

Moderation in the Pursuit of Justice:  
Explaining Japan's Failure in the  
International Whaling Negotiations

著者	FRIEDHEIM Robert L.
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# Moderation In The Pursuit Of Justice: Explaining Japan's Failure In The International Whaling Negotiations

**Robert L. FRIEDHEIM**  
University of Southern California

## I. INTRODUCTION

The behavior of Japanese negotiators in the yearly meetings of the International Whaling Commission (IWC) is difficult for an outsider to understand. Some find it inexplicable that Japanese representatives seemed to follow strategy and tactics most likely to produce an outcome unsatisfactory to its negotiators, and perhaps to its interests. Japanese representatives did not seem to engage in bargaining practices typical of multilateral negotiations. Perhaps as a consequence, Japan suffered a stinging defeat at the 46th Session held in Puerto Vallarta, Mexico, in May 1994.

Japan wanted to restore the right of its whalers to take whales on the high seas. Instead, a sanctuary for whales in the Southern Ocean received a requisite three-fourths vote, no quota was provided for Japanese whalers in the North Pacific, and no special arrangements were made for what Japan claimed were highly dependent coastal artisanal whalers. These measures were but the latest, and perhaps final, defeats for Japan on the issue. At the next (47th) meeting of the IWC, Japan will be confronted with three choices: (1) attempt to alter the outcome within the organization (continue to negotiate); (2) take extreme measures and try to restore her whaling rights outside of the IWC (defect); or (3) accept defeat.<sup>1</sup>

Since most developed states strongly oppose resumption of whaling, perhaps no clever tactics would have fundamentally altered the general outcome. Still, it seems to this observer that inappropriate Japanese bargaining behavior contributed to Japan's defeat. Why did Japan behave the way she did in the 1980s and 1990s in the IWC negotiations? How can Japanese behavior be explained? Perhaps our cumulative social-science knowledge and theories may help us understand. Three approaches stand out:

### 1. Rational choice

Many analysts of international negotiations still believe that agents of a collectivity choose goals (preferences) calculated to maximize the interests they represent, assess the alternatives and the consequences that would flow from each alternative and choose tactics most likely to produce an optimal realization of their goals.<sup>2</sup> In the bargaining arena they make offers, issue threats and attempt to reach agreement with other parties that are "Pareto optimal" (where they can be made better off while those on the other side are made no worse

off). If, despite their best tactical efforts, they cannot arrange an outcome better than the status-quo-ante, they opt out of the negotiation, since their best alternative is the status quo.<sup>3</sup> Can Japan's participation in the IWC be explained by such a conceptual framework?

## 2. Cultural Molding — “The Japanese Way”

Whatever its merits, a pure rational-choice approach has its limitations. It cannot explain the outcomes in many important negotiations. In fact, some critics charge, such models, however useful they are *prescriptively*, are not very useful *descriptively* in assessing the outcome of most “real world” negotiations.<sup>4</sup> They claim that to understand how real people behave in a negotiating setting, one must assess how their personalities and cultures contribute to their behavior. In dealing with Japan and the IWC, we will put aside the question of personality,<sup>5</sup> but will look at the input of culture and values in helping to mold Japanese behavior. While all negotiators reflect their cultural roots, some scholars have asserted that Japanese bargaining behavior is especially distinctive and culture driven.<sup>6</sup> One scholar who has looked carefully at Japanese bargaining behavior in multilateral negotiating settings, albeit before the Second World War, saw a pattern of behavior that was based upon “deeply rooted cultural habits.”<sup>7</sup> Similar “cultural habits” appeared in the IWC negotiations as we shall see. But is culture a necessary and sufficient explanation of the outcome?<sup>8</sup>

## 3. Constraints on the Negotiators

Recently, a number of scholars have emphasized the importance of structure in the outcome of public, especially international, decisions. This school of thought emphasizes the pattern of constraints under which a diplomat must operate, and how they influence behavior. Major constraints are caused by the structure of the domestic system which he/she represents. Thus, Japanese negotiators in the IWC were influenced by constraints imposed by their bureaucratically dominated-political system. Perhaps we should look to “bureaucratic politics” to explain why inappropriate tactics were used in the IWC.<sup>9</sup> Japan's delegates were simply not free to choose what might have worked best.

More recently, international bargaining has been conceptualized as a two-level game.<sup>10</sup> In this framework, the negotiator bargains at two levels — domestic and international — and the output of the former heavily impacts the latter. Bargaining at the domestic level narrows the “win-set” at the international level because the foreign policy negotiator must always be concerned with the necessity of ratifying (in the broadest sense, accepting and implementing the outcome, not just legal ratification) a joint or international decision at the domestic level. The domestic level includes more than the interplay in the bureaucracy while a negotiator's instructions are being devised. It may also include the direct participation at the international level of transgovernmental connections (a faction of one government interacting directly with a faction of another government), transnational connections (the public of one state acting in concert with the public of another), and cross-level connections (a government official from one government interacting directly with the public of another state).<sup>11</sup>

This paper will explore all three of these theories of foreign policy decision-making and their links with international bargaining, and will attempt to apply them to Japan's efforts to

find an acceptable solution to the problem of whaling in the late 20th century. First, the nature of the substantive bargaining problem will be explicated. Japan's bargaining response to these problems in the IWC will then be explored. The three theories will then be examined and "fitted" to the actual bargaining patterns found. Finally, we will assess the usefulness of these methods to understanding Japan's bargaining behavior at the IWC, Japan's bargaining in general, as well as negotiation theory.

I should note that I believe that Japan's diplomatic failure in the IWC matters beyond being a test-bed for international relations theorizing. First, the issue matters to Japan, which has been isolated on this issue. Its values have been attacked, and it must find a way of dealing with the issue because it is important to a sense of self-worth and place in the world. Second, the issue matters to us all as we contemplate the rapidly evolving post-Cold War international system and the role that Japan will be expected to play, particularly through multilateral fora. Were the results of Japan's efforts an anomaly and therefore likely to be restricted to this special issue, or does it tell us something about Japan's ability to play a major role in the bargaining necessary to achieve a stable world system? Third, the problem matters to those interested resolving international problems with a high emotional and ideological content. Is what happened in the last 10 years of IWC negotiations an example of an international politics with a high symbolic content in which little or no tolerance was shown to "reasonable" proposals that violated a new "ethic" . . . and might this be repeated in other fora? Fourth, the issue matters to those concerned with the environment. In some respect the attempt to end whaling raised critical questions about the nature of sustainability, a principle of environmental management enshrined in The Rio Declaration and Agenda 21, laboriously worked out in 1992 at the Rio Conference on Environment and Development as the appropriate standard for environmental management.<sup>12</sup>

## **II. The Problem: Japan in the International Whaling Commission**

### **A. How we got to where we are**

The history of whaling is a record of extraordinarily rapacious behavior. Little concern was shown for the survival of the world's largest mammals. European and American whalers from the sixteenth to the twentieth centuries hunted one species after another to the point of extinction, usually switching to smaller species when the larger animals were so decimated that hunting them was no longer commercially viable. Whalers of bowhead, sperm, humpback and gray whales targeted large slow animals that usually floated when killed.<sup>13</sup> Whale oil was the major source of lighting fuel before Colonel Edwin Drake discovered oil in Pennsylvania in 1859. Demand was high. In addition, whales were commercially valuable in the gilded age for their baleen, which were turned into stays in women's corsets. Whales were a source of wealth. They were common property resources, available to any claimant with the capability to hunt them in the oceans of the world.

Japan joined the high seas hunt after the Meiji Restoration removed the prohibition on

leaving the islands of Japan (1868). Japanese whalers were mostly interested in hunting whales for food. (One of the principal reasons for the “opening” of Japan by Commodore Perry and his “Black Fleet” was Japanese authorities’ treatment of stranded American whalers).<sup>14</sup>

Millennia before the major states of the world developed distant-water whaling fleets, peoples in many areas of the world used whales and other cetaceans for food. Often these were communities of “aboriginal” peoples, especially the Inuit people of the Far North in Canada, Greenland, Russia, and the United States. Even in cases where these fisherfolk did not fit the aboriginal label, e.g. in the Faroes Islands, northern Norway, Iceland, Japan, and some Caribbean Islands such as St. Vincent and the Grenadines, they were artisanal or small-type exploiters.<sup>15</sup> They usually live in remote locations, and even today operate with modest catches and have rarely overexploited cetaceans.<sup>16</sup> Whaling is not merely a significant contribution to their livelihood, it is integral to their culture.<sup>17</sup> The right of Inuit whalers to continue to take whales, although often under attack,<sup>18</sup> is protected under the IWC treaty. Small-type whalers have no such protection.

Whaling needed little regulation when the technical capabilities of the whalers was low. The hunter’s desire to take every animal spotted was counterbalanced by limits in hunting and navigation equipment, vessel speed, and ability to process animals into useful products. But that changed with the advent of steam-powered vessels and the 1886 invention by Sven Foyn of Norway of an explosive grenade harpoon fired from a cannon mounted on a fast catcher vessel. When floating factory ships were developed, shore processing stations were no longer needed for hunting in remote regions. As Dr. Ray Gambell, IWC Secretary, noted, this made fast swimming species such as the blue, fin, and sei targets for the whalers and helped spread the hunt into the Antarctic.<sup>19</sup> It was inevitable that by the 1930s serious overharvesting would occur, so serious that the concerned states were willing to enter into an international convention to regulate whaling.

The first “modern” effort at managing whales was found in a 1931 Convention. As with many early attempts to manage common property resources, the interested parties tried to regulate the taking of whales without trying to solve the open entry problem. That is, a number of parties had little incentive to cooperate in *not* overexploiting a resource if one or more present or new fisherman could come in and take whatever they pleased. Those who would accept restrictions while others did not were “suckers.” For example, Japan, which began whaling in Antarctica in 1934, refused to adhere to the 1931 (and successor 1937) conventions. This made the signatories “suckers” and Japan (and Germany) “free-riders.” Japanese whaling was at its prewar peak in 1941, with 2,972 crewman employed on six factory ships and 45 catcher vessels.<sup>20</sup> The signatories used a “species” approach restricting hunting to baleen whales only. It also regulated by other “biological” standards. The Convention established “seasons” and exempted the taking of females accompanied by calves or other immature whales, and established size limits for some of the whales to be taken. It required the collection of statistics so that regulation could be put on a more “scientific”

basis. The signatories tried to use an international convention to solve not so much an overharvesting, but an overproduction problem. Clearly, industry managers were the predominant drivers of attempts to regulate whaling during the 1930's.<sup>21</sup> Little or no international infrastructure was created to administer the necessary rules.

The 1931 Agreement proved inadequate to the task of managing whaling. It was extended by a 1937 agreement signed by nine whaling states (including the previously non-cooperating Germany) that: (1) prohibited taking of right and gray whales; (2) set size limits for blue, humpback and sperm whales; (3) restricted the Antarctic season to three months; (4) closed factory ship operations in most of the world oceans north of 40° South latitude; and (5) tried its hand at enforcement by asking each signatory to place a government inspector on whaling vessels flying its flag. It used similar management devices as its predecessor to manage whaling. These measures were supplemented by a Protocol signed in 1938 that banned the taking of humpback whales, and created a whale sanctuary in the Pacific sector of Antarctic waters.

