Can Legalization Last?:

Whaling and the Durability of National (Executive) Discretion

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Introduction ........................................................................................................... 711
I. The Ebb and Flow of International Law ............................................................ 713
II. “Legalization” and the International Convention for the Regulation of
    Whaling .............................................................................................................. 716
    A. “Legalization and World Politics” and Its Lacunae ........................................ 717
    B. The Implications of the Legal Structure of the ICRW ....................................... 720
III. The Stable Legal Structure and Dynamic Political Context of the ICRW ............... 722
    A. The (Stable) Legal Structure of the ICRW ...................................................... 723
        1. Obligation .................................................................................................... 723
        2. Precision ................................................................................................... 725
        3. Delegation .................................................................................................. 729
    B. The (Dynamic) Political Context of the ICRW .............................................. 731
IV. Explaining the ICRW’s Stable Legal Structure in the Face of Dramatic
    Political Changes .............................................................................................. 735
    A. The Efficacy of the ICRW’s Legal Structure in Promoting Stability .......... 736
    B. The Utility to National Executive Branches of the ICRW’s Stable Legal
       Structure ...................................................................................................... 738
    C. Legalization vs. Institutionalization .............................................................. 741
V. Domestic Politics and the Legal Structure of International Institutions .............. 747
Conclusion ............................................................................................................. 755

INTRODUCTION

This article examines the international regulation of whaling in the context of international politics, international law, and U.S. law. Its

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main thesis is that the initial specification of the legal characteristics of the International Convention for the Regulation of Whaling—formally binding rules, precise rules, and the lack of an authoritative, centralized system for dispute resolution—has persisted for more than half a century despite a variety of strong political pressures generated both internationally and within the U.S., and that this persistence of the initial legal form of the Convention has preserved a great deal of authority for national executive authorities as opposed to other political actors on the international and domestic scenes. Much other recent analysis of international institutions, in contrast, has short-changed treaties like the Convention in favor of international legal optimism surrounding institutions, like the European Union and the World Trade Organization, that have resulted in authoritative, centralized dispute resolution. This optimism may rest on a dangerously narrow base in light of the general prevalence of institutions that, much like the Convention, have shown limited legal evolution despite their decades-long existences.

This article begins with a description of the rise of international law in the 1990s and its apparent stagnation in the first decade of the twenty-first century.

Section II.A of the article then describes the efforts of political scientists and international legal academics to construct an interdisciplinary theory of legalization in international institutions, while section II.B. summarizes the many implications for legalization theory (and for international law and international institutions more generally) flowing from the durability of the initial choice of legal form for the International Convention for the Regulation of Whaling (ICRW). Parts III through V elaborate upon this summary.

Part III is an institutional history of the ICRW. Section III.A demonstrates the constancy, over nearly sixty years, of the ICRW’s initial legal form: high-precision, formally binding rules set within a rudimentary, highly decentralized system for dispute resolution. Section III.B contrasts the stability of these characteristics of the ICRW with a wide variety of dramatic changes in its other characteristics—the scope of whaling regulated by some rule of the ICRW, the amount of whaling allowed by the ICRW’s rules, the number of parties to the ICRW, and so on.

Part IV sets out the implications of, and thus inferentially potential rationales for, the stability of the ICRW’s basic legal approach in the face of so many other dramatic changes. Section IV.A describes why states in the international system might find the durability of the ICRW’s initial legal form to be useful. Section IV.B explains why such
durability might be especially useful to the executive branches that not only administer institutions like the ICRW but also make the initial choice as to its basic legal approach. Section IV.C argues that the durability of the ICRW’s initial legal form drives a wedge between legal structure and the general political development of organizations, and why the existence of such a wedge argues for more guarded optimism about the legal evolution of international institutions than many analysts display.

Part V describes the failure of an apparent effort by non-executive actors in the U.S. to enlist the highly developed U.S. legal system as a substitute for the dispute-resolution system set up by the ICRW. Part V argues that this failure is further demonstration of the durability of the ICRW’s initial choice of basic legal approach, and thus further evidence of the continuing power of national executive branches in international politics even when, with respect to the issue in question, the political drama plays out against a backdrop of extensive legal regulation.

I. THE EBB AND FLOW OF INTERNATIONAL LAW

"Why," many a curious and vaguely aggrieved child has asked, "is there a Father’s Day and a Mother’s Day, but no Children’s Day?"

"Actually, dear," many a parent has answered with indulgence tinged by hard-won insight, "every day is Children’s Day."

On this particular matter of child-parent conflict, the United States government has weighed in with a resolution much closer to the child’s perception of reality than to the parent’s position: on a number of occasions, the federal government has by law proclaimed exactly one day of the year as Children’s Day. In 1990, for example, the United States designated that day as October 13th—and no other.¹ Congress in its wisdom, as assisted by the President, did not stop there in its willingness to erase any possibility of a calendrical nomen dubium: The same year that saw exactly one of its 366 days celebrated as Children’s Day also saw precisely seven of its days designated as the first

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congressionally recognized National Quarter Horse Week\textsuperscript{2} and all of its 366 days officially celebrated as the "International Year of Bible Reading."\textsuperscript{3}

In November of 1989—which the U.S. Congress had, with a slight ambiguity in nomenclature, designated as "An End to Hunger Education Month"\textsuperscript{4}—the United Nations, for its part, peered down the road of celebratory calendrical designations and decreed that 1990 would be the first year in the "United Nations Decade of International Law."\textsuperscript{5}

In terms of recognizing dramatic changes in the status quo through official declarations, the United Nations seems to have out-predicted the United States: the rise in the relative significance of international law during the 1990s was much more dramatic than any commensurate increases in the relative importance of children, quarter horses, or the Bible.\textsuperscript{6} The United Nations itself, to take one example, was a nearly moribund institution during the Cold War in terms of its contribution to important security issues. In August of 1990 and the subsequent six months, however, the UN Security Council responded to the Iraqi invasion of Kuwait with a series of condemnations, embargos, and authorizations that brought international law to the forefront of international politics to a degree not seen since 1950. UN-authorized interventions in Somalia and Haiti followed. Additionally, the Security Council revived the international war crimes tribunal—a concept that had been in suspended animation since the Nuremberg and Tokyo tribunals—by creating the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) in 1994.

The United Nations was not the only multilateral security organization that saw an increase in its effectiveness. During the 1990s, the North Atlantic Treaty Organization (NATO) saw France rejoin its military command. It conducted—by the unanimous consent of its members—a wide variety of interventions in the former Yugoslavia. In 1999, welcomed three former members of the Warsaw Pact into the

\textsuperscript{4} Pub. L. No. 101-151, 103 Stat. 931 (1989). Apparently Congress did not in its own readings reach, or at least chose not to heed, the separation of secular and divine matters implicit in the biblical admonition: "Render therefore unto Caesar the things which be Caesar's and unto God the things which be God's." \textit{Luke} 20:25 (King James).
\textsuperscript{6} This statement makes only a relative claim, not a statement about absolute importances.
Organization in the first NATO expansion since 1982.

International trade was another area of international relations in which international law substantially expanded its ambit in the 1990s. In 1993, the nations of Western Europe met the European Single Act’s deadline for an economically integrated European Community (EC); the even more ambitious treaty of the European Union, signed in Maastricht, entered into force that same year. By decade’s end, the international legal instruments, courts, and rule-bound bureaucracies of the European Union would govern economies with an aggregate gross domestic product (GDP) of roughly US$10 trillion. On January 1, 1994, the North American Free Trade Agreement (NAFTA) set forth international legal regulations governing trade among national economies that, by decade’s end, would also represent over US$10 trillion in total annual GDP. On January 1, 1995—the precise mid-point of the Decade of International Law—the World Trade Organization (WTO) officially came into being. By decade’s end, the WTO included roughly 150 nations within the ambit of its highly legalized system of trade regulation and dispute resolution. By 2000, WTO members accounted for the vast majority of the aggregate value of international trade.⁷

The United Nations’ description of the 1990s as the Decade of International Law proved prescient not only because international law became so much more prevalent in international politics during the 1990s, but also because the next decade seems unlikely to see any such expansion in the ambit of international law. The 2003 invasion of Iraq by the United States and Britain was hardly a model of broad international cooperation coordinated through the legal enactments of the Security Council. The effort to enshrine the progress made by the ICTY and ICTR by creating an International Criminal Court has failed to win support from the United States. NATO was not the instrument chosen to coordinate international efforts in the war on terror. Efforts to extend NAFTA further south have met with little success. Monetary union in the European Union has occurred among only a handful of

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⁷ Of the seventeen nations with a share of world merchandise exports of one percent or greater in 2000, for example, fifteen were members of the WTO as of that year. The other two, China and Chinese Taipei, joined the WTO in December of 2001 and January of 2002, respectively. See Members and Observers, WTO, at http://www.wto.org/english/thewto_e/wahtis_e/tif_e/org6_e.htm (membership list with dates) (last modified Apr. 4, 2003); International Trade Statistics 2001: World Trade in 2000 – Overview, Table 1.6, WTO, at http://www.wto.org/english/res_e/statis_e/its2001_e/its01_overview_e.htm (this calculation excludes intra-EU exports from the total).
states. The string of Ministerial meetings in which the WTO has failed entirely to expand upon and refine its initial mandates has been perhaps the most highly publicized stall-out for international legal progress since the League of Nations' impotence in the period between World Wars I and II. The ambitious effort at international environmental cooperation represented by the Kyoto Protocol's strictures on carbon emissions appears to have foundered upon the unwillingness of both Russia and the United States to ratify that treaty. 8

With the possible exception of events in Iraq, none of these developments represents an actual retrogression in the ambit of international law, but all of them clearly represent a halt to the radical expansion in international legal cooperation that characterized the 1990s.9

II. "LEGALIZATION" AND THE INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING

Part I of the article has described the dramatic rise in prominence of international law during the 1990s, and the apparent stagnation in the ambit of international law during the opening years of the twenty-first century. In section A of part II, this article describes the interdisciplinary effort of political scientists and legal academics to develop a theory of "legalization"—the degree to which international


cooperation employs international law as its means and the particular characteristics of that employment. In section B, the article summarizes the implications for legalization theory of the persistence in the ICRW’s basic legal approach.

