.6) within the bureaucratic interstices of an institution such as the IWC.

[15] *See* William T. Burke, *A New Whaling Agreement and International Law*, in TOWARD A SUSTAINABLE WHALING REGIME 51-79 (Robert L. Friedheim ed. 2001); Jon L. Jacobson, *Whales, the IWC, and the Rule of Law*, in *id*. at 80-104.

[16] The whole point of TOWARD A SUSTAINABLE WHALING REGIME (Robert L. Friedheim ed. 2001) was that the IWC could and should return to its 1946 roots and map out a program to revive the whaling industry on a sustainable basis. COUZENS (2014), *supra* note 11, at 224-227, takes the view that the polarization between the whaling and anti-whaling blocs is now so extreme that the only viable way forward is to move to higher ground in international law, and to ask whether the ICRW and other wildlife treaties, and the states party to them, can be brought together under the umbrella vision of the 1992 Convention on Biological Diversity (CBD) [31 I.L.M. 818 (1982)]. This assumes, of course, that there is a compelling vision underlying the CBD and that a large number of diverse states in and out of the IWC find it attractive. The United States is not a CBD signatory.

[17] Victor (2001), *supra* note 2, at 307, says the more time goes by the more apparent it becomes that the "whaling problem" is being solved by changing public perceptions and tastes about whales, not through the imposition of international legal rules. The logical outcome of this trajectory would be a complete cessation of whaling, eventually. It is unlikely, however, that opponents of whaling will wait for nature to take its course. Options for acting against Japan, if it does resume Antarctic whaling, are already being mapped. *See* Tim Stephens, After the Storm: The Whaling in the Antarctic Case and the Australian Whale Sanctuary, Legal Studies Research Paper 14/102 (Law School, University of Sydney, Australia, November 2014), available to SSRN subscribers at http://ssrn.com/abstract=2528330.

than ever before.[18] But it cannot, in the eyes of its critics, keep straddling the available options without creating for itself a permanent crisis of legitimacy and substantial risk of ridicule.

The dynamics of the whaling regime have repeatedly shown, however, a deep reluctance on the part of the contracting states to move decisively in one of these directions rather than the other. This indecision might be warranted on several grounds. In terms of the science involved, for example, there is a lot more to be known, even today, about whales and whaling than we know already, and until we know more decisiveness is arguably premature.[19] One can also take the view that indecision is the price of defending the most sacred principle of international law, namely the principle of sovereignty. Indecision keeps disgruntled contracting states from simply walking away from the ICRW, and then taking whales, which it is their sovereign right to do and which Norway and Iceland have already done.[20] And it may also be that the continuing impasse on the regulation of whaling at the IWC simply reflects the fact that the peoples of the world have not yet finally made up their minds what they want to think about whales and, therefore, what they want to do with them.

Perhaps it would be possible to cut through these Gordian knots by consulting the whales themselves and asking them what future they prefer. For most observers, however and perhaps regrettably, that option seems fanciful.[21] And so, short of an intervention *deus ex machina* to tip the balance one way or the other, or of giving up altogether, the interested parties continue to muddle through along a path to which some few of them committed themselves in 1946 and which they, now along with many others, are apparently not yet ready to abandon.

In the meantime, of course, a regime that has become deeply unsatisfactory as a poster child of all that international law can accomplish for wildlife has positively affected whales.[22]

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[18] Palmer (2014), *supra* note 10, takes the view that the ICJ judgment in *Whaling in the Antarctic* amounts to a "comprehensive forensic defeat" for Japan (p. 125). Japan has clearly signaled, however, that it intends to resume whaling in the Southern oceans and has already submitted a new "scientific" program for it to the IWC. *See* http://iwc.int/private/downloads/7bqy9b9maskkk0gc0scccoo40/NEWREP_A.pdf. This NEWREP-A program at a minimum reflects the political determination of the recently re-elected conservative government in Japan to sustain a cultural affinity with whaling on the high seas. Japan will not be allowed to proceed, however, with a new "scientific whaling" exception to the moratorium on commercial whaling without first having the Scientific Committee of the IWC evaluate the scientific merits of the NEWREP-A proposal and issue its opinion. Thus, on top of the embarrassment and loss of face Japan has already suffered by having its most recent and much vaunted JARPA II "scientific whaling" program declared invalid by the ICJ, Japan will face new pressure to leave the IWC, if it still wants to take large numbers of whales for scientific purposes. Why hasn't Japan left already? A recent re-statement of the view, often rehearsed in the literature, that Japan's real interest is in fish, not whales, appears in Peter Wynn Kirby, *The Big Lie Behind Japanese Whaling*, N.Y. Times, Oct. 13, 2014 at http://www.nytimes.com/2014/10/14/opinion/the-big-lie-behind-japanese-whaling.html (accessed 30 December 2014).