Although a significant portion of the major whaling fleets was sunk during World War II, the resumption of whaling was anticipated in a 1944 Agreement promoted by the Whaling Committee of the International Council for the Exploration of the Sea. An overall quota — a measure that had eluded earlier negotiators — was worked out at approximately two-thirds of the prewar catch. However, it was to be measured in a new unit, the notorious “Blue Whale Unit” (BWU). Since most whalers from Allied states were still interested in whale oil and the largest whales produced the most oil, the total catch quota was measured in “blue whale” equivalents. That is, one blue whale equalled 2 fin or 2.5 humpbacks, or 6 sei whales. The impact should have been predictable — every whaling nation rushed to take as much of the BWUs as they could. There was soon more competition from Japan, which was interested mostly in providing scarce protein to feed its war-ravaged population. Over objections of other states, the Supreme Commander for the Allied Powers allowed Japan to resume Antarctic whaling on a “temporary” basis in 1946-47. Japan returned to Antarctic whaling in full force. By 1965 Japanese whalers were taking nearly 27,000 whales a year. Until 1963, the Japanese consumed more whale meat than any other type of meat.<sup>22</sup> Russia was also a major whaling state after World War II for largely the same reasons as Japan — whales were high-quality protein and the cost, compared with the equivalent protein from land sources, was low. To this day we do not know how many whales Russian whalers took before they dropped out of pelagic whaling. The numbers are likely to be very large, but during the monopoly of power of the Communist Party over the Soviet Union, the totals were deliberately under-reported to the IWC.<sup>23</sup>

The International Whaling Commission was established in 1946. It has not enjoyed a reputation as an effective organization, either in terms of its own stated goal of insuring “an optimal level of whale stocks,”<sup>24</sup> or in terms of other “nonconsumptive” goals such as preservation of the great whales. Indeed, “it seems that the whole history of the IWC has filled whale scientists and conservationists with despair.”<sup>25</sup> Often it is characterized as having

been established too late to prevent the decline of the larger species, often using inappropriate standards for its conservation measures (e.g. "Blue Whale Units"), or merely being the captive of the whaling states because of its constitutional defects. Until the 1980s, it seemed powerless to stop the overharvesting of the major stocks of great whales. Critics concede that the situation got somewhat better after a "new management procedure" was put in place (1975), and some of those critics were even more favorable to the organization after a moratorium was put in place (1982).<sup>26</sup> But on the whole the IWC has been a weak and relatively ineffective organization throughout its history. A research group of Norwegian and American analysts, dividing its history into three phases, judged that in the first phase (1946 to mid-60's), effectiveness of the organization was low, in the middle phase (mid-1960's to the end of the 1970's), it was medium as a result of the new management procedure, and in the most recent phase (mid-1970's-1991), it was low again.<sup>27</sup> Since most of the analysts are citizens of states at interest, their conclusions are open to question. Nevertheless, they tried to make their judgments based upon specific criteria that measured "integrative potential," and therefore their judgment should not be dismissed out of hand.

The tasks assigned to the IWC were difficult to accomplish on both technical and political grounds. Scientifically valid data to conduct management were unavailable. Moreover, the foxes had to be set to guard the henhouse. No one else was available. The highly competitive stakeholders were trying to engender voluntary cooperation among themselves in a situation where they hoped they could continue whaling and not reduce their take below the catch tonnage considered economically viable for their fleets. Each hoped the other "fox" could be induced to reduce its take. Usually what occurred was that each did reduce take, but not enough to restore the stocks to some notion of an "appropriate" level since no one wanted to be a "sucker." The IWC was never empowered (except negatively through the moratorium, closing areas, etc.) to allocate the resource and reduce the hunter's incentive to take every animal encountered. The IWC could not make an authoritative determination that State A's hunters had the right to take X animals and State B's hunters had the right to Y animals. In short, the IWC had serious constitutional defects.

The International Convention for the Regulation of Whaling (ICRW) was negotiated in Washington in 1946. The United States, the major developed state physically intact after World War II, was just beginning to recognize its responsibilities for postwar leadership and its obligation to assist the reconstruction of its devastated friends and former foes. While the USA was still a whaling state, the age of the Yankee Whaler was over. Before too long it would be a nonwhaling state, as would many of the other former major European whaling states. Nevertheless, the ICRW was negotiated by most of its parties to protect their whaling interests. Their status changed over the years, and much of the evolution of IWC policy can be explained by the fact that many of the major players no longer had any, or very limited, commercial whaling interests to protect.

ICRW was constructed along the lines of earlier attempts at whaling regulation. The purpose of the agreement was to "ensure proper and effective conservation and development

of whale stocks” and “thus make possible the orderly development of the whaling industry.”<sup>28</sup> To that end, the Convention established the IWC. The Commission was composed of one member from each of the contracting parties. Each contracting party had one vote. Decisions were to be taken by simple majority of members voting, but important substantive decisions required a positive three-fourths majority.<sup>29</sup>

Member states could “defect:” if a state notified the Commission that it objected to a policy decision (technically an amendment to the schedule), that policy decision would not be effective with respect to that government unless or until it withdrew the objection.<sup>30</sup> Member states also could issue permits to conduct scientific whaling, allow the whalers to “process” or use commercially the whales taken as long as the scientific data derived was transmitted to an international data archive.<sup>31</sup> Compliance with the agreement was self-enforcing. Each contracting government was supposed to ensure the application of the treaty to its citizens.<sup>32</sup> The Commission was authorized to create a secretariat (which was always kept small) and establish subordinate bodies (most importantly a Technical Committee and Scientific Committee). The Commission was authorized to perform studies and collect statistical data.<sup>33</sup> It was also expected to cooperate with member governments and international agencies.

The major policy tool of the IWC is found in an attached document, a “schedule” through which the Commission could regulate whaling, among other measures, by specifying: (1) protected and unprotected species; (2) open and closed seasons; (3) open and closed waters (including sanctuaries); (4) size limits for each species; (5) time, methods, and intensity of whaling; and (6) gear restrictions.<sup>34</sup> These measures were to be employed “for the conservation, development and optimal utilization of whale resources” and are supposed to be based on scientific findings.<sup>35</sup> While the Commission could ban all whaling in closed waters, the agreement did *not* give the Commission the right to restrict the number or nationality of factory ships or allocate specific quotas.<sup>36</sup> Its ability to limit entry was constrained. It could not allocate or determine *who* should get *what*. Like five of the eight fisheries commissions created after World War II, it could not divide the catch and eliminate the incentive for a whaling company (and its sponsoring state) to take as much of an overall quota as possible.<sup>37</sup>

During its early years, the dominant influence on the IWC was industry managers who affected the national policy of the whaling states and often participated in the IWC Technical Committee as representatives or observers.<sup>38</sup> The yearly catch limit (16,000 BWUs) established by the IWC, while lower than the overall yearly prewar catch (30,000 BWUs) was woefully inadequate for maintaining many species and stocks at a sustainable level. The whalers were engaging in what IWC Secretary Gambell called a “whaling Olympics.”<sup>39</sup> While the postwar limits were set after study by cetologists, the state of the science was such that they were largely guessing at what might be a sustainable or prudent yield.

In 1961 a new attempt was made to put whaling management on a more scientific basis. A committee of three (later four) population dynamicists was formed to assess baleen whale stocks using more mathematically sophisticated tools than available earlier.<sup>40</sup> They recommended drastic reductions in take. These recommendations were resisted by the active



whaling states until 1965, and even then the whalers were given three years to adjust their catch downward to below the sustainable yield. Blue Whale Units were not eliminated until 1972, and observers reporting to the Commission were not authorized until 1972.

The difficulties in gaining consensus among whalers, their state protectors, cetologists and the increasingly assertive conservationists, preservationists and animal-rights activists did not go unnoticed. In 1972 a resolution of the Stockholm Conference on the Human Environment called for a ten-year moratorium on commercial whaling, partially in response to the inability of the IWC to manage in a sustainable manner.<sup>41</sup> In 1974 the IWC responded with a "New Management Procedure" that went into effect in 1975. It purported to reorient management with a different conceptual approach. Management of whaling was to be on the basis of Maximum Sustainable Yield (MSY).<sup>42</sup> In theory, if the original stock size could be calculated, it should be possible to take whales when they are at 50-60% of their original abundance. This rate of predation should be sustainable over time, presuming the stocks to be exploited can be brought back to the acceptable percentage of their original numbers. Stocks that fall 10% below MSY were to be exempt from exploitation and treated as *Protection Stocks*. Stocks at 10-20% above MSY could be exploited, but not heavily so they too could recover. They were to be treated as *Sustained Management Stocks*. Stocks more than 20% above MSY were viewed sufficiently abundant to be taken at a higher rate. They were to be treated as *Initial Management Stocks*.

Unfortunately, the scheme proved unworkable. Data were difficult to acquire. The method was probably flawed scientifically, and it did not take the economics of the industry into account. The evident failings of the MSY scheme finally induced 25 of 32 members of the IWC at its 1982 meeting to vote a long-proposed indefinite moratorium on commercial whaling. During the period that the quota was reduced to zero, the Scientific Committee embarked upon a comprehensive assessment of whale stocks and the development of a new management procedure to replace maximum sustainable yield. It was arduous work, and there was little consensus within the concerned community of scientists. Indeed, after much study, five different schemes were proposed. The third on the list, or C Procedure,<sup>43</sup> was finally recommended for implementation as a key component of the Revised Management Procedure (RMP) by the Scientific Committee at the 1990 IWC meeting. But it was turned back in the Spring 1991 plenary session in favor of the maintenance of the commercial moratorium. Strenuous efforts were made to adopt the Revised Management Procedure in the subsequent three (44th through 46th) meetings of the IWC, but they were all turned back in favor of the maintenance of the moratorium, and in the last session, a Southern Ocean Sanctuary was created. In response, Iceland gave notice of its withdrawal from the Commission in 1991, withdrew in 1992, and announced it wanted to set up a regional marine mammal commission for the North Atlantic.<sup>44</sup> The Commission reached a crisis.

Although deeply disturbed by the trends, Japan has not exercised her right to withdraw from the organization, but Kazuo Shima, Japan's commissioner, indicated that such a move is now under consideration.<sup>45</sup> At first, Japan indicated that it would not accept the moratorium,

and entered an objection. But Japan withdrew its objection under heavy pressure from the United States. In the 1980s and 1990s Japan had a major dilemma in deciding upon a strategy for dealing with the problem of restoring a right to whaling that would be recognized by the world community. It could drop out as Iceland did, and act unilaterally or in concert with like-minded states, but (as I will show below) there are important negative incentives. Japan also could “opt out.” But it tried that and could not stand the diplomatic pressure. It was reduced to two lines of conduct. First, it could stay in the organization, help reform its weaknesses, and expect that “reasonable” delegates from other states would then accept the lifting of the total moratorium. Second, it could pursue limited “workarounds” or mitigating efforts to a total ban on whaling. Three “mitigations” included avoidance, exceptions, and substitution. In fact, Japan pursued all courses of action simultaneously.