A. "Legalization and World Politics" and Its Lacunae

A few short months after the end of the UN Decade of International Law, the leading journal of political science devoted to international cooperation published a special issue entitled “Legalization and World Politics” (Legalization issue).10 (“Legalization” in this context was not a catalyst for arguments about the elasticity of demand for narcotics, but rather a half-heartedly applied camouflage of the idea of international law’s rising prominence.) To consider international law so extensively is an unusual endeavor for modern political scientists, as is the issue’s persistent mixture of work by both political scientists and legal academics,11 but the organization of the Legalization issue was comfortably conventional within the special-issue genre: several carefully reasoned theoretical articles bookend a number of richly contextualized case studies full of hypotheses, specifications of dependent variables, and qualitative empiricism. For all its methodological sophistication, however, the Legalization issue implicitly displayed a good deal of what political scientists and other social scientists call “selection bias”—that is, a selection of cases biased towards examples representing only one outcome, rather than a selection of cases representing the full spectrum of potential outcomes. In the Legalization issue, all but one of the empirically-oriented articles examined cases where radical increases in the degree of legalization had recently occurred. Areas where the prominence of international law had decreased, or even remained constant, were absent—despite the ready acknowledgment in the Legalization issue’s preface that “the move to law is hardly uniform.”12

10. 54 INT’L ORG. 385 (2000) [hereinafter Legalization].
In its selection bias towards those cases involving dramatic increases in the prominence of international law, the *Legalization* issue stands as a fitting, if implicit, tribute to the UN Decade of International Law. As we leave that decade behind, however, and especially as we enter what looks to be a decade of stasis or retrogression in the prevalence of international law in the international political system, one might wish to pay greater attention to cases in which the prominence and prevalence of international law has remained constant or decreased over the past few decades. This article pays attention to just such a case: the international regulation of whaling.

In this article, I use the theories of legal institutions developed in the *Legalization* issue, which I will call "legalization theory," to examine the role of international law in the international regulation of whaling over the past sixty years. Throughout these half a dozen decades, the degree of "legalization" in international whaling has remained nearly constant, even though a host of non-legal factors directly relevant to the international regulation of whaling have changed dramatically. The structure of the institution most directly associated with whaling, the International Convention for the Regulation of Whaling (ICRW), has therefore displayed a remarkably durable degree of legalization despite dramatic changes in the pressures on that structure.

Given the dramatic increases in legalization in many other areas of international politics, the durability of the ICRW is noteworthy simply as an example of constancy amidst change. Additionally, this durable structure is, in one crucial aspect, not particularly "legalized." Legalization theory’s overarching theoretical framework identifies three variables: obligation, precision, and delegation. As described in detail below, the ICRW displays a high degree of legal obligation (because it is a formal treaty that has entered into force) and a high degree of precision (because its rules are clear and well specified), but it reflects a low degree of delegation (because no independent, court-like body resolves disputes). The perception that international law has become much more relevant to international politics, however, seems to rest specifically upon the development in various institutions of a high degree of delegation. The European Union—surely the most effective and expansive system of regional legal regulation—includes among its components the European Court of Justice (ECJ), an independent, highly legalistic court with non-consensual jurisdiction, private rights of action, and supra-national authority. The World Trade Organization—surely the most effective and expansive system of global legal regulation—includes among its components the Dispute
Settlement Body, an independent, moderately legalistic set of arbitral panels capped by a court-like Appellate Body that issues public opinions setting forth facts and law relevant to the dispute at issue and that treat its earlier opinions as binding law. NAFTA includes among its components a court-like body with private rights of action and supra-national authority. These exemplars of the "new" international law all involve high degrees of delegation to court-like decision-making bodies.

The vast majority of international institutions, in contrast to these engines of economic integration, display a low degree of delegation to court-like bodies. No environmental agreements constitute a court to interpret and enforce their mandates. No arms-control agreements or military alliances, whether they are bilateral or multilateral, create neutral decision-making bodies. No global court decides human rights disputes (although a patchwork of regional human rights courts and the nascent International Criminal Court might someday be stretched and re-stitched into a unified, global system with general jurisdiction and private rights of action). The UN's court of general subject-matter jurisdiction, the International Court of Justice (ICJ), grants no private rights of action and depends even for its jurisdiction upon the consent of the parties, as does the International Tribunal for the Law of the Sea.\(^{13}\) Observers are much more circumspect in heralding these low-delegation institutions as harbingers of a new age of international cooperation, regardless of the degree of obligation or precision that their rules reflect.

The low-delegation ICRW is therefore worth examining not merely because of its own durability, but also because it may serve as a representative of the very large class of international institutions that all display low degrees of delegation. The ICRW and its low-delegation compatriots represent the "old" international law—an "old" international law that not only has been with us for some time, but may also be with us for some time to come.

Furthermore, as soon as one acknowledges that the modern state contains a variety of political institutions within it, one must acknowledge that the low-delegation institution remains effectively the creature of a state's executive branch. It is the executive branch, after all, that formulates the texts of treaties and conducts the daily diplomatic decision making necessary for their administration. In the case of the ICRW, at least, repeated efforts by the legislature to wrest control of ICRW decision making from the executive failed, as did

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\(^{13}\) Note that if one views the United Nations Convention on the Law of the Sea (UNCLOS) as an environmental agreement, then one must qualify the assertion above that no environmental agreements construct a court.
similar efforts in the courts by members of the general public. The ICRW, in other words, displays not only a persistent non-delegation to international court-like or legislature-like institutions but also a persistent non-delegation to *domestic* courts or legislatures. A low delegation institution like the ICRW may be therefore both durably non-legalized in the international realm and durably dominated by the executive branch in the domestic realm.

**B. The Implications of the Legal Structure of the ICRW**

The rules of the international institution that regulates whaling are instantiated in the ICRW. As Part III will argue in some detail, paying close attention to the ICRW over time shows that the international regulation of whaling has displayed a constant form of legalization—high obligation, high precision, and low delegation—throughout its nearly six decades of existence. As Part IV will argue, there have been a variety of changes and pressures in the political context surrounding the ICRW. This sub-section summarizes the implications of the ICRW’s legal constancy in the face of political change.

Given the ICRW’s legal durability in the face of non-legal change, and given some attention to the interaction between the legal structure of the ICRW and domestic politics in the United States, the constancy of the whaling institution’s form of legalization has five important implications.

First, the constancy of the whaling institution’s legalization in the face of great dynamism in its political context implies that high obligation/high precision/low delegation is a form of legalization that produces a durable commitment mechanism. The availability of durable commitments is important in at least two ways. First, if forward-looking actors are going to care about choosing any particular form of legalization when initially designing an institution, then some limitations on the evolution of that institution must follow from that choice; otherwise, one initial form of legalization is just as good as any other form. The whaling institution provides one example of such limitations. Over time, the form of legalization did not change. (There are other possible, systematic relationships between initial legalization and eventual legalization besides constancy of form, of course. One might hypothesize, for example, that choosing an initial design of high obligation, low precision, and high delegation would lead over time to an institution of high obligation, high precision, and high delegation.) More specifically, the particular history of the whaling institution
provides a particular set of forward-looking actors—national executive authorities—with a particular tool. The initial form of legalization in the whaling institution gives great discretion to national executive branches in the interpretation and enforcement of the institution’s rules. The durability of that form of legalization over time means that those actors will retain that power. The availability of such a form of legalization, if generally durable, is especially relevant because the national executive branches themselves choose the initial form of an institution. Furthermore, there is some evidence that choosing other forms of legalization (especially high-delegation forms) can lead to “unintended consequences” that later reduce the power of such the national executive, a phenomenon that should increase the relative attractiveness of the high/high/low form of legalization to self-interested executive authorities within national governments.

The second implication of the durability of the whaling institution’s form of legalization is the impermeability of institutional legalization to domestic politics. Dissatisfaction with the low-delegation state of affairs in the whaling institution led domestic environmental groups to pressure Congress successfully for statutes that appeared to require the executive branch to impose both narrow and broad trade sanctions on nations violating the rules of the institution. The broad sanctions have never been applied, however, and the narrow sanctions have been applied only rarely. The effort to substitute unilateral U.S. enforcement actions for the decision-making authority of the institution foundered on a combination of recalcitrance by the U.S. executive branch and the U.S. judicial branch’s interpretation of the relevant statutes. The form of legalization of the whaling institution thus remained stable even in the face of a strong challenge by domestic political actors in a nation that was both the most economically powerful actor in the institution and one of the leaders in strengthening the substantive regulations of that institution. The impermeability of this form of legalization to this form of domestic politics is especially relevant in light of the general willingness of authors in the Legalization issue to ascribe a crucial role to domestic political mechanisms.

Third, the durability of the high/high/low form of legalization shows the continuing power of national governments in the face of international institutions. Low-delegation legalization leaves the crucial decision about interpretation and enforcement to national executive authorities. In the case of whaling, those national executive authorities were able to select and preserve this power against a variety of changes in the international political environment and a challenge from the
domestic political arena in the United States. In contrast to the EU or the WTO, to take two examples, the founding of an international institution did not lead over time to a significant non-national locus of authority.

Fourth, the whaling institution's constancy of legalization in the face of great dynamism in various political variables shows the distinctiveness of legalization from institutionalization. It is necessary to establish such a distinction if a focus on legalization is to be anything but an examination of the well-trodden intellectual path of institutionalization by another name. This distinction is especially important in light of the co-variance of legalization variables with other institutionalization variables in European economic integration and global trade—the two most prominent examples of high-legalization institutions—and in at least some low-legalization institutions. In the ICRW, in contrast to these institutions, the degree of legalization has remained constant while the whaling institution as a whole has become more institutionalized. Legalization and other institutionalization variables are thus independent, rather co-variant, in at least this case.

Fifth, the prevalence of the high/high/low form of legalization represented by the ICRW implies that it should be studied in the context of other institutions. As authors in the Legalization issue note, both the security and environmental areas are commonly characterized by institutions with rules of high obligation, high precision, and low delegation. Although these institutions constitute a large swath of international relations, they have been almost entirely ignored by legalization theorists to date.

III. The Stable Legal Structure and Dynamic Political Context of the ICRW

The rules of the whaling institution are instantiated in the ICRW, which also sets up an associated organization, the International Whaling Commission (IWC). Section A of this Part assesses the ICRW in terms of legalization theory's central measures of "legalization": obligation, precision, and delegation. Throughout its existence, the whaling institution has displayed a constant and high degree of obligation, a constant and high degree of precision, and a constant and low degree of delegation. Section B of this Part argues that the international regulation of whaling has displayed great change in such non-legalization variables such as the overall purpose of the organization, the scope of its rules, and the breadth of its membership. In Part IV, the article proceeds from this Part's argument that the ICRW's initial legal form has been durable
despite widespread political change to argue that this durability is useful to states in the international system and especially to their national executive branches, while Part V that this durability has persisted even in light of efforts within the U.S. to enlist the U.S. judicial system as a highly developed dispute-resolution system on behalf of the ICRW's rules.)

A. The (Stable) Legal Structure of the ICRW

Legalization theory describes an international institution's legal structure in terms of three variables: obligation, precision, and delegation. Taking up each of these variables in turn, one can conclude that the ICRW has consistently been an institution characterized by high obligation, high precision, and low delegation.

1. Obligation

Legalization theory defines "obligation" as follows:

Obligation means that states are bound by a rule or commitment or by a set of rules or commitments. Specifically, it means that they are legally bound by a rule or commitment in the sense that their behavior thereunder is subject to scrutiny under the general rules, procedures and discourse of international law, and often of domestic law as well.14

The ICRW involves a high degree of obligation. It is a formal treaty. Parties to the ICRW are thus legally bound to observe all of its terms in good faith.