[19] On the other hand, one can argue that framing legal and policy arguments about whaling in scientific terms is a charade. *See* Holly Doremus, *Why International Catch Shares Won't Save Ocean Biodiversity*, 2 MICH. J. INT'L & ADMIN. L. 385-428, at 416.

[20] The comings and goings of states party to the ICRW are carefully traced and indexed by DORSEY, *supra* note 11. Iceland withdrew and then rejoined but filed an objection to the moratorium.

[21] That it ought not to be fanciful is a thought brilliantly teased from a recent symposium on *ferae naturae* and the law of property in Christopher Tomlins, *Animals Accurs'd*: Ferae Naturae *and the Law of Property in Nineteenth Century North America*, 63 U. TORONTO L. J. 35-52 (2013).

[22] Data on the status of whales and population estimates are available on the IWC website. *See* http://www.iwc.int/status and http://www.iwc.int/estimate (accessed 30 December 2014). On the question of whether the moratorium has had a positive impact, controlling for other factors, in the case of the eastern North Pacific blue whales, see Cole C. Monnahan, Trevor A. Branch & André E. Punt, *Do Ship Strikes Threaten the Recovery of Endangered Eastern North Pacific Blue Whales?* 31 MARINE MAMMAL SCI. 279-297 (2014).

For the most part, their situation now, while far from perfect, is vastly improved, compared to what it was as recently as 1970. Some species affected by the depredations of the whaling industry are recovering more slowly than others. Some still face other acute threats in particular parts of the world. And all remain vulnerable to chronic changes in the marine environment, notably from marine pollution and climate change.

But overall, despite all the criticism levelled at it, the whaling regime stacks up pretty favorably in comparison to other international wildlife regimes in its ability to produce positive impacts for the species it seeks to affect. In the beginning the ICRW was not a wildlife treaty, but it has become one.

The fact that the whaling regime, warts and all, has worked and continues to work for whales raises some interesting and difficult questions about the way we think about treaty law and its relationship to wildlife conservation outcomes. They are questions that will be with us for some time to come.

What, for example, is the relationship between the wildlife conservation outcomes a treaty regime accomplishes and the legal form and function of the treaty itself? Is it a necessary and sufficient condition of producing favorable outcomes for wildlife that a treaty, when agreed to, have clear and specific conservation objectives, which do not change over time? Or can treaties and the regimes they bring into existence go through a process of evolution, as has arguably occurred in the case of the whaling regime, so that outcomes once thought unachievable or uninteresting become not only possible but of prime concern?

Is every treaty *sui generis*? Or can treaties be grouped into families based not only on what is in the language and structure of the treaty instrument but also on historical origins, operating procedures, and the motives of the people and organizations that advocated treaty drafting, negotiation and adoption? How do we know which treaties are, if you will, apples and which are oranges, so that the comparative analysis of treaties avoids mistaking apples for oranges?

And what happens to treaties when they die, or more precisely when the assumptions on which they rest become obsolete? If the whaling regime, for example, is premised on the desirability and feasibility of sustaining for the long-term a commercial whaling business that, except for a few, small, and nationally subsidized or culturally relict non-commercial operations has all but ceased to exist, is it time to recast the frame within which the conservation of whales is seen as a challenging and worthwhile international problem?

Do wildlife treaties ever die? Or do they just fade away eventually, MacArthur-like,[23] as new ways of framing international conservation challenges and ways to meet them yield new agreements, which accrete atop the old ones to form a sort of sedimentary geology of regimes?