Avoidance of the impact of a total ban was possible by purchasing whale meat that was either caught legally in a nonsignatory country’s waters or was “poached” by “pirate” whaling vessels such as the *Sierra*. Japan has been accused of such conduct.<sup>46</sup> Exceptions to the total ban were also possible under the Whaling Commission Convention. The United States has successfully requested a quota of bowhead whales for Alaskan Inuit whaling villages.<sup>47</sup> Japan has requested and been refused a permit which would have authorized “small type coastal whaling.”<sup>48</sup> A more controversial form of exception is the provision in the ICRW that allows “scientific whaling.” Iceland, Norway, and Japan have exercised their rights under that provision. All are under vehement attack from anti-whaling forces. As Greenpeace put it, “scientific whaling is almost universally regarded as nothing more than commercial whaling under a different name.”<sup>49</sup> While meat of the whales killed has been sold commercially to help pay expenses of the expeditions, Japan denies that scientific whaling expeditions even recover their costs.<sup>50</sup> Moreover, they state that high-quality investigatory work has been done to support the effort to put a new management plan on scientific basis.<sup>51</sup> Finally, it has been possible to partially substitute high-seas whaling for whaling within a state’s 200 mile economic zone with permission and possibly participation of the coastal state. It is also possible to shift the fishing effort to other gear, such as drift nets,<sup>52</sup> or to other species such as small cetaceans.

## **B. Why We Are Where We Are Today**

The IWC’s agenda at yearly meetings is notable for continuity of issues. But there are certain key points where a jump shift has taken place. Such a jump shift took place with the adoption of the moratorium in 1982. From that time forth, the IWC has been a very different bargaining arena than previously. Did Japan’s representatives see and understand the radical nature of the shift?

The most obvious change was a shift in the working majority. A majority of new and existing IWC member states formed to oppose the resumption of commercial whaling — a powerful coalition that can command the votes of three-quarters of the delegations on important issues. At times, its opponents complained that the majority was packed or padded by the votes of half a dozen small states who were “bought off” by anti-whaling governments

or nongovernment organizations.<sup>53</sup> (For example, rumor had it that a small Caribbean state that adopted an anti-whaling stance at the 46th Meeting in Puerto Vallarta paid off its arrears in membership dues with a suitcase full of cash in order to have its voting rights restored. Where they got the cash is officially still unknown. But even if true, their vote did not tip the scales at the meeting.) The coalition is large, united, and is likely to be sufficiently stable over the long run to hold together. Perhaps effective bargaining pressure could force it to make incremental changes in its positions, but it is unlikely that the basic commitment of its core members — to end commercial whaling — can be reversed.

Why did an anti-whaling coalition form? One clear answer is because the interests of most of the major states of the world have shifted. They no longer participate in whaling; they no longer expect whaling to be an important, or even measurable, contribution to their economic well-being; therefore they have no domestic reason to foster whaling. In fact, the economic argument for them has shifted to the nonconsumption side. Many have whale-watching industries that gross million of dollars. They have an incentive to keep whales alive in the wild.

The consequences of most developed states' disinterest and disapproval in retaining a right to whale have been critically important to Japan. Whatever goodwill Japan has created in relationships with other states does not carry over to the whaling issue. With no major pro-whaling interest groups or pressure groups to make a two-or multilevel game within these countries competitive, the foreign offices of the major developed states have no incentive to try to resist the ardent push of the anti-whaling forces for instructions that would call for the elimination of commercial whaling.<sup>54</sup> The cynical might consider the whaling issue a "throwaway" issue for most developed governments. That is, whatever analytical or scientific understanding of the whaling issue developed-state government officials might have personally, they can throw it away and concede to the anti-whaling animal-rights segment of the strong environmental forces that have arisen in recent years. They won't lose political capital. They do not have to worry about enormous financial capital outlays to *do* something about the problem, as they must for global change, acid rain, or other transboundary problems.

Not only have interests changed in most developed states, but so have the perceptions of their citizens. Environmental awareness has become a major concern of public life. Driving this changed set of perceptions are many ardent, committed direct-action environmental groups. On issues they deem salient, they are adamant and intolerant. They lobby to change the positions of governments on both domestic and international policies. They do not trust governments, or governments alone to "do the right thing," and take direct action with their own governments, nongovernmental organizations, other governments, corporations, and individual citizens of other states. They operate on a transnational basis, and some even have a small presence in Japan.<sup>55</sup>

Whaling is a favored issue of such groups. To them, the very idea of "consuming" an "intelligent"<sup>56</sup> creature is considered not merely poor resource management policy but morally repugnant. As one anti-whaling leader put it, "as a matter of principle, we are deeply opposed

to commercial whaling and believe it is no longer justifiable. We believe the time has come for the IWC, serving the will and conscience of the international community, to recognize that the killing for profit of the global resource of whales is no longer acceptable in evolving world public opinion.<sup>57</sup> They view themselves as moral arbiters<sup>58</sup> and are willing to take virtually any action to reach their goal — including direct participation in the meetings of the IWC, issuing anti-whaling statements whatever their technical or scientific veracity in all possible fora, blocking whaling vessels in port and on the hunt, and various other acts of “guerrilla theater.” It has gotten to the point where Japan, Iceland, and Norway refuse to provide information to the IWC about the registration of whaling vessels “following acts of terrorism directed against whaling vessels.”<sup>59</sup>

At the least, these groups have become a serious impediment to the orderly conduct of business at IWC meetings. At worst, they have poisoned the atmosphere of the meetings, making any serious negotiations virtually impossible because of their physical harassment (such as spitting or pouring blood upon) delegates from states defending whaling. At the 1990 meeting of the IWC, only 29 states with voting rights were represented, while representatives of 68 nongovernmental organizations wandered the meeting hall floor, committee rooms, and delegation lounges.<sup>60</sup> We could debate whether these groups are “Arcadian environmentalists”<sup>61</sup> or millenarians,<sup>62</sup> but the indisputable fact is their presence in the whaling question is felt strongly and directly.

### **C. The Real Bargaining Game Being Played Today in the IWC**

There should be no illusion over the real “game” being played today in the IWC. The majority wishes *to end whaling*, certainly commercial whaling. It expects to accomplish this by preventing reform of past whaling practices and the implementation of the Revised Management Procedure. Without these reforms, the moratorium cannot be lifted. Its tactics include delay, forcing the commitment of time and effort to side issues and the proposal of an alternative scheme (the Revised Management Scheme).

Delay is a very effective tactic. Opponents of whaling are well aware of how small are the remnants of commercial whaling fleets in Japan Iceland, and Norway, the only three states expressing a wish to continue “commercial” whaling. In Japan, there are very few high-seas catcher boats, and many of the whalers, especially skilled harpooners, are now past middle age. Economically, whaling as a potential commercial enterprise is very questionable without government subsidies in the form of expensive fisheries research and monitoring programs required under the terms of the RMP. The whaling fleet in Norway is stronger because it is active, and it may be profitable, but its catching efforts are confined to a localized region.<sup>63</sup> The anti-whalers hope that with delay, the enterprises will go bankrupt, the whalers get too old to put to sea, and the vessels and equipment rot at the pier. After tying up the effort at reform for years they hope that no “rational” government will view whaling as having sufficient economic promise to be worth reviving.

There are many ways to delay action in the IWC, and opponents of the resumption of whaling seem to have found most of them. Nothing that has been done to implement the

Revised Management Procedure is good enough. Consequently, no reform provisions have been put to a vote, and as long as there is a possibility that commercial whaling might resume, none will be. A Revised Management “Scheme” must be developed and perfected before the Revised Management Procedure can be put to a vote. Recommendations of the Scientific Committee are ignored. Norway’s proposal to create an inspection and observation program required under the “Scheme” is not put to a vote because it is “a useful starting point. . .but not nearly comprehensive enough.”<sup>64</sup> The effect of the moratorium on whale stocks must be tested before the moratorium is lifted. The impact of global warming must be tested on the whale stocks, etc.<sup>65</sup> And so the game goes on — the algorithm to underly a new quota must be “tested” and “fine-tuned” before it can be implemented.

The question of humane killing is a perfect diversionary issue. No one who claims to be civilized could object to considering ways to reduce the suffering of a fellow mammal. It is a real issue, but it allows for endless hours to be spent on obfuscation. When Japan raised the question of humane killing of all wild animals and not just whales, its pleas to widen the discussion so that the “moral” values of all states and not just Japan would be debated were swept away. Workshops and discussions on this issue consumed virtually whole annual meetings, such as the 44th Session. Expanding the agenda to other related but not directly relevant issues such as small cetaceans was another successful diversionary tactic.

While many of the opponents justify their tactics as appropriate to the moral obligation to end the immoral practice of whaling, they border on cultural imperialism, racism, and Japan “bashing.” Tolerance of any other way of life, any other sets of beliefs that could include use of whales is so repugnant that any tactic is justified. Anything to embarrass the opponent is permissible. The IWC sessions in recent years are tactically brutal, and any assessment of bargaining in this arena must take this into account.

#### **D. The Ostensible Bargaining Game — Implementation of the Revised Management Plan**

In the last several annual meetings of the IWC, delegations have gone through the motions of dealing with the key issue on the agenda — developing those measures and plans that would allow for the implementation of the Revised Management Plan. As noted, the real plan is that by going through the motions, the opponents of implementation hope to kill any changes in the management system for whales that would allow the resumption of whaling. Going through the motions means ignoring or denegrating any real work that might provide ammunition to pro-whaling forces. This includes scientific advice. As a result, Dr. Phillip Hammond, chair of the Scientific Committee, resigned in disgust when the unanimous recommendation of the Scientific Committee was ignored.<sup>66</sup>

Reform measures are on the agenda, and they have to be duly considered. The algorithm for determining sustainability had to be reduced from 15 rival proposals to one. The Revised Management Procedure was seemingly moved forward. But it had to be tested: that was added to the agenda. However, in the 44th meeting, the Australian delegation introduced the idea that a New Management “Scheme” must be considered and implemented before the New Management Procedure be voted upon.<sup>67</sup> All aspects of the Scheme, such as inspections, had

to be settled before action on the Plan could be considered. By the 46th meeting all aspects had still not been considered and therefore the Procedure could not be implemented.<sup>68</sup> Since every detail has not been settled the moratorium cannot be lifted.

In the meantime, since Japan and Norway have pressed the issue of reform and as technical issue after technical issue is settled, delay may not work forever. In the last three sessions, the anti-whaling forces have turned in a different direction to end commercial whaling in at least one of the most important whale regions of the world — the Southern Ocean. At the 44th meeting, France introduced the idea of creating a whaling sanctuary in the Southern Ocean.<sup>69</sup> Naturally, within a sanctuary all whaling would be banned. Its effects would be reviewed every ten years. In its original formulation it would cover 13 million square miles and reach up to 40 degrees south latitude. The item was referred for study and recommendations to a workshop to be held on Norfolk Island. This measure would make the end of the moratorium virtually meaningless.

The experts gathered at Norfolk Island recommended that the idea receive more study. But that did not stop sanctuary supporters. Since the expert group did not say the sanctuary was an unacceptable idea, they pressed for a vote on the issue.