Some treaties display an even higher degree of obligation than the ICRW. A nation may withdraw from the ICRW, and thus from its obligations, after giving six months' notice. No statement of the reason for withdrawal is necessary. In many arms-control treaties, in contrast, a party may withdraw only when "extraordinary events, related to the subject matter of [the treaty] have jeopardized [the party's] supreme interests."15 The Charter of the United Nations and the various treaties of the European Union do not expressly provide for withdrawal at all.

Some have concluded that withdrawal from the European Union is prohibited. 16 The issue with respect to the United Nations is more controversial, but withdrawal is at least arguably prohibited. 17 In light of the plainness with which withdrawal from the ICRW is allowed, one might characterize the rules of the ICRW as of "moderately high" obligation.

Additionally, the whaling institution has a particular feature—"special permits"—that can operate to make the whaling institution’s obligations selective. The ICRW states:

[N]otwithstanding anything contained in this Convention, any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take, and treat whales for the purposes of scientific research subject to such restrictions...as the Contracting Government thinks fit, and [such whaling] shall be exempt for the operation of this Convention. 18

This provision, sometimes also called the "scientific-whaling exemption," clearly contemplates that scientific research may involve the killing of whales. The "special permit" exemption can therefore operate to provide nations with wide-ranging and unilateral selectivity of obligation: A nation may effectively ignore its obligations under any other provision of the ICRW simply by granting a scientific permit to conduct the otherwise prohibited whaling.

The ease of withdrawal and the availability of special permits limit the degree of obligation imposed upon the parties to the ICRW. The ICRW also allows parties to object to amendments to the ICRW’s "Schedule," which is the portion of the ICRW containing its substantive regulations on whaling. The ICRW’s scheme thus differs from one in which a majority vote of parties to a treaty makes an amendment to that treaty binding on all members, as exists with respect to some but not all amendments in the Montreal Protocol on Substances that Deplete the Ozone Layer. 19 Nonetheless, the ICRW is not especially unusual in allowing a party to be bound only to amendments to which it has

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consented.

The ICRW is thus a formal treaty, with all that such a status implies for the degree of obligation imposed upon its parties. For purposes of the simple “high/low” dichotomy generally adopted in legalization theory, the rules of the whaling institution clearly display a high degree of obligation. Low-obligation institutions, in contrast, typically involve expressly non-binding rules.\textsuperscript{20}

This static evaluation of the treaty’s degree of obligation is consistent with the degree of obligation that it has displayed over time. No overarching subtractions or additions to the whaling regime have occurred. The ICRW has remained continuously in force since initially entering into force in 1948. There have been no follow-on treaties.\textsuperscript{21} A large number of substantive amendments to the Schedule have occurred, but no new text has been added to the treaty regarding such obligation-oriented provisions as withdrawals or objections to Schedule amendments. Furthermore, no one asserts that the treaty has come to embody a rule of \textit{jus cogens}, binding upon even those not party to the ICRW. Indeed, almost no one asserts that the treaty has come to represent a rule of customary law, binding upon those acting in accordance with its provisions but not formally consenting to the treaty itself.\textsuperscript{22}

At the formal level, therefore, the ICRW has continuously possessed a high degree of obligation. It has neither come to possess a greater degree of obligation as a result of, for example, a prohibition on withdrawal, nor a lesser degree of obligation as a result of, for example, the lapse of the treaty without a successor treaty in its wake.

2. \textit{Precision}

Legalization theory defines precision as follows: “Precision means that rules unambiguously define the conduct they require, authorize, or proscribe.”\textsuperscript{23} The precision of the ICRW is high. The central feature of the current version of the ICRW is its moratorium on commercial whaling, and that ban reflects little ambiguity: “catch limits for the killing for commercial purposes of whales from all stocks for the

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\textsuperscript{20} Abbott et al., supra note 14, at 406 (Table One).
\textsuperscript{23} See Abbott et al., supra note 14.
\end{flushleft}
[upcoming whaling season] shall be zero." A "stock" is a set of whales of a given species in a well-defined geographical area. The catch limit of zero is a precise, quantitative measure.

Only the term "for commercial purposes" seems likely to cause difficulty. Commerce typically involves financial gain, the explicit pricing of goods in commerce, the exchange of money for goods, and so forth. There may well be ambiguity in the phrase at its margins, as the debate about what constitutes "commercial speech" in the context of the First Amendment to the U.S. Constitution shows. Nonetheless, the phrase "for commercial purposes" seems fairly well defined in the context of whaling, with its history selling whale meat and other whale products in the marketplace. Furthermore, the definition of "commercial purposes" has not proven to be of much practical difficulty. No group of well-equipped weekend fishermen, for example, has asserted a right to engage in "recreational" whaling.

A ban on "commercial" whaling nonetheless implies that at least some non-commercial form of whaling is permitted. True to this implication, the ICRW allows whaling for two other purposes: aboriginal subsistence and scientific purposes. The first phrase is clearly defined by the ICRW, while the second is more ambiguous.

The textual definition of "aboriginal subsistence" whaling involves both a categorical provision and specific applications thereof. As a categorical definition, the relevant whaling is to be allowed only "to satisfy aboriginal subsistence needs." There may be some potential ambiguity in such a definition—relating to which people groups qualify as aboriginal and what counts as a need—but its translation into an actual rule has been quite precise. A numerical quota for a particular stock is assigned to a particular aboriginal people residing in the relevant geographical area. Additionally, each of the relevant specific provisions imposes a local-consumption requirement that contributes to maintain the distinction between aboriginal subsistence whaling and commercial whaling.

The scientific-permits exception, which allows whaling "for the purposes of scientific research," presents more ambiguity. Science may be no more difficult to define than commerce, but the provision does not require the whaling in question to be exclusively for purposes of scientific research. One may thus have some difficulty in determining whether a dual-purpose permit—such as one for the conduct of scientific research on whale carcasses, followed by selling the meat at

24. ICRW, supra note 18, sched. ¶ 10(e).
market—is "for" scientific purposes or actually "for" some other purpose. In fact, this issue has been controversial in the whaling institution.\textsuperscript{26} The lack of delegation in the institution has meant that the controversy remains unresolved.\textsuperscript{27}

The ICRW also requires states to enact "appropriate measures" in their respective domestic legal systems to effectuate the treaty's provisions.\textsuperscript{28} This provision is imprecise: the word "appropriate" is inherently vague, and, in contrast to some other treaties, there is no specification of any particular activity that must be made punishable under domestic law. More generally, there are no provisions in the ICRW authorizing or requiring particular actions or sanctions at the international level in the event that a state breaches the ICRW. An analogous omission would be astonishing in the criminal code of a domestic legal system but is almost universally characteristic of treaties (the WTO is a prominent exception.) General (that is, non-treaty-specific) international law on allowable responses to the breach of a treaty exists, but it is poorly specified.\textsuperscript{29}

On the whole, the ICRW displays a high degree of precision in comparison to other treaties or statements of rules for international institutions. The ICRW's core regulatory scheme—a highly precise moratorium on whaling for commercial purposes, a precise quantitative and geographic limitation on whaling for purposes of aboriginal subsistence, and a slightly vague requirement to allow special permits for scientific whaling—reflects, on average, a high degree of precision. The rules governing domestic incorporation are, in their vagueness, fairly typical for an international treaty, and the vagueness of the rules governing responses to breach is almost universally typical of international treaties. One could ask for more precision, but could hardly point to an actual treaty that displays more precision than the current version of the ICRW.

High precision has been a feature of the ICRW throughout its many decades of existence—even as the core regulatory approach of the ICRW has shifted at least twice.

The initial version of the ICRW lacked either moratoria or sanctuaries.\textsuperscript{30} For five species of whales, no taking was allowed where

\textsuperscript{27} See section III.A.3 infra.
\textsuperscript{28} ICRW, supra note 18, art. IX.
\textsuperscript{29} See Responses to Breach, supra note 11, at 18-24, 73-80.
\textsuperscript{30} ICRW, supra note 18, sched.
the whale in question was below a certain length (specified for each species). Factory ships, a clearly recognizable type of vessel, were forbidden to operate in various areas specified precisely in latitude and longitude. In the whale-rich waters near the Antarctic (specified in the ICRW as those waters below forty degrees south latitude), the taking of non-humpback whales by factory ships was limited to a season between December 1 and April 15 (inclusive). Humpback whaling in those waters by factory ships was forbidden year-round. Factory ships operating in southern waters faced not only a seasonal restriction but also an overall quota on the number of baleen whales to be taken, with the quota set at 16,000 Blue Whale Units (BWUs). BWUs were set precisely as one BWU per one blue whale taken, one BWU per two fin whales taken, and one BWU per six sei whales taken. The quantitative nature and the well-defined categorical distinctions (blue whale vs. humpback, factory ship vs. smaller vessels, etc.) make these regulations highly precise.

Exceptions for aboriginal whaling in the original ICRW, however, were less precise than their current form (described above). The initial Schedule stated: “It is forbidden to take or kill gray whales or right whales, except when the meat and products of such whales are to be used exclusively for local consumption by the aborigines.” One wonders whether the last phrase, “by the aborigines,” implies the phrase “by the aboriginals who take them” and thus that the taking, as well as the consumption, is to be limited to aborigines. The original ICRW also contained an exception to its minimum-length requirements, in the form of some shorter minima when “the meat of such whales is to be used for local consumption.” These exceptions both involve at least a bit of ambiguity in deciding what is “local” consumption. Nonetheless, these exceptional provisions are not at the core of the ICRW’s regulatory approach, which focuses on general quotas on open-ocean whaling for general consumption rather than on exceptional quotas on coastal whaling for aboriginal consumption. The great distances between most whale-rich waters and most populated areas make the definition of “local” of limited import.

Between the initial version of the ICRW and the Commission's

31. Id. sched. ¶ 9.
32. Id. sched. ¶ 4-5.
33. Id. sched. ¶ 7(a).
34. Id. sched. ¶ 6.
35. Id. sched. ¶ 8.
36. Id. sched. ¶ 2.
37. Id. sched. ¶ 9.
adoption of the commercial moratorium in the early 1980s, there was one fundamentally new approach. This was the use of quotas set by both species and “stock.” A stock is the set of whales in a given geographical area, with that area set forth in degrees of latitude and longitude.\textsuperscript{38} This is clearly a highly precise approach, with numerical quotas, numerical indicators of the relevant area, and biologically clear species as the relevant parameters.

With the exception of the move to slightly greater precision in exceptional ICRW provisions related to aboriginal whaling and local consumption, then, the precision of the ICRW has remained entirely constant. As with its degree of obligation, the ICRW’s precision has been high, as well as constant, throughout its history.

3. Delegation

The third and final legalization variable is delegation. Legalization theory defines delegation as follows: “\textit{Delegation} means that third-parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules.”\textsuperscript{39}

Although legalization theory has not explicitly done so, one might distinguish two aspects of delegation in the international politico-legal system. The first is the degree to which the parties delegate the elaboration of rules and resolution of disputes to some collectively endorsed entity; the second is the degree to which that collective entity functions as a truly independent organization, rather than as simply an organizational umbrella for individual nation-states. The European Union has proven to involve the delegation of a great deal of authority to the European Court of Justice, which has operated with a good deal of independence. Little delegation occurs to the International Monetary Fund in terms of dispute resolution or rule interpretation, but that entity displays significant independence. Arms control treaties between the superpowers formally involve a good deal of delegation to particular organizations created by those treaties, but the independence of those organizations from the national governments of the parties to those treaties is minimal.