The importance and value of raising questions such as these[24] is underlined not only by recent developments affecting the whaling regime but also by the appearance of what is arguably

[23] In his farewell address to Congress in April 1951, General Douglas MacArthur recalled the words of a barrack ballad popular when he joined the Army fifty-two years earlier to the effect that old soldiers never die, they just fade away.

[24] The comparative analysis of treaty regimes on a much more anodyne basis, avoiding any difficult (but interesting) questions about history, politics, and international ambitions appears in the draft options paper produced by experts convened to inform a UNEP project on the "synergies" between the six major biodiversity-related conventions, and released for public review and comment on 15 December 2014, at http://www.cbd.int/doc/notifications/2014/ntf-2014-138-attachment-02-en.docx (accessed 30 December 2014).

the most direct and damning indictment of international wildlife law to surface since Simon Lyster first began to give distinct identity to the subject in 1985.[25]

2. CASTING OFF THE SHACKLES OF THE PAST: THE "ELEPHANT TREATIES"

Comes now Rachelle Adam[26] to argue that the biodiversity conservation treaties currently and widely regarded as the crown jewels of international wildlife law are seriously deficient. Far from making things better for wildlife, they are making things decidedly worse, most especially in the case of the charismatic elephant, where the inability of international treaties to save the species is both chronic and notorious.[27]

Indeed, despite the elephant treaties, which is how Adam refers collectively to this accreted body of international law, precisely because of the charismatic significance of elephants for the international nature conservation movement and the place the elephant occupies in the history of that movement, scientists foresee the imminent demise of elephants,[28] unless there is a radical re-framing of the impending extinction problem as a matter of both international law[29] and national policy and practice.[30] The elephant treaties are irremediably poisoned by their colonial legacy. Adam describes and analyzes this in great detail. It is a legacy which makes the elephant treaties, in her view, unfit for purpose.

In Adam's book there is no reference whatsoever to the whaling regime. The defensible explanation for this is that her analysis focuses on the link between colonialism and biodiversity agreements, because that link is, in her view, the source of many of the drawbacks of those agreements. As Adam sees it, the whaling regime comes from a "totally different background"

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[25] SIMON LYSTER, INTERNATIONAL WILDLIFE LAW: AN ANALYSIS OF INTERNATIONAL TREATIES CONCERNED WITH THE CONSERVATION OF WILDLIFE (1985).

[26] RACHELLE ADAM, ELEPHANT TREATIES: THE COLONIAL LEGACY OF THE BIODIVERSITY CONSERVATION CRISIS (2014).

[27] Adam traces the history of the elephant treaties to British concerns in the late 1890s about "excessive destruction" of big game animals and the impetus this gave to the 1900 Convention for the Preservation of Wild Animals, Birds and Fish in Africa (the London Convention). *Id*. at 19, quoting Lord Salisbury, the British Prime Minister and Foreign Secretary at the time. The real driver for Britain and other colonial powers in eastern and southern Africa was, however, the ivory trade, a "chief source of revenues for colonial governments, [and] the foundation of colonial trade" that was declining at the end of the nineteenth century. *Id*. at 20. The failure of international law to protect the elephant – it is dismissed by Adam as at best "irrelevant," *id*. at 81 – has been notorious at least since Michael Glennon, *Has International Law Failed the Elephant*? 84 AM . J. INT'L L. 1-43 (1990). See also ENDANGERED SPECIES, THREATENED CONVENTION: THE PAST, PRESENT & FUTURE OF CITES (Jon Hutton & Barnabas Dickson eds., 2000).

[28] ADAM (2014), *supra* note 26, at 81.

[29] Rachelle Adam, Delegitimizing Ivory: The Case for An Ivory Trade Ban Treaty, AJIL Unbound (Dec. 3, 2014), online at http://www.asil.org/blogs/delegitimizing-ivory-case-ivory-trade-ban-treaty (accessed 30 December 2014). This blog post is part of a set of three developed by the Elephant Law Forum of the American Society of International Law's International Environmental Law Interest Group. The notion that legal ideas about how to protect elephants have been and will be re-framed from time to time is developed in André Nollkaemper, Aligning Frames for Elephant Extinction: Towards a New Role for the United Nations, AJIL Unbound (Dec. 1, 2014), online at http://www.asil.org/blogs/aligning-frames-elephant-extinction-towards-new-role-united-nations (accessed 30 December 2014). *See* also Anne Peters, Elephant Poaching and Ivory Trafficking as a Threat to the Peace, AJIL Unbound (Dec. 2. 2014), online at http://www.asil.org/blogs/elephant-poaching-and-ivory-trafficking-threat-peace (accessed 30 December 2014).