Supporters had to work to gain a three-quarters majority. The original geographic boundaries of the sanctuary overlapped the 200 Exclusive Economic Zones (EEZ) of Argentina and Chile. While there is no scientific justification for excluding Argentina's and Chile's EEZs, in order to gain the requisite majority, there was sufficient political justification. Therefore supporters proposed that the sanctuary's boundary dip below the economic zones of the two Latin American states.<sup>70</sup> Japan, Norway, and several Caribbean states tried to remove from the sanctuary protection the only whale species that was likely to be exploited in the foreseeable future — the minke whale — but that effort failed.<sup>71</sup> The sanctuary proposal was put to the vote and passed with 23 yeas, 1 nay, and 5 abstentions. Japan, of course, was the one negative vote. Even Norway abandoned Japan, absenting itself from the vote rather than abstaining, so that it would not have to put itself on record.<sup>72</sup>

Japan suffered other humiliating blows. A long-term effort had been put forth to provide relief for four small Japanese coastal communities by recognizing a special status for small-type coastal whaling. While Japan's arguments were convincing to an impressive cadre of social scientists,<sup>73</sup> they fell largely on deaf ears in the IWC debates. One objection was that, while small-type coastal whaling may be small, it is still commercial and someone is making a profit from the killing of intelligent creatures. To counter this argument, Japan developed a new action plan for community-based whaling (CBW). The distribution of whale meat would be arranged by local governments on a cost-recovery basis and the profit removed from distribution.<sup>74</sup> But these arrangements also were turned down.

#### **E. Japan's Dilemma**

Japan suffered a complete diplomatic defeat at the 46th meeting of the IWC. It is difficult to see how the situation could be worse. The moratorium remains in place, with new obstacles constantly being placed in the way of reforms that would allow the Revised Management Plan

to be implemented. A sanctuary has been created in the Southern Ocean. Japan received no interim North Pacific quotas. Japan's plan for community-based whaling is not likely to be taken seriously, and no relief is in sight for small-type coastal whalers. Japan's scientific whaling, which includes lethal methods, is viewed as a disguised commercial operation and is subject to constant diplomatic harassment by opposing governments and from Greenpeace in the field. Japan has few and not very powerful friends on the whaling issue.

All Japan's alternatives involve significant costs. To succeed, Japan would have to induce most of the major developed states to alter their positions, notably Australia, France, the Netherlands, the United Kingdom, and especially the United States. Turning the United States around is particularly important since the U.S. has been the principal enforcer of whaling and other international environmental regimes, such as the Convention on International Trade in Endangered Species (CITES).

Domestic law requires that the U.S. use its domestic jurisdiction to impose punishments upon states violating what the U.S. claims are their obligations under international environmental treaties. An amendment, the so-called Packwood Amendment to the basic U.S. fisheries law (the Magnuson Act) requires that an offending state lose its right to fish in the U.S. 200-mile EEZ. Another amendment — the Pelly Amendment — forces U.S. authorities to deny an offending state the right to export seafood to the United States. The Packwood Amendment is no current threat since, for other reasons, all foreign fishing in the U.S. 200-mile EEZ has been terminated. But the Pelly Amendment is a serious deterrent, since there is a multi-million dollar trade between the United States and Japan in fisheries products. But beyond the specific dollars involved, a serious effort to enforce the Pelly Amendment could well trigger a trade war. There are already so many unresolved trade issues between the United States and Japan that all concerned with harmonization of relations between the two countries feel very uncomfortable.<sup>75</sup> Whaling could add a nasty element of cultural misunderstanding, aid "Japan-bashers," entangle Japan and the United States in General Agreement on Tariffs and Trade (GATT) proceedings and escalate mistrust to a point where U.S.-Japan relations will be even more difficult to untangle than they are at present. Moreover, enforcement of penalties against states that defy what the environmental community perceives as their environmental treaty obligations has been quite popular with a substantial proportion of the U.S. Congress. Often senior officials on both sides hope to avoid making the situation worse by enforcing the Pelly Amendment, but whenever a U.S. administration tries to avoid or delay certification of a state, environmentalists sue in the courts to ensure enforcement.

### **III. Fitting the theory to the behavior**

#### **A. Japan's Bargaining Behavior in the IWC**

Individuals and groups who interact with each other develop predictable patterns of behavior. The following attributes of Japan's interactions with others in the IWC seem to be

characteristic of Japan's approach to protecting her whaling interests within the IWC:

### 1. Moderation or Reasonableness

Given the original premise upon which Japan's position is based, the positions that Japan espoused at the IWC were moderate and reasonable. Consequently, Japan felt there was nothing to negotiate. Japan's stance was not a negotiating stance but a problem-solving stance.

If the underlying problem in the IWC was failure to prevent the overharvesting of whales because of flawed procedures, then the task at hand was to reform those procedures so that the hunt could be put on a sustainable basis. This was the heart of Japan's position. Japanese negotiators worked on and cooperated with others on the necessary research to develop criteria for a Revised Management Procedure. They also were willing to develop humane killing methods and declare various whale species as Sustained Management Stocks and as Protection Stocks, to be even more stringently regulated.<sup>76</sup>

Japan was even willing to use the sanctuary idea, as long as it did not include a very abundant species that research showed could sustain a limited take. Since sufficient progress had been made on these issues for confidence that, in the foreseeable future the "Whaling Olympics" would not recur, Japan demanded the restoration of her whaling rights in respect to robust stocks of non-endangered whale species. Even in specific demands, Japan was moderate. Since the 1982 moratorium, researchers estimated 760,000 minke whales in the Southern Ocean. A take of 2000 per year, requested by Japan, would not effect the stock's sustainability, or a quota of 50 in the North Pacific, nor would special status for small-type whalers, threaten the survival of those whale stocks.

Unfortunately for Japan, participants had to be convinced of the underlying premises of Japan's position to be convinced of Japan's "reasonableness." From the perspective of one branch of the environmental movement, Japan was the leading advocate of "sustainability." Sustainability, its supporters claim, includes the right of human beings to exploit nature and nature's creatures, but draws the line on exploitation if the survival of a species is threatened. In espousing sustainability,<sup>77</sup> Japan's representatives couldn't see why they were under vehement attack. After all, one of the most important problems of the late 20th century is finding mechanisms acceptable to most if not all states that will prevent the overexploitation of resources in global commons such as the ocean.<sup>78</sup> This is a position that should be applauded by environmentalists, not derided. But while some environmentalists recognize the importance of solving the problem of exploitation of common property resources, there has been a shift in values in many developed states. For some opponents of exploiting living resources, the whale is a special, intelligent creature that should be exempt from human predation. For others, they care not about human standards, but support every effort to save every living creature from human exploitation whatever the consequence to humankind. To them, there is a reason for their unreasonableness. The new "ethic" has created a formidable opponent, as we shall see below.

Could a mutually acceptable solution, or one in which both sides could be made better



off, be worked out between these opposing positions? It was a bargaining situation in that it was a dynamic or moving event with parties, values, outcomes, and movement.<sup>79</sup> Consequently, difficult as the situation was for Japan, it required a bargaining stance. Japan did not adopt a bargaining stance. Japan's reservation price — the minimum she would find acceptable — and her maximum preferred position seem virtually indistinguishable.<sup>80</sup> Though Japan has been involved in this negotiation every year in modern times, there are no obvious signs it has thought seriously about its best alternative to a negotiated agreement (BATNA).<sup>81</sup> Japan's position is a problem-solving approach. A problem exists. Barriers to solving the problems are identified, and solutions worked out. At the final stage all that needs be done is implement the correct solutions. Japan's stance is very close to a "Boulware" strategy: begin with what you deem a fair opening offer and hold firm.<sup>82</sup>

## 2. Persistence as a Strategy

Japan's general bargaining position in the IWC was to hold firm on demands, show patience as detailed issues were worked out, and expect to outlast the opposition by sheer persistence. This was aided by the size of Japan's delegation — usually over 50 — and the continuity of leadership. Kazuo Shima has headed the Japanese delegation since 1987. If Japan kept at the effort to get the imperfections of the management regime cured, surely when all delegates saw that the management system was technically perfected, they would see that Japanese whaling would not be a danger to the sustainability of the whale stocks, and they would eventually accede to Japan's request to restore whaling rights. Discipline and fortitude were needed. Others must be persuaded of the correctness of Japan's position, or outlasted.<sup>83</sup>

Others have noted a tendency among Japanese negotiators to value commitment and resolve (*ketsui*) and to believe that if Japan shows resolve, opposing negotiators will take their demands seriously.<sup>84</sup> This tendency was evident in the behavior of the Japanese delegation. A will to win was clearly shown. This reinforced and was intertwined with the belief in the substantive correctness of their position. Surely, if they showed patience, others would see that Japan was not making extravagant demands, that Japan's position represented a reasonable solution to the problem.

Some say that in negotiations Americans are impatient and too quick to make unnecessary concessions in order to conclude a negotiation expeditiously. But although many of the representatives of the NGOs that harassed Japan in the IWC were American, they and their allies in developed-state delegations were a different breed than "normal" developed state negotiators. They were committed to a new "ethic," their sense of commitment quasi-religious. From their perspective, they were morally correct and they were not going to compromise, and certainly not concede to the idea that any whaling, much less full-scale whaling, might resume. But since their behavior was at times so extreme, it is hard to believe that Japanese delegates took them seriously however vociferous their participation. Surely, governments of the major states would see that their delegates had been led astray by people who represented fringe elements of their societies. They must eventually come to their senses and reverse "irrational decisions."<sup>85</sup>

Underestimating an opponent is a major error. The anti-whaling forces have captured major state delegations, and that is not likely to change. They are very, very persistent. In addition to being certain that they control the outcome on major issues, they constantly attempt to widen the agenda of the Commission. The tactical effect is to create many fronts on which a state like Japan must fight. They raise new issues all the time, such as bringing small cetaceans such as porpoises under the jurisdiction of the Commission. Small cetaceans are not mentioned in the 1946 List of Nomenclature but, as the U.S. delegate put it, the IWC should now “broaden the debate to all cetaceans subject to commercial operations.”<sup>86</sup> They demand new information on scientific work, more studies, detailed reports on whale strandings, examinations of the records of the hunts of indigenous people, etc. They insist that the situation be re-reviewed in the light of new threats such as global change. They demand that states report information normally considered matters of domestic jurisdiction.<sup>87</sup> In short, they keep their opponents busy answering queries and defending themselves against charges of sloppy technical work or moral insensitivity.

### 3. Passivity

The concomitant behavioral pattern associated with a “tough-it-out” strategy is seeming passivity. Japan rarely initiated new proposals, new or different ideas or activities in the IWC. It was not until the 46th session that Japan’s delegates mounted any counterattack. Even then, when Japan tried to propose a new initiative, it was in an area where the delegates felt comfortable — research to promote conservation of large baleen whales in the Southern Ocean.<sup>88</sup>

Japanese delegates rarely strongly criticized the proposals of others or issued threats or warnings. As discussed above, when the Japanese were put on the defensive by the activist majority, their defense was stolid and not creative. The task was difficult and circumstances adverse, but one might have put forth new proposals which might repackage a basic position in a different way to require response from an opponent. Diversionary tactics are also useful. But ultimately, if Japan is to escape from the IWC with something of value, it must make proposals that are attempts at compromise or that, as Lax and Sebenius phrased it, “create value.”<sup>89</sup> If not, Japan must depend upon others to rescue it (a hope for *amae*?).<sup>90</sup> To be effective, Japan must also respond positively to critics with plans or proposals that indicate that it takes seriously the concerns of opponents, “has considered the structure of the other sides’s values and opportunities. . .”<sup>91</sup> For example, many environmentalists worry that if a commercial market continues to exist for whale products, it will be impossible to prevent unauthorized or illegal whaling. If Japan’s demands for restoration of commercial whaling are to be seriously entertained, Japan must show that it will vigorously participate in all efforts to end illegal whaling. This is but one of many substantive avenues that have been left unexplored.