Under this two-part definition of delegation, the degree of delegation manifested in the current ICRW is not very high—indeed, one would almost certainly describe it as very low. Article V(1) of the ICRW states

\textsuperscript{38} Stock Definition, National Marine Mammal Laboratory, \textit{at} http://nmml.afsc.noaa.gov/CetaceanAssessment/stock%20definition.htm (last modified Mar. 8, 2004).

\textsuperscript{39} See Abbott et al., \textit{supra} note 14, at 401.
that “[t]he Commission may amend from time to time the provisions of the Schedule…” The IWC thereby does have some rule-making power (although even here, as discussed above, a nation-state may object to such amendments and remain unbound by them). The ICRW delegates no dispute settlement authority to the IWC, however, nor does the IWC have the power to issue prospectively binding documents that further interpret the rules set forth in the ICRW. Instead, the Commission may “encourage, recommend, or if necessary organize studies and investigations relating to whales and whaling;” it may “collect and analyze statistical information” about whale stocks and the effect thereon of whaling; and it may “study, appraise, and disseminate information concerning methods of maintaining and increasing the population of whale stocks.”

Article VI allows the Commission “to make recommendations to any or all Contracting Governments on any matters which relate to whales or whaling.” These powers or encouragement and recommendation and so on are the stuff only of administrative support, not of delegation.

The second aspect of delegation is the degree of independence of the collective entity. On this score, the IWC fares little better—indeed, it probably fares worse. The text of the ICRW quite clearly constitutes the IWC as a collection of nation-states exercising their individual authorities rather than as an independent “third party” in the institution. Article III(1) specifies that the Commission is “to be composed of one member from each Contracting Government. Each member shall have one vote and may be accompanied by one or more experts and advisers.”

This structure for the Commission thus underscores both the equal sovereignty under the law of each state and, more importantly for present purposes, the nationally oriented nature of the Commission. Article III(5) states that each government is responsible for paying the expenses of its own member and for any experts or advisers accompanying that member. Article III(4) notes that committees of the Commission are allowed, but these too are to be composed of member states and their experts or advisers. Article IX(3) emphasizes, or perhaps simply repeats, the general allocation of enforcement responsibility to individual nation-states: “Prosecution for infractions against or contraventions of this Convention shall be instituted by the

40. ICRW, supra note 18, art. IV.
41. Id. art. VI.
42. Id. art. III, ¶ 1.
43. Id. art. III, ¶ 5.
44. Id. art. III, ¶ 4.
Government having jurisdiction over the offense.\textsuperscript{45}

One might also note that the scientific-permits exemption is consistent with the disinclination of the parties to grant the IWC much authority. The relevant passage plainly gives each state the exclusive authority to grant (or not to grant) a scientific permit. The provision mentions no role for the IWC.

The low formal degree of delegation in the ICRW has remained constant since its inception. No amendment to the ICRW has given the Commission, or any other body, any power to resolve disputes. Neither the Commission nor any other body has been given new textual authority to develop interpretations, whether prospectively or retrospectively oriented, of the treaty text. The Commission has retained its exclusive authority to make the rules embodied in the ICRW.

At the level of actual practice, there has been one minor movement towards a greater role for the Commission in rule interpretation. After disputes among the parties as to whether particular takings were truly for scientific purposes, the IWC issued guidelines on whether a particular taking of whales meets the scientific-permits exemption of Article VIII. In so elaborating upon the phrase “whaling for scientific purposes,” the Commission acted very much like an interpreter of rules. Of course, Article VI has always given the Commission the broad authority “from time to time to make recommendations to any or all Contracting governments on any matters which relate to whales or whaling and to the objective and purposes of this Convention.”\textsuperscript{46}

Similarly, Article VII has made clear that the individual nation-state contemplating the issuance of a scientific permit has the actual and exclusive authority to do so. This activity by the Commission did not, therefore, constitute a challenge to the structure of the ICRW, nor did it reflect some textual change to that treaty. Additionally, the elaboration of criteria with respect to scientific whaling appears to be the only time that the IWC has chosen to make recommendations that took the rhetorical form of an interpretation of pre-existing rules.

\subsection*{B. The (Dynamic) Political Context of the ICRW}

Section A of this Part tells a story of stasis in all three of the variables—obligation, precision, and delegation—that comprise an institution’s degree of “legalization” under legalization theory. Despite this stability in the ICRW’s legal structure, “[f]ew international

\textsuperscript{45} Id. art. IX, ¶ 3.

\textsuperscript{46} Id. art. VI (emphasis added).
organizations have undergone a more dramatic change than the
International Whaling Commission.”47 This section describes the
changes in political variables in the international regulation of whaling.
Part IV will offer several explanations for the durability of the
high/high/low form of legalization in the whaling institution—including, most promimently, the utility of this form of
legalization to national executive branches as a means of preserving
their own authority vis-à-vis other national actors—as well as for the
methodological utility of examining an international institution
reflecting legal stasis but political change.

At the broadest level, the core purpose of the international regulation
of whaling has changed dramatically: The ICRW has moved from an
institution aimed at preserving whaling to an institution seeking to
preserve whales.48 At a finer level of detail, the core regulatory approach
of the whaling institution has similarly displayed important change.
The ICRW’s regulatory approach began with generous quotas based on
BWUs, then moved to less generous stock-and-species quotas, and
finally changed to a commercial moratorium coupled with geographic
sanctuaries covering huge portions of the globe’s oceans. The political
salience of whaling in international relations has been similarly
dynamic: Whaling was obscure in the 1950s, on center stage in the late
1970s and early 1980s, and subject to fits of prominence (correlated
with the Commission’s annual meetings) in the 1990s.49 Across this
wide variety of overarching non-legalization variables, therefore, the
ICRW has changed dramatically, and often frequently, in its many

Participation Make a Difference, in THE IMPLEMENTATION AND EFFECTIVENESS OF
INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE 431, 431 (David G.

48. See David D. Caron, The International Whaling Commission and the North Atlantic
Marine Mammal Commission: The Institutional Risks of Coercion in Consensual Structures, 89
Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching.” See
PARTICIA BIRNIE, INTERNATIONAL REGULATION OF WHALING: FROM CONSERVATION
OF WHALING TO CONSERVATION OF WHALES AND REGULATION OF WHALE-WATCHING (1985).
Peterson describes how the ICRW went from an institution controlled by whaling industry
managers to one controlled by environmentalists (with at most a brief interim of control by
cetologists, though that epistemic community had some influence at the margins throughout). See
M.J. Peterson, Whalers, Cetologists, Environmentalists, and the International Management of

49. For a summary of the politics of the whaling institution in the midst of the crucial
transitional period from pro-whaling to pro-whale, see R. Michael M’Gonigle, The
“Economizing” of Ecology: Why Big, Rare Whales Still Die, 9 ECOLOGY L.Q. 119, 181-202
(1980).
decades of existence.

At least three more specific changes have also occurred in the non-
legalization characteristics of the international regulation of whaling.
First, the scope of its rules has clearly increased. The reach of the
ICRW's quotas or moratoria has increased to include sperm whales and
minke whales—two species covered in the initial ICRW either by only a
restriction on minimum length (for sperm whales) or by no restrictions
at all (for minke whales).50 No species has been dropped from the
ICRW's purview.51 The regulation of aboriginal whaling has broadened
from takings only of gray and right whales to the aboriginal taking of
whales generally.52 Seasonal restrictions and geographically-based
sanctuaries once limited to factory ships have expanded to include land-
based whaling.53

Second, the strictness of the ICRW's rules has plainly increased
through the years. The initial quotas of the ICRW allowed the taking of
tens of thousands of whales, while the current quotas allow for the
taking of only a few dozen (and all by aboriginal whalers).54 The same
pattern of increasing strictness is visible in finer grain. During the time
when the core regulatory approach of the ICRW involved BWUs, the
BWU total either declined from year to year or remained the same.55
During the era of species-and-stock quotas, those quotas diminished
from year to year as well.56 The initially supplemental approach of
commercial moratoria on particular species grew in number from just
two species (gray and right), to three (adding the blue), to four (adding
humpbacks), to an all-species moratorium constituting the core of the
ICRW's regulatory approach.57

50. See ICRW, supra note 18, sched. ¶ 9, 18; International Convention for the Regulation of
Whaling, Dec. 2, 1946, with Schedule of Whaling Regulations, ¶ 1, 16, as amended by the
51. See ICRW, supra note 18, sched. ¶ 18; ICRW Current Schedule, supra note 50, ¶ 1.
52. See ICRW, supra note 18, sched. ¶ 2; ICRW Current Schedule, supra note 50, ¶ 13(b).
53. See ICRW, supra note 18, sched. ¶¶ 4, 7(a); ICRW Current Schedule, supra note 50, ¶¶ 4,
7.
54. See ICRW, supra note 18, sched. ¶ 8; ICRW Current Schedule, supra note 50, ¶¶ 10(e),
13(a).
55. See Pat W. Birnie, International Legal Issues in the Management and Protection of the
56. Chairman's Report on the Twenty-Fourth Meeting of the International Commission on
Whaling, ¶ 15, 18-19 (1974); Chairman's Report of the Thirty-Fifth Annual Meeting of the
International Commission on Whaling, app. 6 (1994).
57. ICRW, supra note 18, sched. ¶ 2; Birnie, supra note 55, at 922; Twenty-Third Report of
the International Whaling Commission, International Commission on Whaling, at 6 (1973);
ICRW Current Schedule, supra note 50, ¶ 10(e).
Third, the numerical membership of the institution has increased steadily over time. The number of states belonging to the IWC has increased from eight nations in the earliest years of the institution, to roughly twice that many during the 1960s and 1970s, to roughly five times its initial membership in the early 1980s. (Membership has been almost stable since the mid-1980s).

These changes have not been without controversy, including some that have affected the ICRW’s membership. Iceland, one of the few nations actively conducting commercial whaling during the 1980s, left the IWC in the early 1990s and has yet to return (but also has yet to conduct any whaling since its withdrawal). Canada has withdrawn in a dispute over aboriginal whaling. Denmark, historically a whaling nation, has withdrawn from the ICRW; Panama and the Netherlands have done so more than once.