[30] Ideas about needed improvements in national policy and practice to save elephants from extinction are summarized in ADAM (2014), *supra* note 26, at 128-135.

and for that reason cannot be considered a biodiversity agreement, even though it has done so much for the whales.[31] The whaling convention and the elephant treaties are apples and oranges.

This stands in marked contrast to the approach taken to comparative treaty analysis by Ed Couzens, for whom the parallels between the old watchdog whaling treaty and what is for him another old watchdog, CITES,[32] one of the crown jewels of late twentieth century biodiversity conservation, are both strong and compelling. That is why they are at the core of his analysis. They are both, he says, "representative of a problematic tradition of managing particular wild species on their own, as if [they] were somehow isolated from their ecosystems, and [both] suffer from the problem that their states parties currently lack the common vision necessary for the treaties to succeed."[33] In his view, they are both apples.[34]

So, the way forward for all wildlife and especially the elephants of Africa, according to Adam, is to cast off the shackles of the past, which would mean *inter alia* abandoning the "obsolete" Convention on Biological Diversity (CBD),[35] and then replacing that and all the other elephant treaties with more narrowly framed agreements. The most effective scale at which to conserve wildlife in the international system as it currently exists, according to Adam, is that of the sovereign state and more particularly its subnational communities,[36] but the elephant treaties are not anchored in workable assumptions *about how states work*. Indeed, the treaties presuppose that the sovereign states of Africa do not and will not work, not to conserve wildlife at least,[37] and need to be circumvented through international arrangements of some sort, but not the CBD.

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[31] Personal Communication, Rachelle Adam to Geoffrey Wandesforde-Smith, 17 December 2014. On file with the author. Adam does not entertain the possibility that the ICRW may have evolved into a wildlife treaty. There may be other backgrounds at work here, too, and a greater affinity between the whaling regime's concern to establish a *sustainable* basis for the commercial whaling industry and the CBD's concern to establish a *sustainable* basis for the use of natural resources in developing countries to support their economic development. *See* Harry N. Scheiber & Chris Carr, *The Limited Entry Concept and the Pre-History of the ITQ Movement in Fisheries Management*, in SOCIAL IMPLICATIONS OF QUOTA SYSTEM FISHERIES 235-260 (Gisli Palsson & Gudrun Petursdottir eds., 1997); Harry N. Scheiber, *Historical Memory, Cultural Claims and Environmental Ethics in the Jurisprudence of Whaling Regulation*, 38 OCEAN & COASTAL MGMT. 35 (1998); CARMEL FINLEY, ALL THE FISH IN THE SEA: MAXIMUM SUSTAINABLE YIELD & THE FAILURE OF FISHERIES MANAGEMENT (2011). Adam is not impressed, however, by the likelihood that "sustainable development" as embodied in the elephant treaties can be the basis for effective wildlife law. ADAM (2014), *supra* note 26, at 125.

[32] Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 27 U.S.T. 1087, 993 U.N.T.S. 243, signed 3 March 1973, entered into force 1 July 1975, amended 22 June 1979.

[33] COUZENS (2014), *supra* note 11, at 1-2.

[34] The argument for this is set out in *id*. at 1-10.

[35] ADAM (2014), *supra* note 26, at 11.