Could a more creative attempt to “create value” have succeeded? Passivity only seemed to incite further attacks. It created a belief that Japan was intransigent and unyielding; that Japan wanted to restore *unrestricted whaling* at any price; that others must always be suspicious

of Japan's motives; that Japan is supporting an immoral activity. These beliefs may border on racism and anti-Japanese feelings, and some of them go over the border into outright racism. In turn, Japanese participants and observers feel that their motives and behaviors are misunderstood, and that there is a war of "meat"-based cultures against a "fish" culture. These feelings have poisoned the atmosphere.<sup>92</sup> One key element needed for a positive sum outcome is trust. It is in very short supply in the IWC, making it problematic as to whether there can be a positive-sum outcome, instead of an imposed outcome.

Japan seemed always to be waiting for the other shoe to drop or preparing to fight off the next assault in an environment where the other shoe *will* drop and, if Japan does not surrender, the next assault, whether petty and harassing or more critical and strategic, *will* occur.

#### 4. Go It Alone

Over the years of IWC meetings, Japan rarely sought allies. Until the 46th meeting, Japan essentially tried to achieve its aims alone. IWC meetings are a multilateral bargaining arena, and those who try to go it alone put themselves at a grave disadvantage. The structure of the situation calls for coalitional behavior. If there are three parties to a bargaining situation, the possibility of two-against-one always exists. Consequently any proponent of a position should always seek collaborators.

Japan was slow in seeking like-minded friends, and consequently has been isolated in the IWC. Some of this is a natural concomitant of her substantive interests. Japan is the only state currently seeking to whale legally in the Southern Ocean, and therefore has no natural allies on this issue. But on questions of the right of a state to engage in whaling in its own geographic region as long as the stocks are not threatened, and the right of its highly dependent artisanal whalers to continue to whale to maintain their lifestyle and their values, allies *were* available. To be sure, they were mostly small, economically weak states, but an effective coalition built among them could have forced the opponents of whaling to pay a higher price in seeking to find common value. In fact, when there was a hint in the Japanese press that Japan might have tied economic aid to Caribbean states to supporting Japan's positions in the IWC, anti-whaling forces protested vigorously.<sup>93</sup>

Japan began actively to seek out allies only in the 46th session. By that time a bandwagon effect had occurred, and its enemies had built a solid coalition in opposition.<sup>94</sup> A and B agreed, and brought over C who also agreed, and D who did not want to be left off of the winning side joined up. A or B also were owed some favors by E, so E cooperated, and so on. In a sequence of actions over the 1980s and 1990s the anti-whaling coalition, calling themselves the "like-minded group" put Japan in a position where bargaining alternatives were limited and choices painful.

#### 5. Legalism

In arguing its case, Japan relied heavily upon the notion that it was legally correct. But Japan missed the major point — the IWC is not a court but a negotiating arena. Even if Japan's interpretation of the ICRW is legally correct, it is at best a useful bargaining point to

use in debate, not an anchor for a bargaining strategy.

Japanese delegates argue that actions in recent years have turned the rules of the whaling regime on their head and are illegal: the majority has illegally transformed the IWC into something that violates the explicit language of the 1946 agreement. In particular, the ICRW preamble calls for members to help preserve whale stocks so that “sustain(ed) exploitation” should be possible. The IWC was established as a conservation organization. Its basic mandate is predicated on controlled consumption, not total preservation of whales. Moreover, “proper conservation of whale stocks. . . [should]. . . make possible the orderly development of the whaling industry.”<sup>95</sup> The heart of the IWC’s work should be amending the schedule. But in recent years, amendments have been blocked. The organization has taken action via resolutions which can be made under Article VI. But these are mere “recommendations,” without binding force. Yet, the U.S. through domestic actions attempts to give them binding force, and for all practical purposes they have binding force.

These are powerful arguments (and if Japanese lawyers were arguing these points before an international equivalent of U.S. Supreme Court Justice Antonin Scalia, Japan’s position might be sustained). Assuming that the founders’ original intent forever freezes the notion of permissible behavior, then Japan’s position would be seen as correct. The majority argues that they act in the spirit of the original agreement, but that no original agreement can account for changing circumstances, and that what they are doing falls under the notion of “progressive development.” They are merely updating the actions of the organization to deal with the problems of the times. There is nothing in the ICRW or, for example, Agenda 21 that prohibits setting a stricter standard.<sup>96</sup> Naturally, in the process of “updating” the agreement, the majority has substantially expanded the mandate of the organization.

Though there is no international equivalent of a Justice Scalia, Japan could take the issue to an international tribunal. The final outcome might be no better than Mexico’s fate when she brought the tuna controversy to a GATT panel, won, and then was forced to suspend any further action in order not to get the issue brought into the NAFTA debate. The diplomatic and economic weight of the United States prevailed.

Japan’s emphasis on legal rights in the negotiation indicates that Japanese delegates felt deprived of substantive and procedural justice,<sup>97</sup> and felt a sense of outrage. But keeping resentments boiling rather than looking for creative ways out of their dilemma probably will not help. Would acting more appropriately in multilateral bargaining before the situation got so bad have avoided the worst case? Japan’s low state came about, at least partially, because of inadequate tactics.

## 6. Tactical Poverty

Some blame extenuating circumstances for Japan’s IWC delegation failure to come up with creative tactics. Substantial numbers of Japanese delegates have scientific backgrounds, and such behavior is alien to their positivist instincts and training. But most other delegations are also staffed largely by persons with a scientific background, and they have become competent “political” scientists who can maneuver very effectively in a multilateral arena.

This cannot be the explanation of why Japan did so poorly in IWC negotiations.

Clearly many of the actions a delegation must take to function successfully in a multilateral setting were distasteful to the Japanese delegation. For the most part, they shied away from the rough and tumble of operating in an arena where tactics do matter, where the logic of one's position will not automatically persuade. I am not a specialist in Japanese political behavior. I cannot explain why this is so, but merely note that from observation, it is so. However, others have commented on the Japanese propensity for risk minimization and conflict avoidance.<sup>98</sup>

The paragraphs above discussed effective tactics which Japan's delegates did not use until they had been defeated on virtually all issues they cared about. The Japanese did not participate vigorously in debate to defend their own positions and attack others. Japan did not attempt to join, much less lead, a group of "like-minded" states that could have extracted a price for its cooperation. Japan did not try to manipulate the rules of procedure to its benefit but had to respond to the manipulations of others. Japan almost always reacted, almost never anticipated. Japan was always scrupulous in not leaking information to the press before providing it officially to IWC members.<sup>99</sup> While Japan did meet with possible friends before the 46th session to map strategy and tactics, the efforts were so tentative that it did not provide effective leadership for the attempt to establish a workable coalition. Japan did not wish to appear to justify its opponents' specious claim that it was "buying" votes from the poor and weak. In most recent sessions of the Commission, Japan was not vigorous in making friendly amendments to documents of "like-minded" states and hostile amendments to documents submitted by opposing states until it tried to get minke whales exempted from the Southern Ocean Sanctuary.

There is no record of Japan encouraging a contact or compromise group meeting at or between IWC sessions, or seeking an "honest broker." If Japan thought that the United States would play the role of honest broker, it was sadly mistaken. Indeed, Japan gave opponents a significant advantage by routinely seeking advice from the United States on its IWC draft proposals months before an IWC session. The information provided ensured several months of counterpreparation and coordination for Japan's opponents in the IWC.

As of this writing, there is no indication that Japan has considered developing a package which includes a tradeoff. In such a tradeoff, typically a party to a negotiation indicates willingness to accept a less satisfactory outcome on an issue of lesser importance, or salience, for a more satisfactory outcome on an issue of greater salience. But this requires that within the country, government, and delegation there must be agreement on what is of greater and lesser salience. I doubt Japan has made such a determination. At a certain point in the history of a negotiation, the calculation of salience is influenced more by the notion of what can be saved rather than its intrinsic value. As shown earlier, Japan has no allies on Southern Ocean whaling, but should have on regional and small-scale whaling. Will Japan sacrifice the former for the latter? Is it ready to salvage what it can, or continue to defend all at the risk of overall failure?

Finally, the behavior of Japan's delegation does not indicate that there was a good general understanding of international negotiations or its subset, multilateral negotiations.<sup>100</sup> As I. William Zartman has shown, the typical international negotiation goes through identifiable phases. During the early or diagnostic phase, it becomes evident how the participants are framing the issue. What is being sought is a "formula" or "common definition of the conflict in terms amenable to a solution."<sup>101</sup> In a bilateral negotiation, that common definition must be shared by both parties or defection will result. In a multilateral negotiation, unanimity is desirable, but may not be essential. Decision can come about if the decision rules allow for some form of majority rule. In the early 1990s the end of commercial whaling was the formula notion around which a majority was forming. While defection was still possible (it was a true negotiation), the opportunities available to those delegations in a small minority were not overturning the formula of the large majority, but mitigating it, or perhaps undermining it. The final phase of a typical international negotiation requires a refinement of the details. During this phase, a clever "loser" can do many things to help its situation. That is where we are today. Is Japan prepared to do this?

#### **IV. Fitting Observations to Theories**

None of the three theoretical approaches — rational choice, a special culturally derived "Japanese Way," or the constraints under which Japanese delegates operates — provides by itself a satisfactory explanation of Japan's bargaining behavior in the IWC. However, each of the three do provide partial explanations. Each needs one or more elements of the other approaches to enhance its ability to explain the outcome. As a result, our argument is circular and indeterminate.<sup>102</sup>

##### **A. Rational Decision-making**

If what is sought and the relationship of one's interests to what is sought is the core of rational decision, then a rational approach can illuminate a portion of Japan's behavior.<sup>103</sup> Japanese delegates clearly understood that their purpose was to advance Japan's interests. More abstractly, they "would prefer more primary goods than less."<sup>104</sup> Japan's delegates certainly exercised a rational choice in terms of the ends pursued. They, like virtually all other decision-makers, exhibited bounded or limited rationality: They did not necessarily consider all their options, nor did they pursue their ends sequentially, and did not consider all of the consequences of their alternatives, but under the now widely accepted conditions of bounded rationality, they were rational.<sup>105</sup> However, it is questionable whether Japanese delegates were rational in the means they chose to pursue their ends.<sup>106 107</sup>

In an effort to understand the problems of developing a positive-sum outcome in the IWC, I conducted an experiment using a decision-analytic technique called Multi-Attribute Utility Technology (MAUT). Instead of trying to capture all of the ongoing political activity in the organization, I assumed that the members had become serious about a thorough reform of the organization and were willing to engage in a constitutional type of negotiation to form a

“new” IWC. This allowed me to model the potential behavior of participating states over some key issues — both substantive and procedural — in the IWC debates.