Formal objections to the rules of the ICRW have also been frequent, at least when weighted by the prominence of the objecting members in the actual conduct of whaling.58 The two countries still conducting factory-ship whaling into the 1960s (Japan and the Soviet Union) remained members of the institution but, having objected to the ban on factory-ship whaling in the Antarctic, effectively exempted themselves from the changes in the strictness of the ICRW’s rules. Norway, having objected to the ban on commercial whaling and the subordinate ban on whaling in the North Atlantic, was able to conduct the kind of whaling (whaling for minke in waters relatively close to its home waters) that it wished.59 Norway and Russia remain unbound by the commercial moratorium as a result of their objections thereto.60 (Japan and Peru initially objected but have since withdrawn their objections.)61 Japan and Russia have ongoing objections to the ban on whaling in waters near the Antarctic.62

Nonetheless, whale catches since the adoption of the moratorium

58. See Gene S. Martin, Jr. & James W. Brennan, Enforcing the International Convention for
the Regulation of Whaling: The Pelly and Packwood-Magnuson Amendments, 17 DENV. J. INT’L
L. & POL’Y 293, 301 (1989).

59. Clay Erik Hawes, Norwegian Whaling and the Pelly Amendment: A Misguided Attempt at

60. Martin & Brennan, supra note 58, at 306-07.

61. Marian Nash Leich, Contemporary Practice of the United States Relating to International
(1985).

62. See Eldon V. C. Greenberg et al., Japan’s Whale Research Program and International
Law, 32 CAL. W. INT’L L.J. 151, 156 (2002); Michael Twigg, Marine Species Protection and
have dropped quite substantially. Only Norway conducts expressly commercial whaling, and only Japan and Norway conduct whaling under scientific permits. The exact causality of the shift is complex—Russia has almost certainly stopped whaling because of its economic collapse and the poor state of its whaling fleet, for example—but the shift itself shows that behavior in the world has become largely consistent with the anti-whaling norm embodied in the commercial moratorium. Behavior in the world has been even more consistent with the complex rules, including the escape clauses, of the ICRW. The greater strictness of the ICRW’s general rules has therefore been far from an empty gesture.

IV. EXPLAINING THE ICRW’S STABLE LEGAL STRUCTURE IN THE FACE OF DRAMATIC POLITICAL CHANGES

What is one to make of this combination of stability (in the whaling institution’s legalization variables) and change and controversy (in so many other relevant, non-legalization variables)? First, it shows the strength of high obligation/high precision/low delegation as a self-perpetuating combination of legalization variables. As Section IV.A discusses, such stability is generally a useful option to forward-looking, rational actors. Second, as section IV.B argues, the high/high/low form of legalization is especially useful to the national executive branches, which often play a crucial role in the initial design of the institution as well as in its administration. One may then explain the frequent choice of a high/high/low form of legalization as a manifestation of the desire of national executive branches to erect what is for them a dependably useful edifice of international cooperation. Third, as section IV.C argues, an examination of high/high/low forms of legalization can be useful to scholars analyzing international institutions because, at least in the case of the ICRW, such institutions allow scholars to unbundle increases in legalization from increases in institutional cooperation generally. Institutions like the European Union and the WTO show

64. Hawes, supra note 59, at 107; Martin & Brennan, supra note 55, at 304, 309.
increases in both legalization and non-legalization variables, and so any causal explanation of the changes necessarily paints with a broad brush. In these cases, one is especially hard-pressed to decide whether increasing legalization drives increasing cooperation or whether the reverse is true. The ICRW does not display increases in both legalization and non-legalization variables, so one can at least begin to examine the two phenomena separately.

A. The Efficacy of the ICRW’s Legal Structure in Promoting Stability

Rational governments choosing an initial form of legalization will eventually evaluate the wisdom of their choice in light of the subsequent course of events. Governments, perhaps importantly influenced by non-state actors, make an initial choice about legalization. Events unfold. Governments will then judge whether events have unfolded in accord with their purposes (or at least their interests), and use this judgment to shape their subsequent choices about forms of legalization. If the choice of legalization has not served a useful function for the actor making such a choice, then that actor will be less likely to make such a choice in the future.  

If this functionalist story of choices about legalization is to be credited, then actors must believe that there is some predictable relationship between the initial choice of a particular form of legalization and the outcome of events. Of course, some factors besides the initial form of legalization may contribute to the outcome of events, but the initial form of legalization must predictably be one factor in the outcome. Otherwise, the veil of ignorance will be so thick that choosing one initial form of legalization will be as good as choosing any other.

One can imagine a variety of relationships between an initial choice of an institution’s legalization variables and the subsequent values of those variables. The initial choice of a low/low/high form for an international institution might lead to an evolution towards a more legalized institution, perhaps because an organization delegated significant authority conscientiously worked out the details of the relevant rules and created an environment of reasoned decision making sufficiently attractive to other states for them to firm up their initially cautious commitments to the institution. The initial choice of a

high/high/high form for an institution might lead to later de-legalization, perhaps because the initial specification of detailed rules proved to be a poor match for the practical problems faced by member states and the organization was unable to dissolve the dissonance despite its possessing significant delegated authority. In addition to an initial choice leading to more legalization or less legalization, the initial choice of form could of course lead to a constant degree of legalization over time.

This last, stabilizing set of legalization dynamics appears to describe most accurately the ICRW. As Part I discussed, the ICRW was founded with a high/high/low form of legalization, and the institution has continuously retained this form of legalization down to the present.

Such durability in an initial form of legalization plainly has some benefits. In an uncertain world of limited resources, after all, constancy is valuable. Actors in international relations, especially governments, are forever complaining of the breadth and complexity of the issues that clamor for their limited attention and their finite means to address them. A durable initial form of legalization gives such actors one less thing about which to worry. They may then plan with greater surety and make investments of knowledge and resources with greater confidence.

Additionally, as Abbott and Snidal emphasize, there is a need in international politics for mechanisms that allow credible commitments to be made even in a decentralized system. Legalization can, in theory, provide such a mechanism. In practice, the initial commitment to the high/high/low form of legalization in the ICRW has proved credible in at least two dimensions.

First, the whaling institution has retained its particular form of legalization for more than fifty years. This is a long time, at least in international institutional terms. Certainly other institutions have displayed significant shifts in the form of their legalization during the same (or a shorter) length of time. In roughly the same time span covering the ICRW's existence, for example, the amount of precision and delegation in European economic integration shifted significantly as the ECJ and various national courts grew in power and as the ECJ and other sub-institutions of Western European economic integration

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68. See id. at 426.
69. None of the specifically named institutions in Table One of the overarching conceptual article in the Legalization issue existed until after World War Two. See Abbott et al., supra note 14, at 406 (Table One). The generically named institutions in that table—"technical standards," "spheres of influence," and "balance of power"—may be significantly older, but they hardly seem the flower of international institutionalism.
elaborated substantive rules of increasing precision. The General Agreement on Tariffs and Trade (GATT) grew from an apology for the failed International Trade Organization (ITO) into an institution with thousands of pages of precise rules and, through the creation of the WTO, into a dispute-resolution mechanism possessing a good deal of delegated authority. In just a few short years, the regime governing the production and consumption of ozone-depleting substances moved from the vague norms of the Vienna Convention on Protection of the Ozone Layer to the much more precise rules of the Montreal Protocol on Substances that Deplete the Ozone Layer. The ICRW, in contrast, has remained steadfastly high obligation, high precision, and low delegation.

Second, the commitment to a high/high/low form of legalization has proven credible despite a variety of changes in other variables. In the absence of changes from without, there might be less to be said for the impressiveness of stability within. As discussed above, however, the whaling institution has seen a sea of changes in a wide variety of its aspects—from purpose to political salience to membership to the scope and strictness of its rules. The whaling institution has therefore demonstrated the durability of its particular form of legalization over a long period of time during significant shifts in a wide variety of non-legalization variables.

B. The Utility to National Executive Branches of the ICRW’s Stable Legal Structure

What might account for such long-standing stability in the legal structure of the ICRW (as reflected in the three legalization variables) despite significant shifts in a host of other phenomena associated with the international regulation of whaling?

One broad explanation would be that the “low” value in the high/high/low form of legalization is the crucial value of the crucial variable. If delegation is low, then executive authorities within national governments are likely to retain a great deal of discretion in interpreting and enforcing the rules of the relevant institution. No plausible explanation of the increasing legalization in Western European economic integration, in contrast, could fail to assign a prominent role to the delegation of decision-making authority to the European Court of Justice—that is, to the “high” value of the delegation variable in the relevant institution. That delegation itself has led to the centripetal diffusion of power to national courts, transnational alliances of lawyers,
and private litigants. As Abbott and Snidal have said in more general terms, "Delegation provides the greatest source of unanticipated sovereignty costs." A low-delegation form of legalization, conversely, removes much of the potential for unintended consequences, subtle interactions among non-executive actors, and the momentum of legal discourse. The low-delegation environment generates a political dialogue conducted by national governments, especially their executive branches, and thus preserves the sovereignty of member states.

Indeed, one would do well to note that the same actors formally responsible for negotiating the texts of treaties—the executive authorities of national governments—are also the actors given ongoing formal authority for rules interpretation and enforcement in a low-delegation institution. Legislatures may have a role to play in whether the executive may legitimately ratify the treaty and in how the treaty is implemented within that nation; national courts may have something to say about implementation as well; and of course various non-state actors must be reckoned with or placated. Nonetheless, the formal authority to negotiate the relevant rules goes to the executive branch. In most nations, the executive remains a formidable power in actuality as well. Choosing a low-delegation form of institutionalization gives that national executive authority the most prominent possible ongoing role in the institution.

This explanation supports the choice of any low-delegation form of legalization but does not, without more explication, support the choice of any particular value for the obligation and precision variables. Indeed, if maximizing executive discretion is the key, then one might expect low-obligation institutions and low-precision rules to be preferred and stable. Taking a "reasonable" number of whales each season, for example, is a less constraining rule for an executive authority, one imagines, than taking "no more than ten blue whales and no more than one hundred humpback whales" each season. A similar argument might apply to obligation as well: does not a lack of any legal obligation give an executive branch more discretion than formally binding obligations?

70. See Walter Mattli & Anne-Marie Slaughter, Revisiting the European Court of Justice, 52 INT'L ORG. 177 (1992); Anne-Marie Slaughter et al., Legalized Dispute Resolution: Interstate and Transnational, 54 INT'L ORG. 457 (2000).
71. See Abbott & Snidal, supra note 67, at 438.
72. Of course, the balance of power is listed in Table 1 of Abbott’s introductory chapter as such an institution, and it may well be one with great stability of form. See Abbott et al., supra note 14, at 406. Certainly theorists of international relations have been keen to display its long-standing relevance.
The whaling institution has rules of high precision and obligation, however, rather than the low-precision, low-obligation rules that one might initially predict. One explanation of the ICRW’s structure as actually observed might simply privilege delegation over obligation and precision. So long as the executive branches of national governments are in charge of implementation and enforcement, after all, there may be little to fear even from rules that are formally binding and formally precise. If the proof is in the pudding, then one may be able to trust one’s fate to the baker regardless of the recipe. Using high-obligation rules of high precision may also allow a national government to reap some of the political benefits of having taken action while ensuring that the government actually remains in control.