[36] The "dilemma of scales," choosing the scale at which biodiversity conservation can most effectively be pursued, is discussed in *id*. at 2-4. The great complicating factor, here, is the principle of Permanent Sovereignty over Natural Resources (PSNR), now enshrined as an international principle of customary law. *Id*. at 94-97. COUZENS, *supra* note 11, at 176-186, devotes a chapter to sovereignty over natural resources but differs from Adam in thinking that it is, can be, and should be a more malleable principle than Adam allows. Working around the limitations of sovereignty by putting major emphasis on community-based natural resource management, while it seems to be attractive to Adam, ADAM (2014), *supra* note 26, at 131-135, has substantial limitations. *See* CLARK C. GIBSON, POLITICIANS & POACHERS: THE POLITICAL ECONOMY OF WILDLIFE IN AFRICA (1999); ROSALEEN DUFFY, KILLING FOR CONSERVATION: THE POLITICS OF WILDLIFE IN ZIMBABWE (2000); Arielle Levine & Geoffrey Wandesforde-Smith, *Wildlife, Markets, States, and Communities in Africa: Looking Beyond the Invisible Hand*, 7 J. INT'L WILDLIFE L. & POL'Y 135-142 (2004); DAN BROCKINGTON, ROSALEEN DUFFY & JIM IGOE, NATURE UNBOUND: CONSERVATION, CAPITALISM & THE FUTURE OF PROTECTED AREAS, ch. 5; ROSALEEN DUFFY, NATURE CRIME: HOW WE'RE GETTING CONSERVATION WRONG (2010).

[37] This perception is a major theme in *Decolonialization*, ch. 3, in ADAM (2014), *supra* note 26, at 58-97.

For Couzens, on the other hand, the essential problem of international wildlife conservation is that we have little to work with except old watchdog treaties, like the ICRW and CITES, and they won't get the job done because they are burdened with outdated and unworkable assumptions *about how nature works*. For Couzens, the CBD offers much better possibilities inasmuch as he thinks it would "move us closer to the goal of overall protection" [of habitats and ecosystems rather than of particular species].[38] Indeed, it may offer the only possibilities because, as Adam adroitly notes,[39] the days when the international community evinced an interest in global biodiversity agreements with nearly as many signatories as there are members of the United Nations are gone.

The great value, then, of treating the international community's experience with whales and elephants as comparable, as apples if you will, is that it shows how all states have legitimate interests in wildlife conservation "in an increasingly globalized world," above and beyond the "obvious interests" stemming from the presence of wildlife within their own boundaries.[40] "Ultimately," Couzens concludes, "this may prove to have been the true value of the leviathan battles fought over [whales and elephants]."[41]

The difference in views here of the life and death of wildlife treaties seems to me to be quite remarkable.

3. EVOLUTION ONLY BY CONSENSUS AND UNANIMITY?

The difference appears to hinge on a question of evolution (which is perhaps not inappropriate in relation to the life and death of treaties that aim to conserve wildlife and nature). Can there be departures from the original terms of an international agreement and if so under what circumstances? Must the subsequent practice that effectively amends the initial treaty have, for example, the unanimous or near unanimous support of contracting parties? Or is it the case that, once states decide how they want, in Nollkaemper's word, to "frame" a conservation problem, and they negotiate an agreement, and they then translate that agreement into treaty law, "the law freezes the frame and limits [its] relevance to other frames,"[42] and its value, therefore, in solving complex conservation problems?

In the one case, the conceptualization of treaties and their history is essentially organic. Treaties are treated as if they were creatures, who are born, mature, become elderly and outdated, and eventually fade away or die, as if they were passing through some natural life cycle. In the other case, the progression appears to be mechanistic, with one frame succeeding another much as images pass through a projector and appear on a screen or in a PowerPoint presentation, as someone or something presses a button or clicks a mouse.

As nearly as I can tell, Nollkaemper has not (yet) explained the precise dynamics by which one frame is succeeded by another, although it presumably has a great deal to do with the

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[38] COUZENS (2014), *supra* note 11, at 227.
[39] ADAM (2014), *supra* note 26, at 126-128.
[40] COUZENS (2014), *supra* note 11, at 227.
[41] *Id*. Couzens does not explain, however, how the CBD is to be made effective given the major damage done to it by the principle of Permanent Sovereignty over Natural Resources. Other grave reservations about the CBD also need to be taken into account. *See* Stuart R. Harrop & Diana J. Pritchard, *A Hard Instrument Goes Soft: The Implications of the Convention on Biological Diversity's Current Trajectory*, 21 GLOBAL ENVTL. CHANGE 474-480 (2011).
[42] André Nollkaemper, Framing Elephant Extinction, 3(6) ESIL Reflections 4 (July 2014), online at http://www.esil-sedi.eu/sites/default/files/ESIL%20Reflection%20-%20Nollkaemper.pdf (accessed 30 December 2014).

way in which scientific evidence about the changing (and usually deteriorating) status of species and ecosystems is created and then relayed to policy makers and the general public, and is then further exploited politically by networks of influential actors and interest groups to mobilize support for a change of frame within some relevant decision structure. In the organic case, at least as it is described by Adam, Dorsey and Couzens, the agency of change is much easier to discern.