To perform a MAUT it is necessary to (1) identify the objectives of decisions and the functions decision is intended to perform; (2) identify the stakeholders; (3) elicit value dimensions or attributes from stakeholders; (4) assess the relative importance of each value as found in the previous step; (5) ascertain single-attribute utilities or payoffs; (6) aggregate the payoffs with measures of importance; and (7) perform a sensitivity analysis.<sup>108</sup>

I tested Japan and several other states as stakeholders. For each, their value dimensions were elicited on the issues at hand (and not all of their values in the abstract). A partial list of these included contribution of whaling to GNP, contribution of whaling to local or regional economies, moral values, ecosystem concerns, aboriginal rights, management costs, national jurisdiction concerns, international obligation, and leadership. The other side of the matrix was composed of the substantive and procedural issues, such as a new constitutional statement of IWC purpose, principle of sustainability, entry control measures, geographic jurisdiction, special rights for small-type coastal whalers and aboriginal peoples, killing rules, enforcement measures, scientific whaling, as well as membership rules, voting rules, opt-out provisions, and others. I wrote three scenarios to test possible national approaches. The first was a nonconsumption regime; the second a limited coastal consumption regime; and the third a restored but controlled pelagic whaling regime.

In the classic use of such models, an analyst usually attempts to elicit the values of the actual decision-makers. I had no resources to do so and I doubt if many delegations would have allowed it. Instead, as a second best, I used American students to “place sit” or stand in for the real-world decision-makers.

The experiment worked well and provided answers that seemed intuitively correct, including for Japan. This gave me confidence that in terms of substantive rationality, Japanese negotiators were rational. My students playing Japanese decision-makers not only chose the outcomes that could be expected of Japanese decision-makers, but reflected Japanese utilities (or payoffs) in a fashion that was convincing: a pelagic whaling regime was worth substantially more than a coastal whaling regime, and a nonconsumptive regime was almost valueless.

The model provided a good test of rationality concerning ends, but not for the process of matching means to ends. Because the model tried to take account of values, it captured well the Japanese delegation’s sense of outrage. It predicted a strong response, but it did not help explain why Japan clung so tenaciously to the position it had espoused consistently on whaling since the moratorium — the complete restoration of Japan’s right to whale for abundant species in local waters, the North Pacific, and the Southern Ocean as long as its takings were sustainable. The external costs were high, and delegation members were aware of these costs. However, to explain the behavior of pursuing rational ends by ineffective means, we must seek answers elsewhere. It seems likely that the delegation leaders believed that the internal costs would have been higher if they had chosen to pursue any other course of action

than sheer persistence. After all, persistence is the “Japanese way.” Moreover, while there were few forces in Japanese domestic politics who found positive value in a compromise that might result in a partial restoration or surrender of Japan’s whaling rights, there were plenty of forces with strong bureaucratic allies who wished to prevent the whaling problem from getting out of hand and creating problems on issues they really cared about. Continuing to persist was the best tactical response to the inputs of both cultural values and domestic constraints, and it is also rational in that, as the delegation saw it, they attempted to advance Japan’s interests. Thus the logic of my argument is circular.

### **B. A “Japanese Way” or Culture As The Key Explanatory Variable**

I believe Japan’s behavior is distinctive, that patterns could be seen. But that does not mean that I have discovered the wellspring of Japanese behavior.<sup>109</sup> Have those patterns been caused by “set codes that are culturally determined”?<sup>110</sup> And, if they are culturally determined, are Japanese negotiators fated to repeat those patterns over and over again?

On the first question, since my observations were similar to other scholars’, especially Blaker’s, I believe that an important explanation of Japanese bargaining behavior on the whaling issue is found in culture. But what are the attributes of the culture that are causally related to particular patterns discerned? Being only marginally acquainted with the literature on Japanese behavior, I leave it to specialists to comment on whether what I observed was “typically” Japanese and to explain what in Japanese culture conditioned its representatives to act as they did.

Nevertheless, from the viewpoint of instrumental rationality, whatever “caused” Japanese bargaining efforts in the IWC, a good portion of it was dysfunctional. It harmed rather than helped create a higher probability of some degree of success in meeting Japan’s objectives and finding a positive-sum outcome. But must Japan go on repeating such behavior? Bargaining is a process that involves learning, which involves adaptation. Japan has been successful in adapting in many other realms, including other ocean negotiations. Japan also lost in its vehement defense of a Grotian worldview in the early portions of the Third United Nations Conference on the Law of the Sea and adapted well.<sup>111</sup> Japanese negotiators can improve their success rate if they examine their actions with an open mind and not mistrust “countercultural learning because it goes against the grain.”<sup>112</sup>

Before leaving the question of culture, I should mention that some interested parties<sup>113</sup> may consider my observation about Japanese “dysfunctional” bargaining behavior too broadly drawn. One could argue that indeed, Japan’s delegation did respond strongly on this issue and in a particularly Japanese manner, but that whaling is such an atypical case that one should not use it to generalize on overall Japanese bargaining behavior. I did not perform a comparative analysis, so I cannot make claim that the patterns I observed were typical.

### **C. Constraints**

Japanese negotiators in the IWC were, I believe, constrained in their range of tactical options by the instructions they received. Of course, all diplomats, except in very ad hoc situations, have instructions they must obey. But the substance of the constraints and the



manner in which they will effect bargaining outcomes differ from state to state. In Japan's case, instead of culture molding outcome, one might argue that *structure* molds outcome so that, for example, the slow pace of Japanese decision-making is not an artifact of the culture but of a bureaucratically dominated political system.<sup>114</sup> This is one of the systemic structural features of Japan that could explain why Japan behaved as she did in the IWC. The instructions were written within a bureaucratically dominated system with a close alliance between the bureaucracy, big business, and the ruling political party. It was run until recently by a conservative coalition. It is characterized by state-run capitalism with an important role for the Ministry of International Trade and Industry (MITI) and an over-representation of rural areas and small towns in the Diet. It is a consensus-based system that pays a high transaction cost for reaching agreement. Consequently, it makes decisions slowly, and they are hard to change. This is probably too sweeping a set of generalizations (perhaps even a caricature, especially in the light of increasing pluralism<sup>115</sup>), but if one posits constraints as the principle causal factor, these attributes could explain the deep causes of Japan's tactical failure in the IWC.

I believe there is merit to this approach.<sup>116</sup> I hope this report can be the basis of further work by a scholar with the skills and resources to read the Japanese press in depth, assess Japanese public opinion, interview senior officials in the relevant bureaucratic agencies, and look at leadership patterns on the issue. I must rely upon acquaintance with participants in IWC matters; Japanese and American ocean officials, and social-science theory. My evidence is anecdotal. Most is related directly to the Japanese delegation or the bureaucracies it deals with so it is long on information about these organizations and short on public opinion, Diet politics and interest groups. It is therefore difficult to demonstrate the usefulness of the two-level game approach to the problem.

There are some signs of increasing Japanese pluralism on the whaling issue — the growth of anti-whaling environmental groups in Japan, the increase in the economic value of whale-watching.<sup>117</sup> But there seems to be very little dissent concerning the *goals* of Japanese bargaining in the IWC. Restoring Japan's right to whale, albeit under controlled conditions, was desired by the public and leaders of most major institutions. In other words, there were few cross-cutting cleavages in Japanese society that would have made it difficult for delegation members to present the strongest case for restoring commercial and small-type whaling.<sup>118</sup> There was dissensus, according to insiders, on the question of how far Japan should go *tactically* and how Japan's position on whaling might effect the *interests* of other groups in the political system and their bureaucratic sponsors.

One key issue is best explained by the constraint argument is why Japan has stayed in the negotiations, even under the most adverse circumstances. It is difficult to conceive of any worse outcome than has been achieved thus far. Moreover, there is a prospect that matters could get worse. But the delegation did not take stronger action — probably because it could not.

The Japanese delegation to the IWC was headed by Kazuo Shima. He is an experienced

and articulate bureaucrat and negotiator who has headed the delegation for seven years. Having been the focus of the anger and unseemly behavior of anti-whaling groups, he has a personal incentive for Japan to take stronger measures, and perhaps even withdraw from the IWC. But his agency has to worry about precedents being set in the IWC. There are already rumors that any new constraints on whaling Japan might be forced to accept might also be applied to other marine hunting (fishing) activities, in particular, tuna fishing.<sup>119</sup>

While a Fisheries Agency bureaucrat heads the delegation, it is staffed by bureaucrats from other agencies. Many delegates were drawn from the Ministry of Foreign Affairs (MOF), which has a strong interest in seeing that the IWC negotiation does not get out of control and impinge upon other issues of importance to Japan. Anecdotal evidence also points to the strong if hidden hand of MITI. Their interest also was to see that whaling did not get entangled with ongoing trade negotiations that Japan has been conducting with the United States and others. Since whaling is an infinitesimal contributor to Japan's GNP, and there are substitutes for whale-derived protein, MITI wanted to be very sure that a U.S. trade sanction was not invoked, since it might lead to a round of retaliations. Matters could unravel very quickly if that were to happen and a trade war between the United States and Japan might result.

Since there was a consensus that Japan's goals were worthy goals but no consensus on how to achieve or what was the appropriate price to pay to reach those goals, Japan's delegates were forced to stay in the negotiation to the bitter end. Although the outcome was predictable several years ago, no action was taken to prevent the worst from happening. Japan is now faced with deciding whether it can continue to whale under IWC auspices, or at all. However difficult it will be to form a new consensus within Japanese society and government re whaling, it is now imperative.

Japan has three options — withdraw, surrender, or continue to negotiate. If it chooses the first, Japan could proclaim its adherence to “sustainability” as a rival principle to “nonconsumption,” withdraw from the IWC, and seek allies to establish a rival organization(s) to give its legal claims legitimacy. This judgment might be based upon an assessment of the fact that the rules of the game are stacked against it, that it could no longer adapt to this framework, and it could not manipulate the system to its advantage.<sup>120</sup> But if the price of defection is judged to be too high, Japan could exercise Ikle's other option — openly surrender and find substitutes for whale meat. This course would create heavy cultural and psychological, but trivial material, costs.

On the other hand, if one believes that Japan is most likely to behave in ways that respond to cultural and structural mediation of their rational choice set, there is another scenario for the future of Japan's relationship to the IWC. Japan could remain a member, make demands for the restoration of whaling rights, claim adherence to the sustainability principle, convince itself that with persistence some day the majority will come to their senses, continue to take a small number of whales under the right to conduct scientific whaling but not otherwise “cheat” on the moratorium, and never admit defeat. In this way,

Japan could avoid openly exercising a choice that is painful for the individual decision-makers and dangerous to entrenched interests. If Japan chooses this course, two opposing outcomes might result — implicit surrender if opponents do not accommodate its interests, or victory if the assumption that its will is stronger proves correct. Because this scenario is based on the way I view Japan's substantive rationality heavily influenced by culture and structure, my guess is that this will be Japan's preferred course of action.

If Japan decides to "tough it out" or "stay the course," unless the new Republican majority in the 104th U.S. Congress forces changes in US whaling policy, Japan can expect more of the same — delay, delay, delay. Action will shift to working out details of a compliance scheme under the RMP. A perfected scheme will be a prerequisite for restoring commercial whaling.<sup>121</sup> Once again the world probably will watch guerrilla theater instead of a demonstration of how an important international institution helps resolve a resource problem of consequence to the planet's future.