Alternatively, at least in the case of the whaling institution, the obligation of its rules may be “high” compared to many alternatives, but nonetheless not be truly constraining to an alert government willing to cast off the ICRW’s rules if they should bind it too tightly. Withdrawal from the entirety of the whaling institution’s formally binding and high precision obligations, after all, may be accomplished with six months’ notice, and there is no requirement even to state the reasons for withdrawal.73 At a more specific level, a nation may object to any amendment to the original Schedule of the ICRW and thereby not be bound by the new rule—a right especially important since amendments to the Schedule have been the method by which any general tightening or broadening of the ICRW’s substantive rules has occurred.74 And at a yet more specific level, the unilateral availability of the “scientific permits” exemption allows a nation to decide to conduct whaling in any particular instance, even if it is formally bound by the other rules of the ICRW and amendments thereto.75

One might also note that the high precision of the rules in the ICRW may, against the backdrop of the various escape clauses in the ICRW,

73. See ICRW, supra note 18, art. XI, 62 Stat. at 1721, 161 U.N.T.S. at 86 (providing that “Any Contracting Government may withdraw from this Convention on 30th of June, of any year by giving notice on or before 1st of January of the same year to the depository Government, which upon receipt of such a notice shall at once communicate it to the other Contracting Governments”).

74. See ICRW, supra note 18, art. V (setting forth procedures for amending Schedule). The treaty does not even mention how to amend the non-Schedule portion of the treaty. See also http://www.iwcoffice.org/iwc.htm/history (“The main duty of the IWC is to keep under review and revise as necessary the measures laid down in the Schedule to the Convention which govern the conduct of whaling throughout the world.”) (emphasis added) (last visited Apr. 7, 2004); Setear, Iterative Perspective, supra note 21, at 222 n.325 (discussing lone amendment to non-Schedule portion of treaty and contrasting frequent and wholesale changes made to Schedule).

75. See ICRW, supra note 18, art. VIII, 62 Stat. at 1719-20, 161 U.N.T.S. at 82.
actually benefit cautious bureaucrats in the executive branches of national governments. Ordinarily, a national government might wish for low-precision rules to maintain its greatest freedom of action. The presence of various escape clauses within a system of high-precision rules, however, may in fact be a better combination over time for states seeking to preserve their freedom of action. Upon joining the ICRW, a nation knew just what the relevant rules were. To attempt subsequently to constrain the behavior of a nation in some different fashion would require changing those rules. With vague rules, in contrast, some actors might reasonably resolve ambiguities in the direction of stricter application, to the detriment of cautious governments still formally bound to the relevant terms. One must change precise rules with explicit changes in language, however, which gives nations the opportunity, under the precise procedural rules addressed to escape clauses, to avoid obligation under the reformed rules.

C. Legalization vs. Institutionalization

The authors of the introductory article in the Legalization issue both define and distinguish legalization and the broader concept of institutionalization:

International institutions—enduring sets of rules, norms, and decision-making procedures that shape the expectations, interests, and behavior of actors—vary on many dimensions. The WTO and the international regime for the protection of polar bears are both institutions, but they differ according to the scope of their rules, the resources available to the formal organizations, and their degree of bureaucratic differentiation. In general, greater institutionalization implies that institutional rules govern more of the behavior of important actors—more in the sense that behavior previously outside the scope of particular rules is now within that scope or that behavior that was previously regulated is now more deeply regulated. Substantial institutionalization can be demonstrated to exist in world politics, but Legalization represents a specific set of dimensions along which institutions vary. The definition of legalization adopted in this issue contains three criteria: the degree to which rules are obligatory, the precision of those rules, and the delegation of some functions of interpretation, monitoring, and implementation to a third party.  

76. Goldstein et al., supra note 12, at 387.
1. Legalization and Institutionalization in General

How exactly does legalization relate to institutionalization? On the surface, the long passage quoted above seems to make a clear enough point: the three dimensions of legalization are some, but far from all, of the dimensions of institutionalization. This incorporation of legalization within institutionalism implies that legalization is not so problematic for institutionalist theorists after all, whatever puzzles it may present for theorists of other stripes. Certainly one chapter in the Legalization issue describes legalization in language that could be lifted almost verbatim from many descriptions of the role of institutions: “[L]egalization can help states and other actors resolve the commitment problems that are pervasive in international politics, reduce transaction costs, and expand the grounds for compromise.”

If we accept the incorporation of legalization as a phenomenon within institutionalization, another question presents itself: Why single out obligation, precision, and delegation as exactly the three variables worthy of study independent from any other variable(s) of institutionalization? The authors of the introductory chapter present the definition but do not defend its perimeter. The authors of all the other chapters simply adopt the definition of legalization in the introductory chapter as their own.

One might imagine that “legalization” is a word chosen to evoke some connection with the concept of law. The authors of the introductory chapter are at pains, however, to emphasize that the legalization variables do not correlate with what international lawyers or

77. One might also note that the definitions of the three dimensions of legalization all mention rules, but none mentions norms or decision-making procedures, the two other enduring influences of institutions. If legalization focused only on rules, while institutions focused on norms and decision-making procedures, then the rules-oriented focus of legalization would further narrow legalization as a concept compared to institutionalism. But surely the notion in legalization theory of delegation, with its concern for the methods of interpreting rules and otherwise resolving disputes, is a question of decision-making procedures. As to norms, the introductory article in the Legalization issue refers several times to “legal norms” in a fashion that implies a connection between legalization and legal norms. See id. at 389 ("Contemporary WTO panels are conduced in accord with legal norms"); id. at 393 ("International legal norms are most effectively enforced when they are embedded in domestic 'rule of law' legal systems..."); id. ("Constructivists... have not explained the distinctiveness of legal norms or why actors sometimes prefer to reinforce normative consensus with legalized institutions."). One must therefore conclude that legalization is in fact about not only rules but also about norms and decision-making procedures.

78. Goldstein et al., supra note 12, at 394 (describing Abbott & Snidal, supra note 67).

79. Frederick Abbott quibbles with one aspect of one of the three variables, however. See Frederick M. Abbott, NAFTA and the Legalization of World Politics: A Case Study, 54 INT'L ORG. 519, 520 n.4 (2000).
legal philosophers would characterize as "law." In any case, there is no reason why importing a concept unquestioningly from another discipline would justify its merits to theorists of international relations. The notion of obligation in legalization theory is plainly one of legal obligation, however, and the notion of delegation to a neutral third-party decision maker surely brings courts of law to mind. Indeed, the broader concept of an institution bears many similarities to the modern legal academic’s view of the functions of international law.80

Perhaps the greatest difficulties of line drawing revolve around the inclusion of precision and the exclusion of other characteristics of the substantive rules of the institution. If the precision of rules qualifies as part of legalization, why doesn’t their strictness or scope or breadth of adherence?81 The authors of the introductory chapter state: “Precise sets of rules are often, though by no means always, highly elaborated or dense, detailing conditions of application, spelling out required or proscribed behavior in numerous situations, and so on.”82 Why is precision part of the definition of legalization but not elaboration or density?

Similar difficulties, of course, might beset any definitional effort. Indeed, institutionalization as a whole is subject to some of these problems. Some are questions of the level of analysis: Is “national treatment” within the GATT an institution? Is the GATT as a whole an institution? The WTO? “Free trade”? International political economy? There are related problems of aggregation for the analysis of legalization or any other aspect of institutionalization. For example, the European Economic Community (EEC) as a whole is listed, in Table 1 of the introductory piece in the Legalization issue, as an institution of high/high/high legalization. The EEC’s antitrust policy is listed as high/low/high. Is it the high precision of policy on the free movement of goods that outweighs the imprecision of antitrust policy and makes the institutions as a whole one with precise rules? What about the impact on the determination of the imprecision of the EEC’s policy on

81. By “strictness,” I mean the degree to which behavior along a given dimension is flatly prohibited. A quota of fifty humpback whales is stricter than a quota of 100 humpback whales. By “scope,” I mean the number of dimensions of behavior subject to some rule. Rules setting forth quotas of 100 humpback whales and a ban on cold-grenade harpooning are of greater scope than rules that rules simply setting forth a quota of 100 humpback whales. By “breadth of adherence,” I mean the number of nations who ascribe to the rules. A treaty with fifty parties sets forth more popular rules than would the same treaty if it had just ten adherents.
82. Abbott et al., supra note 14, at 413.
environmental matters? The EEC, of course, is now just a portion of the European Union (EU). Is the EU a high-precision institution because the EEC is its dominant component, or do the ambiguities of EU rules on the unification of national foreign policies and systems of social justice make the EU a low-precision institution?

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This article raises the questions discussed just above, but in the end accepts legalization theory's definition of legalization. This article does discuss strictness, scope, and breadth of adherence, but it does so as non-legalization variables relevant to institutionalization. It implicitly ignores other definitional issues by using "the whaling institution" interchangeably with "ICRW" (technically, merely a legal instrument) and "IWC" or "Commission" (technically, merely an associated organization).

This article now addresses head-on, however, a more fundamental question about the relationship between institutionalization and legalization: Is legalization an empty concept because its variables always co-vary with other measures of institutionalization? A number of examples prominent in the Legalization issue suggest an affirmative answer. The WTO and the EU show not only increasing legalization over time but also increases in non-legalization variables such as strictness, scope, and breadth of adherence. The history of the whaling institution, however, supports a negative answer to this question. Its legalization variables have remained constant while a wide variety of its non-legalization variables have changed. The ICRW thus stands as evidence—on this point at least—that one at least can distinguish legalization from institutionalization.

2. Legalization, Institutionalization, and Whaling

The legalization variables, as defined in the Legalization issue, are obligation, precision, and delegation. Institutionalization variables include, as mentioned in the long passage quoted above, "the scope of

83. See supra section III.B. For a discussion of these variables in the context of the international institution regulating ozone-depleting substances, see Setear, Ozone, supra note 19.

84. There is even another arguably relevant organization, NAMMCO, which has a few members and a set of rules much more favorable to whaling in the North Atlantic (the only area that it purports to regulate) than does the ICRW. See David D. Caron, Current Development: The International Whaling Commission and the North Atlantic Marine Mammal Commission: The Institutional Risks of Coercion in Consensual Structures, 89 Am. J. Int'l L. 154 (1995). I ignore NAMMCO, however.
rules, the resources available to organizations, and the degree of bureaucratic differentiation involved. Even from this short list, there is at least one problem of co-variance: Institutions with high delegation rules will almost certainly have a highly differentiated bureaucracy. The European Court of Justice is quite distinct from non-court EU entities such as the European Commission. Nor is the ECJ the only court in the legal structure of the European Union. A Court of First Instance as well as national courts (themselves a well-differentiated bureaucracy) play important roles. Indeed, if "[d]elegation means that third parties have been granted authority to implement, interpret, and apply the rules," then surely the European Commission is part of the analysis of the EEC or European Union as well.

Still, at least some variables relevant to institutionalization are plainly absent from the three-variable definition of legalization set forth in the *Legalization* issue. The commitment of more resources to the institution is one such variable. The scope of the institution’s rules, their strictness, and their density are all absent from the three-variable definition (though this last measure, once fleshed out, may prove to be similar to precision). The breadth of adherence to an organization seems likely to indicate growing institutionalization. And for a constant membership, an increase in the influence of the institution’s rules on states’ behavior presumably would also indicate greater institutionalization.