In Adam's account, for example, the responsibility for bringing the elephant treaties into existence, and starting them on their life cycles, is placed very squarely on the shoulders of IUCN (the World Conservation Union),[43] which clearly had a long-term program to save nature from the vagaries of newly independent and capacity poor African states by trying to bring globally charismatic wildlife resources, and national parks, under effective international jurisdiction.[44] It was successful, at least in the sense that new treaties were proposed and endorsed. This is not entirely new information, because some of the ground was previously explored by Boardman, Caldwell, Holdgate, and Cioc,[45] albeit without any semblance of the sharp even harsh critical edge Adam brings to her treatment of IUCN or her riveting focus on colonialism.

But, while there may be some analytical purchase in talking about treaties metaphorically as if they had life and could evolve, the processes at work to shape that evolution are quite unclear, no matter whether we turn to Adam or Couzens or Nollkaemper, as is the question of whether these processes have anything to do with some mechanism of natural selection in the international system.

What is clear, however, and here we can revert to the ICJ judgment in *Whaling in the Antarctic (Australia v. Japan; New Zealand intervening),* is that talk about treaties as "living instruments" for the effective protection of wildlife, or for any other purpose, goes to the heart of some very basic and controversial issues in international law, issues that Bjorge has cleverly brought to the fore.[46]

The essence of the problem is nicely stated by Arato:

> On the one hand, in light of the important role of [international] organizations in supranational governance, there is a perceived need for them to employ a flexible approach to their functions in

[43] One gets a glimpse of the tone and tenor of Adam's criticism of IUCN here: "IUCN is not only compromised by its colonial legacy. It is enslaved by an oversized and hungry budget, forging complex alliances and hidden agendas, and sparking allegations of undue influence of corporate donors and governments. … Formerly recognized as the 'conscience of the world,' respected for 'her complete freedom of expression,' IUCN's operations today challenge [the] once prevalent thinking of the organization, and of other NGOs, as environmental heroes. …Wrought originally as a tool for European governance of African nature, international law was stripped of elements evocative of colonialism by the developing countries, as they rebuffed attempts by UNEP and IUCN to recycle colonial law during the CBD negotiations." ADAM (2014), *supra* note 26, at 124.

[44] While IUCN has now lost some of its former enthusiasm for internationalizing the governance of Africa's resources, other initiatives with essentially the same purpose are still being prosecuted. *See* BRAM BÜSCHER, TRANSFORMING THE FRONTIER: PEACE PARKS & THE POLITICS OF NEOLIBERAL CONSERVATION IN SOUTHERN AFRICA (2013).

[45] ROBERT BOARDMAN, INTERNATIONAL ORGANIZATION & THE CONSERVATION OF NATURE (1981); LYNTON K. CALDWELL & PAUL STANLEY WEILAND, INTERNATIONAL ENVIRONMENTAL POLICY: FROM THE TWENTIETH TO THE TWENTY-FIRST CENTURY, 3d ed. (1996); MARTIN HOLDGATE, THE GREEN WEB: A UNION FOR WORLD CONSERVATION (1999); MARK CIOC, THE GAME OF CONSERVATION: INTERNATIONAL TREATIES TO PROTECT THE WORLD'S MIGRATORY ANIMALS (2009). Adam notes how well-connected Caldwell was to IUCN. ADAM (2014), *supra* note 26, at 90. Holdgate was Director General of IUCN from 1988 to 1994.

[46] BJORGE (2014), *supra* note 13.