### Notes

- 1 These options fit under the notion of Fred Ikle's threefold choice. *How Nations Negotiate* (New York: Harper & Row, 1964), pp. 59-75.
- 2 James G. March, *A Primer on Decision Making: How Decisions Happen* (New York: Free Press, 1994), pp. 2-5.
- 3 Howard Raiffa, *The Art and Science of Negotiation* (Cambridge: Harvard University Press), 1982.
- 4 Max H. Bazerman and Margaret A. Neale, "Negotiator Rationality and Negotiator Cognition: The Interactive Roles of Prescriptive and Descriptive Research," in H. Peyton Young, ed. *Negotiation Analysis* (Ann Arbor: University of Michigan Press, 1991), p. 109.
- 5 This is because of the author's lack of competence in this type of research.
- 6 Chie Nakae, *Japanese Society* (Harmondsworth, UK: Penguin, 1973) and Takeo Doi, *The Anatomy of Dependence* (Tokyo: Kodansha, 1973).
- 7 Michael Blaker, *Japanese International Negotiating Style* (New York: Columbia University Press, 1977), p. 226.
- 8 For other analyses of the cultural input to negotiation see: Raymond Cohen, *Negotiating Across Cultures* Washington, DC: US Institute of Peace Press, 1991; Geert Hofstede, "Cultural Predictors of National Negotiating Style," and Ype H. Poortinga and Erwin C. Henricks, "Culture as a Factor in International Negotiations: A Proposed Research Project from a Psychological Perspective," in *Processes of International Negotiation*, ed. by Frances Mautner-Markhof (Boulder: Westview Press, 1989), pp. 193-201, 203-212.
- 9 Graham Allison, *The Essence of Decision: Explaining the Cuban Missile Crisis* (Boston: Little, Brown, 1971) and Morton Halperin, *Bureaucratic Politics and Foreign Policy* (Washington: Brookings, 1974).
- 10 Robert D. Putnam, "Diplomacy and Domestic Politics: The Logic of Two-Level Games," *International Organization* 41 (Summer 1988), pp. 427-60.
- 11 Jeffrey W. Knopf, "Beyond two-level games: domestic-international interaction in the intermediate range nuclear forces negotiations," *International Organization* 47 (Autumn 1993), pp. 599-628.
- 12 *Agenda 21, RIO Declaration on Environment and Development, and Statement of Forest Principles*, New York: United Nations, 1992.
- 13 Ray Gambell, "The Management of Whales and Whaling," (unpublished manuscript) p. 1.
- 14 Hugh Borton, *Japan's Modern Century* (New York: Roland, 1955), p. 13.
- 15 Milton M. R. Freeman, "The International Whaling Commission, Small-type Whaling, and Coming

- to Terms with Subsistence," *Human Organization* 52: 3 (1993), pp. 243-251.
- 16 T. Akimichi, P.J. Asquith, H. Befu, T. C. Bestor, S. R. Braund, M.M.R. Freeman, H. Hardacre, M. Iwasaki, A. Kalland, L. Manderson, B. D. Moeran, and J. Takahashi, *Small-type Coastal Whaling in Japan* (Edmonton, Alberta: Boreal Institute for Northern Studies, 1988).
  - 17 Oran R. Young, Milton M.R. Freeman, Gail Oshrenko, Raoul R. Andersen, Richard A. Caulfield, Robert L. Friedheim, Steve J. Langdon, Mats Ris, Peter Usher, "Subsistence, Sustainability, and Sea Mammals: Reconstructing the International Whaling Regime," *Ocean and Coastal Management* 23 (1994), pp. 117-127.
  - 18 "The IWC management of indigenous whaling plays an important role in this conflict. The great majority of anti-whaling member states and their affiliated NGOs have not understood, or even shown a willingness to understand, the nature of this kind of whaling. Instead the IWC has become a forum for expressing the most common misperceptions and prejudices about indigenous peoples that regrettably still prevail in many Western societies." Joint Opening Statement By The Observers For ICC And IWGIA To The 46th Annual Meeting Of The International Whaling Commission, IWC/46/OS/ICC-IWGIA.
  - 19 Ray Gambell, "The Management of Whales and Whaling," p. 1.
  - 20 Robert L. Friedheim and Tsuneo Akaha, "Antarctic Resources and International Law: Japan, the United States and the Future of Antarctica," *Ecology Law Quarterly* 16:1 (1989), 139.
  - 21 M. J. Peterson, "Whalers, cetologists, environmentalists and the international management of whaling," *International Organization* 46:1 (Winter 1992), pp. 149-153.
  - 22 Friedheim & Akaha, "Antarctic Resources and International Law. . .," p. 139.
  - 23 The logs of Russian whalers are currently being reanalyzed in order to estimate the Russian take. The effort is being paid for by the United States. United States Opening Statement (IWC/46/OS USA); "Resolution on the Unreliability of Past Whaling Data" (IWC/46/60); and Table 4 (IWC/46/8a) and "Intersessional Meeting of the Working Group on a Sanctuary in the Southern Ocean," 46th Meeting of the IWC (IWC/46/19), p. 3.
  - 24 "Preamble," No. 2124 International Convention For The Regulation Of Whaling, Signed At Washington, On 2 December 1946. *United Nations Treaty Series*, Vol. 161 (1953), p. 74. Hereafter *ICRW*.
  - 25 Milton M.R. Freeman, "A Commentary on Political Issues with Regard to Contemporary Whaling," *North Atlantic Studies* 2:1-2 (1990), p. 107.
  - 26 Ray Gambell, "The Management of Whales and Whaling." unpublished.
  - 27 Jorgen Wettestad and Steinar Andresen, "The Effectiveness of International Resource Cooperation: Some Preliminary Findings," *International Challenges* 11:3 (1991), p. 55.
  - 28 Preamble, *ICRW*.
  - 29 Article III(2), *ICRW*.
  - 30 Article V(3), *ICRW*.
  - 31 Article VIII, *ICRW*.
  - 32 Article IX, *ICRW*.
  - 33 Article IV, *ICRW*.
  - 34 Article V(1), *ICRW*.
  - 35 Article V(2), *ICRW*.
  - 36 Article V(2), *ICRW*.
  - 37 Robert L. Friedheim, "International Organizations and the Uses of the Ocean," in Robert S. Jordan, ed., *Multinational Cooperation* (New York: Oxford University Press, 1972), pp. 242-251.
  - 38 M. J. Peterson, "Whalers, cetologists, environmentalists and the international management of whaling." p. 160.
  - 39 Gambell, "The Management of Whales and Whaling," p.4.
  - 40 They were Dr. D.G. Chapman (USA), Mr. K.R. Allen (New Zealand), Mr. S.J. Holt (FAO), and Dr. J. Gulland (UK).

- 41 For an examination of the “legacy” of the Stockholm Conference, see: Lynton Keith Caldwell, *International Environmental Policy: Emergence and Dimensions* 2d ed., (Durham: Duke University Press, 1990, pp. 21-93.
- 42 James Crutchfield and Giulio Pontecorvo, *The Pacific Salmon Fisheries: A Study in Irrational Conservation* (Baltimore: Johns Hopkins University Press, 1969); Francis T. Christy, Jr. and Anthony D. Scott, *The Common Wealth in Ocean Fisheries* (Baltimore: Johns Hopkins University Press, 1965); Anthony D. Scott, “The Fishery: The Objective of Sole Ownership,” *Journal of Political Economy* 63 (1955), pp. 116-124.
- 43 Named after its developer Dr. Justin Cooke.
- 44 Government of Iceland, Ministry of Fisheries, “Government of Iceland Announces Withdrawal From the International Whaling Commission,” *Press Release*, 27 December 1991.
- 45 “It is my urgent task now to recommend my Government as soon as I return to Tokyo that the hitherto cooperation to IWC by Japan come under a critical review. . .” Closing Statement by the Commissioner for Japan. *46th Meeting of the IWC* (IWC/46/67).
- 46 In 1993, an environmental organization — Earthtrust — commissioned two scientists to perform DNA tests on samples of whale tissue purchased in retail markets in Japan to determine their origin. In addition to minke whale meat from the Southern Ocean that could have been obtained legally, they also reported finding North Atlantic Minke Whale, Fin Whales, and Sei Whale meat in samples. These could only have been obtained illegally. “DNA Testing Emerges From Courtroom To Detect Whales Killed Unlawfully,” *Wall Street Journal*, August 9, 1994, p. B2; C. S. Baker and S. R. Palumbi, “Which Whales Are Hunted? A Molecular Genetic Approach to Monitoring Whaling,” *Science* 265 (September 9, 1994), pp. 1538-1539.
- 47 “Report of the Technical Committee,” (IWC/43/5), “Report of the Aboriginal Subsistence Whaling-Sub-Committee, *Proceedings, 43d Meeting of the International Whaling Commission* (IWC/43/13).
- 48 “Japanese Small-type Coastal Whaling,” *Circular Communication to Commissioners and Contracting Governments*, International Whaling Commission, 18 December 1989; “Small-Type Coastal Whaling in Japan: Report of an International Workshop,” *Occasional Publication Number 27* (Edmonton: Japan Social Science Association of Canada Fund to Promote International Educational Exchange and Boreal Institute for Northern Studies, 1988); Arne Kalland and Brian Moeran, *Endangered Culture: Japanese Whaling in Cultural Perspective* NIAS Preprint No. 2 (Copenhagen: Nordic Institute of Asian Studies, 1990).
- 49 “Whales,” *Greenpeace Fact Sheet* (Greenpeace International via Greenbase), September 18, 1991.
- 50 It is claimed that the total expenses for the 1987-88 expedition was 1.7 billion yen. 350 million yen was provided as a subsidy by the Japanese Government and 1.3 billion yen was recovered from the sale of whale meat, leaving a shortfall of 50 million yen which had to be raised by public donations. “A Disguised Commercial Operation? — The Costs of Scientific Whaling —,” *Science and Technology in Japan* 8:31 (July 1989), p.37.
- 51 Fukuzo Nagasaki, “The case for scientific whaling,” *Nature* 344:6263 (15 March 1990); *Japanese Research on Antarctic Whale Reocurces* (Tokyo: Institute for Cetacean Research, June 1990; *The Research on the Whale Stock in the Antarctic: The Result of the Preliminary Study in 1987/88* (Tokyo: Institute for Cetacean Study, March 1989).
- 52 See Douglas M. Johnston, “The Driftnetting Problem in the Pacific Ocean: Legal Considerations and Diplomatic Options,” *Ocean Development and International Law* 21 (1990), pp. 5-39.
- 53 See, for example, Leslie Spenser, with Jan Bellwerk and Richard C. Morris, “The not so peaceful world of Greenpeace,” *Forbes* (November 11, 1991), p. 177.
- 54 Using Knopf’s terms, the possibilities of cross-level (government official from one state to public of another state) connections are limited. See note 9.
- 55 For example, see the report on a anti-whaling petition and hunger strike by Yoshi Kamejima in *The Japan Times* (May 13, 1993), p. 4.
- 56 Margaret Klinowska, “How Brainy Are Cetaceans?” *Oceanus* 32:1 (Spring 1989), pp. 19-20.