In the abstract, therefore, one may advance variable that seem relevant to institutionalization but are not present in the definitions of the legalization variables. The empirical difficulty in advancing legalization as a concept implicitly independent from institutionalization, however, is that legalization and non-legalization variables seem to co-vary so closely in the most prominent examples of high-legalization regimes. Surely European economic integration is the most prominent example of increasing legalization in international institutions, with the steady increase in the precision of its rules provided by its formal court—a court supported doctrinally by direct effect and supremacy, and supported organizationally by a transnational network of other courts and lawyers. Yet European economic integration also displays a remarkable and steady increase in non-legalization variables relevant to institutionalization. The resources devoted to its organizations have clearly grown. The scope of transactions covered by its rules increased as the European Coal and Steel Community became the European Economic Community and then

85. Goldstein et al., *supra* note 12, at 387.
86. Abbott et al., *supra* note 14, at 401.
the European Community. Membership in the institution increased monotonically, if somewhat fitfully, during the Cold War; since the fall of communism, the line of would-be members runs out the door. Over time, the EU seems to have transformed the continent from national fiefdoms into a harmonized Western and Central Europe, both normatively and behaviorally.

The story in global free trade—the other high-profile example of legalization—shows a similar co-variance between legalization specifically and institutionalization generally. As its mechanisms of dispute resolution deepened during the Cold War from diplomatic parleys to more formal and partly legalistic panels, the scope and strictness of tariff reductions broadened and deepened with each major round of negotiations. In the shift from GATT to the WTO, dispute resolution moved from panel decisions binding only with WTO Council unanimity to panels reviewed by an Appellate Body and binding only if unanimously overruled by the Council. This shift from political to legal decision-making is consistent with increasing legalization. In the shift from GATT to the WTO, the scope of rules in the institution broadened to include not only goods but also services, capital, and intellectual property. This shift from regulating international trade in goods to regulating international trade generally is irrelevant to legalization but consistent with increasing institutionalization. High values for legalization variables in the GATT/WTO are thus correlated with high values for non-legalization variables of institutionalization. Legalization leading to both the contemporary EU and the WTO, therefore, does not appear to be an independent phenomenon and thus, at least by implication, is not worthy of independent study.

The same correlation of legalization and non-legalization variables in institutionalization also occurs with respect to low-legalization institutions. The introductory article in the Legalization issue, for example, identifies "spheres of influence" and "balance of power" as two low-legalization institutions. One is indeed hard pressed to infer many legally binding obligations, precise rules, or highly delegated decision-making in these arenas. (Treaties of alliance, whether used to balance power or denote spheres of influence, seem to be the exception, but their rules in the post-World War II era have been imprecise and their degree of delegation non-existent.) One is similarly hard pressed, however, to identify any other dimensions of institutionalization along which these regimes score high. What associated organizations

87. See id. at 406 (Table 1).
administered their enduring sets of rules, norms, and decision-making procedures? When did the scope or strictness of the rules on spheres of influence expand? Indeed, were there any rules, norms, or decision-making procedures at all in the "institution" of spheres of influence or the balance of power during the Cold War beyond "no rollback in Eastern Europe, no medium-range missiles in Cuba, no new deployment of one superpower's troops near the other's, and no superpower troops at all in the Middle East?" Low values of the legalization variables thus seem correlated with low values of the other institutionalization variables, just as high values of the legalization variables in European economic integration and global trade regulation are correlated with high values of the non-legal institutionalization variables in those regimes. The independence of legalization from other aspects of institutionalization seems questionable in these cases.

The whaling institution, however, can provide an example of the independence of legalization variables from other dimensions of institutionalization. As described above, the form of legalization in the ICRW has remained unchanged for more than five decades, while a wide variety of changes have swirled in and around the whaling institution. These changes tend to show greater institutionalization in the whaling institution—more members and more comprehensive regulation. Legalization thus remained constant in the ICRW while its institutionalization as a whole increased, demonstrating the possibility that—in at least one case—legalization and institutionalization are independent phenomena.

Furthermore, one would do well to note that a host of international institutions—including virtually all institutions concerned with security or environmental issues—share with the ICRW a low-delegation system of dispute resolution. The ICRW is therefore not simply an isolated example of variance between legalization variables and other variables related to institutionalization but rather a potential representative of a large class of institutions typically ignored by legalization theorists.

V. DOMESTIC POLITICS AND THE LEGAL STRUCTURE OF INTERNATIONAL INSTITUTIONS

Legalization theorists often examine the interplay between domestic politics and legalization, and they also often emphasize the absence of any rigid barrier between law and politics. Yet the analyses of domestic

88. See supra section II.A.
politics in the *Legalization* issue are rarely accompanied by any discussion of domestic law. (The exception involves some analysis of the transnational alliances between courts and lawyers associated with the European Court of Justice.) This omission of domestic law is consistent with legalization theorists’ definition of their three crucial variables, which, after all, mentions domestic law in connection only with obligation, and then only somewhat tentatively. 89 Likewise, this article has thus far ignored domestic law.

This Part of the article, however, opens the domestic legal door a few inches to examine two U.S. statutes, known as the Pelly Amendment and the Packwood-Magnuson Amendment, that are directly relevant to the ICRW. Both of these congressional enactments set up a two-stage process of certification, and then sanctioning, by the U.S. executive branch; in both cases, the U.S. executive branch is to act when the actions of the offending foreign state “diminish the effectiveness of” the ICRW. 90

I argue that these statutory amendments were, in effect, an attempt to increase the degree of effective delegation in the ICRW by grafting the United States’ robust, highly developed domestic system of legal interpretation and enforcement onto the weak reed of the ICRW’s actual, low-delegation mandate. The graft did not take, however, as a combination of executive recalcitrance and judicial interpretation of the relevant statutory law left the U.S. executive branch (and thus the ICRW as well) with nearly the same freedom of action that it (they) possessed before the enactment of the relevant statutes. 91 Although a combination of statutory enactment and litigation may in many circumstances be a potent engine of domestic legal reform, that same combination proved to be incapable of reducing the executive branch’s discretion in the conduct of foreign policy. The low-delegation legalization of the ICRW thereby endured, with national executive authorities retaining their power to interpret and enforce the legally binding, high-precision rules of the whaling institution.

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89. Obligation is said to signify that states “are legally bound by [a] rule or commitment in the sense that their behavior thereunder is subject to scrutiny under the general rules, procedures and discourse of international law, and often of domestic law as well.” Abbott et al., supra note 14, at 401 (emphasis added). Domestic law is mentioned again in the introductory chapter only by way of analogy, not by way of inclusion in the form of legalization.


91. For an argument that Congress and the courts have likewise failed to constrain executive discretion with respect to the degree of legislative involvement required before presidential ratification of a treaty, see John K. Setear, The President’s Rational Choice of a Treaty’s Preratification Pathway, 31 J. LEGAL STUDS. 55 (2002).
1. Congress Proposes

As a low-delegation institution, the ICRW lacks a sophisticated, authoritative, permanently specialized mechanism for the interpretation of its rules. Additionally, as with virtually every treaty, the ICRW says nothing about the sanctions to be levied against those who break its rules. Interpretation and enforcement in the low-delegation ICRW is a matter for individual states, not for the institution.

One might imagine that such a situation is not, at least against the general backdrop of the ICRW’s history, particularly stable. By many accounts, the rules of the ICRW tightened in the 1970s and 1980s in response to the entreaties of anti-whaling environmental groups.\(^{92}\) One might well imagine that such groups would think their victory incomplete if states continued to retain nearly unfettered control over the formal interpretation and enforcement of those stricter rules. International environmental NGOs mainly drew their members from nations with highly legalized domestic legal systems. Environmentalism was a new and apparently potent force not only in international relations but also in domestic politics. Private organizations were more familiar, and perhaps more powerful, actors on the domestic political scene than in international politics. In domestic law, such groups had the right to bring lawsuits. In light of these factors, a campaign by environmentalist groups to use domestic legal systems as high-delegation reinforcements for the shaky, low-delegation flank of the ICRW would presumably be quite attractive.\(^{93}\) In the case of the U.S. domestic legal system, however, the campaign failed to take much new ground. The bastion of national executive discretion proved too strong.

The story begins, in the United States at least, with the incorporation of the ICRW into the U.S. Code: “It shall be unlawful for any person or vessel subject to the jurisdiction of the United States to do any act prohibited or to fail to do any act required by the convention.”\(^{94}\) Per

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93. See Joseph Weiler, The Transformation of Europe, 100 YALE L.J. 2403 (1991) (discussing how nations in the European Community balanced concerns of “voice” and “exit,” prompted in significant measure by the higher delegation that the ECJ brings to European economic integration). The actors, and the concepts, are different in the whaling institution as analyzed here, but the efforts to manipulate a variety of variables in a dynamic environment are similar.

another section of the U.S. statutory code, a violation of a substantive provision of the ICRW risks a fine of $10,000, imprisonment for up to one year, and an indeterminate ban on subsequent whaling by that person.\textsuperscript{95} Violation even of the reporting requirements of the ICRW risks a fine of $500 and a prohibition on subsequent whaling until the requirement has been fulfilled.\textsuperscript{96} As an initial matter, therefore, the interpretation and enforcement of the ICRW involves the highly developed U.S. legal system.

Who is "subject to the jurisdiction of the United States" (and thus subject to this statutory scheme that incorporates the ICRW and specifies its own penalties for violation thereof)? U.S. citizens, of course, are subject to the jurisdiction of the United States—even when on the high seas.\textsuperscript{97} Additionally, the United States clearly has jurisdiction over citizens of \textit{any} nations in those waters within twelve nautical miles of the U.S. coastline and, under the United Nations Convention on the Law of the Sea, over matters pertaining to access to economic resources (such as whales) within 200 nautical miles of the U.S. coastline.\textsuperscript{98} The "person or vessel subject to the jurisdiction of the United States" triggering the application by the U.S. of the ICRW would thus include any U.S. citizens anywhere, as well as the citizens of any nation when they are in waters within 200 nautical miles of the U.S. coastline.

By the time that the whaling institution became a focus of political attention, especially of environmental NGOs, the U.S. laws discussed above had little impact on whaling, however. With the exception of aboriginal whaling, U.S. citizens and ships were no longer active whalers. Commercial whaling within 200 nautical miles of the U.S. coastline, whether by U.S. citizens or others, had also ceased. Large-scale whaling occurred mostly in Antarctic waters, conducted mostly by the Soviet Union and Japan. (Some whaling in other non-U.S. waters, or by other non-U.S. whalers, still occurred, however.) If U.S. environmental NGOs were to use U.S. statutes to strengthen the anti-whaling tendency of the ICRW, then those statutes needed to target individuals and ships operating outside the jurisdiction of the United States. The Pelly and Packwood-Magnuson amendments aimed at just

\textsuperscript{95} See \textit{id.} § 916(f) (2003).
\textsuperscript{96} See \textit{id.} § 916(e) (2003).
\textsuperscript{97} \textsc{Restatement (Third) of the Foreign Relations Law of the United States} § 402(2). \textit{See} 28 U.S.C.A. § 1783(a) (West 2004).
such entities.