> a changing legal and political environment. On the other hand, in light of the very same importance and sensitivity of the areas regulated by these treaties, there is a countervailing pressure to stick to the bargain struck. The evolution and adaptation of treaty-based organizations may be desirable under the right conditions. Their amendment procedures are often difficult to engage, making it difficult for these organizations to respond appropriately to manifest changes in international law and politics. Informal change may indeed yield desirable results—any particular such development will have to be judged in its own right, case-by-case. But the specter of consent always lurks in the background: irrespective of its outcome, informal transformation carries in its wake the potential to produce serious problems of legitimacy and accountability.[47]

In the recent whaling case, Australia and New Zealand tried to persuade the ICJ that over the course of time the use of lethal means in scientific research on whales had been outlawed by resolutions of the IWC, notably but not exclusively one adopted in 1995 to the effect that the killing of whales only occur in exceptional circumstances and to answer scientific research questions that could not be answered by using existing data and/or the use of non-lethal research techniques.[48] The claim was that the resolutions were a valid basis for interpreting the original bargain struck in the ICRW, most especially in Article VIII(1), allowing contracting states to issue special permits to kill whales for purposes of scientific research.[49] The resolutions, thus, represented an agreement among the parties about how the treaty should be interpreted and what practices contracting states could lawfully follow.

The Court acknowledged that the ICRW had been amended several times by the IWC and that "the functions conferred on the Commission have made the Convention an evolving instrument."[50] It noted that resolutions could be relevant for the interpretation of the Convention when they were adopted by consensus or by unanimous vote.[51] But the resolutions relied on by Australia and New Zealand were not all of this kind. Some were adopted by majority vote and notably did not have the concurrence of Japan.

> Australia and New Zealand overstate the legal significance of the recommendatory resolutions and Guidelines on which they rely. First, many IWC resolutions were adopted without the support of all States parties to the Convention and, in particular, without the concurrence of Japan. Thus, such instruments cannot be regarded as subsequent agreement to an amendment of Article VIII, nor as subsequent practice establishing an agreement of the parties regarding the interpretation of the treaty within the meaning of [the relevant portions of the Vienna Convention on the Law of Treaties].[52]

"Thus, to generalize," Arato writes, "while unanimous or consensus resolutions of a supervisory treaty body [like the IWC] might be considered [by the Court to be] subsequent agreements or practice relevant to the interpretation of the underlying convention, resolutions

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[47] Julian Arato, *Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations*, 38 YALE J. INTL. L. 289-357, at 291-292 (2013).
[48] *Whaling in the Antarctic (Australia v. Japan; New Zealand intervening)* (31 March 2014), http://www.icj-cij.org/docket/files/148/18136.pdf, at ¶ 78 (accessed 30 December 2014) (hereinafter *The Whaling Judgment*).
[49] Article VIII(1) of the ICRW provides that "Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research."
[50] *The Whaling Judgment*, *supra* note 48, at ¶45.
[51] *Id*. at ¶46.
[52] *Id*. at ¶83. Vienna Convention on the Law of Treaties (VCLT), Art. 31-33 [8 I.L.M. 679, 23 May 1969, in force 27 Jan. 1980].

adopted by a disputed majority will not count under the general rules of interpretation"[53] articulated in the Vienna Convention.

What most impresses Arato about the judgment in the whaling case is the "jarring" contrast it presents to other ICJ judgments in other contexts in which, for example, reliance was placed on majority resolutions of the General Assembly as a proxy for subsequent practice of the members of the United Nations, and as an authentic basis on which to interpret the U.N. Charter.[54]

What most impresses me about the whaling case judgment is the heavy burden it places on students of wildlife treaties to deal more carefully and explicitly and at greater length with the evolution of such treaties, and with the bases on which they can be compared. And then to explain how such treaties can hold much hope for the conservation of wildlife, in Africa and around the world, if a chief mechanism for adapting such "living instruments" to changing conditions and circumstances is a rule of unanimous consent. That is not a rule, I think, that Charles Darwin would recognize or see as a very efficacious force in shaping the past, present, and future of the world's biodiversity. Nor does it bode well for the future of whales.

The editors invite additional perspectives on these issues.

[53] Julian Arato, Subsequent Practice in the Whaling Case, and What the ICJ Implies about Treaty Interpretation in International Organizations, EJILTalk.org, 31 March 2014, online at http://www.ejiltalk.org/subsequent-practice-in-the-whaling-case-and-what-the-icj-implies-about-treaty-interpretation-in-international-organizations/ (accessed 30 December 2014).

[54] *Id*.