- 57 Robbins Barstow, "Cetacean Society International Open Statement, *46th Session of the IWC* (IWC/46/OS CSI).
- 58 As noted by Anna Bramwell, for some radical ecologists, "ecological values have the force of a religion." *Ecology in the 20th Century: A History* (New Haven: Yale University Press, 1990), p.238.
- 59 Report of the Technical Committee, *43d Meeting of the IWC*, (IWC/43/5), plenary item 16.
- 60 See, for example: Robbins Barstow, "1990 Noordwijk IWC Meeting Marks Historic Turning Point for Cetaceans: A Summary Report and Analysis," (Weathersfield, Conn: Cetacean Society International, 1990).
- 61 Martin W. Lewis, *Green Delusions: An Environmental Critique of Radical Environmentalism* (Durham: Duke University Press, 1992), pp. 253-256.
- 62 Ronald Bailey, *The False Prophets of Ecological Apocalypse* (New York: St. Martin's Press, 1993).
- 63 I am grateful to Alf Hakon Hoel for pointing this out.
- 64 Report of the Working Group on Supervision and Control, *46th Meeting of the IWC* (IWC/46/65), p. 1.
- 65 Dr. Justin Cooke, developer of algorithm "C" demonstrated the fallacy in this argument: "If environmental effects are severe then even reducing catches to zero would do little to mitigate them." "Simulation trials of the RMP Catch Algorithm in the presence of adverse external influences of whale populations," *46th Meeting of the IWC* (SC/46/Mg 12).
- 66 "But the matter of substance is, what is the point of having a Scientific Committee if its unanimous recommendations on a matter of primary importance are treated with such contempt." Phillip Hammond, letter of resignation, May 26, 1993.
- 67 Report of the Working Group on Revision of the Schedule, *44th Meeting of the IWC* (IWC/44/14), p. 3.
- 68 Resolution on the Revised Management Scheme, *46th Meeting of the IWC* (IWC/46/56 Rev.).
- 69 Government of France, "A Southern Ocean Whale Sanctuary," in *Chairman's Report on the 44th Meeting* (IWC/44/19), p. 29.
- 70 Delegation of Chile, "Establishment of a Sanctuary in the Southern Ocean," *46th Meeting of the IWC* (IWC/46/34).
- 71 "Proposed Consideration for Sanctuary in the Southern Ocean," *46th Meeting of the IWC* (IWC/46/35/ Rev. 1).
- 72 *46th Meeting of the IWC* (IWC/46/25).
- 73 See note 15.
- 74 *46th Meeting of the IWC* (IWC/46/31).
- 75 In addition, American authorities must contemplate the possibility that the U.S. would be found to be in violation of international trade law. See: Ted McDorman, "The 1991 US-Mexico GATT Panel Report on Tuna and Dolphin: Implication for Trade and Environmental Conflicts," *North Carolina Journal of International Law and Commercial Regulation* 17:3 (Summer 1992), pp. 461-488.
- 76 While I believe that Japan's position was reasonable, I also believe that Japanese planning for the resumption of whaling is inadequate. While it is very likely that in the first stage of a resumption of commercial whaling, Japan's announced maximum catch would not threaten sustainability, Japanese authorities has failed to answer two key questions. First, if Japan resumes whaling and other do not, why should Japan enjoy a monopoly of a commonly owned resource? This requires legal, political, and economic analysis. For example, Japan might pay into a fund to compensate the world's owners in order to exercise its monopoly. Second, and more likely, if Japan's resumption of whaling is an economic success and attracts others to re-enter whaling, are the existing rules of the IWC sufficient to prevent the resumption of the "whaling Olympics"? What type of management scheme beyond what is already proposed would be needed? This must be thought through before the moratorium can be lifted.
- 77 I personally agree with this position.
- 78 The basic problem of managing the global commons, and the theories put forth to account for what

- has been, and might be done are described in my *Negotiating The New Ocean Regime* (Columbia, South Carolina: University of South Carolina Press, 1993), pp. 3-26.
- 79 I. William Zartman, *The 50% Solution* (Garden City, NY: Anchor Books), 1976, pp.
  - 80 Howard Raiffa, *The Art and Science of Negotiation* (Cambridge: Belknap Press of Harvard University Press, 1982), pp. 46-47.
  - 81 Roger Fisher and William Ury, *Getting To Yes: Negotiating Agreement Without Giving In* (Boston: Houghton Mifflin, 1981).
  - 82 This is named after Lemuel Boulware, former Vice-President of General Electric Company. He would make an offer in wage negotiations he viewed as fair to both sides and then not budge from his position. Raiffa, *The Art and Science of Negotiation*, p. 48.
  - 83 This position is also reflected in the Japanese press. Below is a portion of an editorial in the *Mainichi Daily News*, May 31, 1994, p. 2:  
The IWC is a disappointment to us, but we should continue our membership in the organization and keep advancing our views as we see fit. We have no need to compromise on the universal principle of sustained use of wildlife compatible with the environment. Sooner or later, rational people will understand our position.
  - 84 Blaker, *Japanese International Negotiating Style*, p. 174.
  - 85 Kazuo Shima, "Closing Statement by the Commissioner for Japan," *46th Meeting of the IWC* (IWC/46/67), p.2.
  - 86 Report of the Technical Committee, *43d Meeting of the IWC* (IWC/43/5), plenary item 9.
  - 87 Report of the Humane Killing Working Group, *43d Meeting of the IWC*, May 27, 1991, item 10(b).
  - 88 "Resolution On Promotion Of Research Related To Conservation Of Large Baleen Whales In The Southern Oceans," Item 16, *46th Meeting of the IWC Meeting* (IWC/46/58).
  - 89 David A. Lax and James Sebenius, *The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain* (New York: Free Press, 1986), pp. 88-116.
  - 90 Unfortunately, there are very few potential rescuers or those who might understand Japan's motives. Cf. Takeo Doi, *The Anatomy of Dependence*
  - 91 Ralph L. Keeney and Howard Raiffa, "Structuring and Analyzing Values for Multiple-Issue Negotiations," in H. Peyton Young, ed. *Negotiation Analysis*, p. 134.
  - 92 Kazuo Sumi, "The 'Whale War' Between Japan and the United States: Problems and Prospects," *Denver Journal of International Law* 17:2 (Winter 1989), pp. 317-372.
  - 93 *The Japan Times* (May 14, 1993), p. 1; *Mainichi Daily News* (May 25, 1994), p. 1..
  - 94 Sebenius and Lax, "Thinking Coalitionally: Party Arithmetic, Process Opportunism, and Strategic Sequencing," in Young, ed. *Negotiation Analysis*, pp. 131- 151.
  - 95 Preamble, ICRW.
  - 96 The basis of the majority's legal case can be found in Resolution 19.63 of the International Union for the Conservation of Nature: " EMPHASING that nothing in Agenda 21 restricts the right of a State, or competent international organization, to prohibit, limit or regulate the use of marine mammals more strictly than is required for sustainable use, within areas under its jurisdiction or control. . ." *Report of the IUCN General Assembly*, 17-26 January 1994.
  - 97 I. William Zartman, *The 50% Solution*, pp. 38-41.
  - 98 Michael K. Blaker, "Probe, Push, and Panic: The Japanese Tactical Style in International Negotiations," in Robert A. Scalapino, ed. *The Foreign Policy of Modern Japan* (Berkeley and Los Angeles: University of California Press, 1977), pp. 98-99.
  - 99 For a response to the problem of leaking information to the press, see: "The Present Practice of the Secretariat Concerning the Commission's Documents and Reports," *46th Meeting of the IWC* (IWC/46/14).
  - 100 For a detailed discussion of multilateral negotiation, see my *Negotiating The New Ocean Regime*, chapters 3 and 9, pp.41-69, 310-359.
  - 101 I. William Zartman and Maureen R. Berman, *The Practical Negotiator* (New Haven: Yale University

- Press, 1982), p. 9.
- 102 Seeking better outcomes depends upon how one defines “better.” While, on occasion there are objective determinates of “better” the notion of better is usually heavily influenced by values. In turn, values are influenced by culture. Even constraints are perceived by decision-makers not just as structural givens but structures created on the basis of values. This indeterminacy is bothersome because while I am convinced that the three factors mentioned account for almost all of the variance, I cannot show what proportion of the variance is accounted for by each, nor can I show the causal links or feedback mechanisms with precision.
- 103 Cf., “we proceed from the premise that Japanese political actors rationally maximize subject to institutional constraints.” J. Mark Ramseyer and Frances McCall Rosenbluth, *Japan’s Political Marketplace* (Cambridge: Harvard University Press, 1993), p. 7
- 104 John Rawls, *A Theory of Justice* (Cambridge: Belnap Press of Harvard University Press, 1971), p.142.
- 105 James G. March, *A Primer on Decision Making*, pp. 8-9.
- 106 Detlof von Winterfeldt and Ward Edwards, *Decision Analysis and Behavioral Research* (Cambridge: Cambridge University Press, 1986), p. 2.
- 107 Moreover, some rational choice theorists might view Japan’s pursuit of its ends, the restoration of all of its whaling rights in all areas — local, regional, and the Southern Ocean—as not rational because it is a defense of “sunk costs.” Pouring in new resources to defend old commitments is not rational *per se* because only future, not past cost should be considered in a properly made rational choice. Robyn M. Dawes, *Rational Choice In An Uncertain World* (San Diego: Harcourt, Brace, Jovanovich, 1988), pp.22-31.
- 108 Ward Edwards and J. Robert Newman, *Multiattribute Evaluation* (Beverly Hills, CA: Sage, 1982).
- 109 A number of American specialists on Japanese politics believe that there has been an overemphasis on the uniqueness of Japanese culture and the use of culture as an explanation of Japanese political behavior. On the other hand, diplomats, and those who prepare materials to train diplomats, are more willing to accept culture as an explanatory variable. See the contrasting views in: Gerald L. Curtis, *The Japanese Way Of Politics* (New York: Columbia University Press, 1988), p. 247; Glen Fisher, *International Negotiation: A Cross-Cultural Perspective* (Yarmouth, Maine: Intercultural Press, 1980), pp. 32-36.
- 110 I. William Zartman, *The 50% Solution*, p. 483.
- 111 See, Robert Friedheim, *Negotiating the New Ocean Regime*, pp. 19, 80; Robert Friedheim, et. al, *Japan and the New Ocean Regime* (Boulder: Westview, 1984); and Tsuneo Akaha, *Japan in Global Ocean Politics* (Honolulu: University of Hawaii Press, 1985).
- 112 Zartman, *The 50% Solution*, p. 483.
- 113 Including Ambassador Edamura, a retired senior Japanese ambassador and Mr. Iino, director of the Fisheries Office, Economic Bureau, Ministry of Foreign Affairs, Japan.
- 114 Curtis, *The Japanese Way of Politics*, p. 247.
- 115 Haruhiro Fukui, “Studies in Policymaking: A Review of the Literature,” in T.J. Pempel, ed. *Policymaking In Contemporary Japan* (Ithaca: Cornell University Press, 1977), pp. 22-59
- 116 It is difficult for me not to believe that Japan’s delegates were seriously constrained because of my acquaintanceship with a number of them. They are capable, articulate, and worldly persons who understood the issues and politics within the IWC.
- 117 “Okata Journal: The Whale: Food for Soul Or Stomach,” *New York Times* ( April 6, 1992), p. A4.
- 118 Robert Axelrod, *Conflict of Interest: A Theory of Divergent Goals with Applications to Politics* (Chicago: Markham, 1969), pp. 158-163.
- 119 *Asahi Shimbun* (May 12, 1993), p. 3.
- 120 Ramseyer and Rosenbluth, *Japan’s Political Marketplace*, p. 3
- 121 “Whaling Debate Shifts To Compliance,” *Science* 267 (January 13, 1995), p. 163.