Congress passed the Pelly Amendment in 1971, in the midst of dramatic changes in U.S. domestic politics that led to such landmark pro-environmental legislation as the Clean Air Act Amendments (1970), the establishment of the Environmental Protection Agency (1970), the birth of environmental-impact statements (in 1970’s National Environmental Protection Act), the Clean Water Act (1972), and the Endangered Species Act (1973). The Pelly Amendment states:

When the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President.99

(The statute makes clear that the ICRW, although it governs whales rather than fish, is nonetheless a “fishery conservation program” for the relevant purposes.) The original language of the statute then continued:

Upon receipt of such certification, the President may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of fish products of the offending country for such duration as he determines appropriate and to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade.100

Despite this authorization, however, and despite five Pelly certifications between 1971 and 1978, the executive branch levied no such sanctions.101

After a good deal of congressional criticism of this executive inaction, Congress passed (and the President signed) the Packwood-Magnuson amendment. Its standard of certification is stated in terms nearly identical to that of the Pelly Amendment (though even more plainly focused on the effectiveness of the ICRW in particular):

The term “certification” means a certification by the Secretary [of Commerce] that nationals of a foreign country, directly or indirectly, are conducting fishing operations or engaging in trade or taking which diminishes the effectiveness of the International

Convention for the Regulation of Whaling. 102

Immediately upon such certification, the U.S.-waters fishing quotas of the relevant nation “shall be reduced by the Secretary of State” by no less than fifty percent, and shall be reduced to zero if the nationals of the offending nation do not cease their offending activity within a year of the initial certification. 103

Thus, the grounds for certification under either the Pelly Amendment or the Packwood-Manguson Amendment are similar: action that “diminishes the effectiveness” of the ICRW. 104 Indeed, the Packwood-Magnuson Amendment expressly states that a certification under its terms also counts as a certification for purposes of the Pelly Amendment. 105 The post-certification pathways of each statute, however, diverge in both their choice of instrument and the degree of discretion given the executive branch in wielding that instrument. As to choice of instrument, Pelly sanctions involve trade sanctions 106 while Packwood-Manguson involves quotas to take fish in U.S. waters. 107 As to discretion, the Packwood-Magnuson Amendment plainly restricts the freedom of action of the U.S. executive branch more than the earlier law: After certification, the executive may levy Pelly sanctions on trade but must levy Packwood-Magnuson sanctions on fishing quotas. 108

2. The Courts and Executive Dispose of the Whaling Amendments

If environmental NGOs and the members of Congress believed that the mandatory aspects of the Packwood-Magnuson amendments would force the executive branch off the no-sanctions dime, they were wrong. Faced with proposed Japanese whaling that plainly appeared to merit certification, the U.S. executive branch instead entered into an agreement with Japan that expressly condoned extensive Japanese whaling in the face of an ICRW ban. An environmental NGO challenged the Executive’s policymaking in litigation that began in late 1984. By 1986, the case had gone all the way to the Supreme Court, where it was styled Japan Whaling Association v. American Cetacean Society. 109 There, the U.S. Supreme Court upheld inaction on sanctions

103. Id. § 1821(e)(2)(B)(ii).
105. See id. § 1821(e)(2)(A)(i).
as within the executive branch’s discretion. At the domestic level, as at the international level, national executive authority was triumphant.

The key to the case, at least in the view of the Supreme Court, was the wide latitude with which the executive branch may, in deciding whether to certify a nation, interpret the phrase “diminishes the effectiveness of the International Convention for the Regulation of Whaling.” Congress did not further define the diminution-in-effectiveness term in either the Pelly or the Packwood-Magnuson Amendments. The Court thus looked to a cluster of other factors—the circumstances of pre-Packwood Amendment certifications made by the executive branch under the Pelly Amendment, congressional statements made outside the statute books, and the terms of the executive agreement with Japan—in order to reach its conclusion.

At each turn, the Court interpreted the relevant factor in the light most favorable to executive discretion. Congress had tacitly approved Pelly certifications issued against nations formally unbound by the ICRW by way of objection, and even against nations not party to the ICRW at all. To the Court, this indicated that Congress intended wide latitude in the crucial certification phase, not that Congress wanted the executive branch to certify whaling nations whenever possible. The Court emphasized congressional statements stating that individual or isolated violations would not ordinarily warrant certification. The Court ignored the fact that Japan was proposing to take hundreds of whales annually from a stock with respect to which the ICRW had set a zero quota, not asking for leniency after taking a few stray whales above an allowable quota in the thousands. The Court saw the executive agreement as one reasonable way to promote the conservation-oriented interests of the new ICRW in a world where, implicitly, the IWC had no authority of its own and Japan had significant bargaining power compared to anti-whaling nations. The Court did not see the agreement as explicit approval by the U.S. executive branch of violations of the ICRW’s core regulatory approach in exchange for nothing more than Japan’s promises to relinquish their formal objections to the relevant ICRW provisions.

Since the Japan Whaling decision, Congress and environmental groups have not revisited the issue to change the text of the relevant statutes, except to broaden potential sanctions under the Pelly Amendment to include not only fish products but also any other kind of product imported into the United States by the certified nations. The

110. Id. at 222-23.
executive branch, for its part, has yet to levy any sanctions under the Pelly Amendment, although it has since twice sanctioned a nation under the Packwood-Magnuson Amendment.\footnote{Hawes, supra note 59, at 106 (“To date, the sanctions called for by the Pelly Amendment have never actually been imposed.”); Contemporary Practice of the United States Relating to International Law, 95 Am. J. Int’l L. 132, 151-52 (2001) (describing certifications of Japan).}

The executive branch is not, however, always opposed to the threat or the application of sanctions in support of the whaling institution. As was true before Packwood-Magnuson and the Supreme Court case interpreting that statute, the arguably offending nation’s utilization of escape clauses in the relevant international agreement has not insulated nations from the threat or application of sanctions. Of the twelve certifications that have issued against various nations at various times, in fact, none involved a nation accused of breaking an ICRW provision to which it was clearly bound in international legal terms. Five certifications involved nations that had objected to the “violated” provision and were thus unbound by it; four certifications involved nations not party to the ICRW at all at the time; and three certifications were of nations conducting scientific whaling, which is, as described above, a category of whaling with respect to which a nation has very great, if not absolute, discretion in international law.\footnote{See Martin & Brennan, supra note 58.}

The executive branch thus does not take the position that sanctions shall never issue, nor does it assert that sanctions may issue only against those in actual violation of the rules of the ICRW under international law. Rather, the U.S. executive branch simply takes the position that it, and it alone, shall decide when to threaten or levy such sanctions.

The U.S. executive branch has succeeded in maintaining its discretion to interpret and enforce the ICRW as it sees fit. One may view this as a demonstration of the impermeability of the high/high/low form of legalization to domestic politics. Even in the United States, with its highly legalized system of domestic laws and its significant degree of economic and political power in international relations, the nearly unfettered discretion of the national executive authority to interpret and enforce the rules of the whaling institution remains intact in both domestic and international spheres.

To draw the unqualified conclusion that domestic politics is irrelevant to international relations would of course be premature, even rash. Holding aside the fact that this has been only one examination of one domestic political system with respect to one institution, domestic
politics may have affected the events described above in at least three ways.

First, if law is part of politics, then domestic politics played some role through the Supreme Court’s authoritative interpretation of the statute’s meaning.

Second, one may always hypothesize that an apparently unsuccessful political effort has in fact had an impact. Perhaps pressures from Congress and environmental NGOs at least led the U.S. executive branch to make those scattered certifications that the Secretary of Commerce has promulgated. Perhaps dialogue between the U.S. executive branch and whaling nations has led to less whaling because the U.S. executive branch has been able to credibly claim that domestic political pressures will necessitate sanctions unless the whaling nation changes its practices soon.

Third, Congress did not go back to its statutory drafting boards and amend the certification standard to read, for example, “The Secretary of Commerce shall certify a nation whenever that nation violates a provision of the ICRW’s Schedule as enacted by the IWC.”114 The Supreme Court was interpreting a statute that raised no constitutional concerns, so Congress was certainly free to undertake such a re-drafting. Congress’s failure to do so may well be a result of domestic political factors, whether of a long-standing inability of environmental groups to push Congress beyond a certain point or of changes in the domestic political atmosphere between the time when Congress enacted the Packwood-Magnuson Amendment (1978) and when the judiciary made clear the need for statutory re-drafting if the legislature wished to constrain the certification decisions of the executive (1986).

CONCLUSION

This article has reviewed the interaction between the legal structure and the institutional history of the International Convention for the Regulation of Whaling and its associated organization, the International Whaling Commission. The ICRW’s rules are precise and formally binding under international law. The party-states to the ICRW delegated little authority to the IWC to resolve disputes or otherwise interpret the rules of the ICRW. This cluster of high-obligation, high-precision rules and a low-delegation organization has proven remarkably durable, even

114. Similarly, if Congress wished to avoid sanctions when the violations were individual and isolated, as the Supreme Court believed that Congress did, then Congress could re-visit the statute and include a clause to that effect.
as virtually everything else about the international regulation of whaling has changed during its nearly six decades of existence. The fundamental purpose of the IWC has changed from the preservation of whaling to the preservation of whales. The regulatory approach of the ICRW’s rules has morphed from weight-oriented Blue Whale Units to sustainability-oriented stock quotas to a moratorium on commercial whaling. The species of whales that the ICRW regulates has grown from a small number of the largest species to include all species of marine mammals commonly recognized whales. The membership of the IWC has increased many-fold, with a dramatic shift in the preponderance of member orientation from states that have historically been whaling nations to states with little or no tradition of engaging in the activity regulated by the ICRW. The relevant U.S. laws have changed as well, not only as a result of the implicit changes flowing from the continuous U.S. incorporation of the ever-shifting rules of the ICRW, but through the Pelly and Packwood-Magnuson Amendments designed to enlist a variety of U.S.-imposed trade sanctions upon states diminishing the effectiveness of the ICRW—even, apparently, when that diminution in effectiveness involves no actual violation of a state’s legal obligations.

This article has focused on the preservation of national executive discretion as a potentially overarching explanation for the basic legal structure of the ICRW and for its durability over time. National executives initially formulate treaties like the ICRW. A national executive authority choosing the high-obligation, high-precision, low-delegation form of legal structure might reasonably expect such a choice to specify rules with predictable implications (because of their precision and high level of obligation) that it may nonetheless manipulate at their margins (because of the low level of delegation to any third-party, international dispute-resolution body). The institutional history of the ICRW would certainly validate such an expectation. Indeed, even within the United States—a system where the executive branch generally could hardly be said to have a monopoly on political power—the initial legal structure of the ICRW proved highly durable despite efforts by Congress and environmental groups to limit the executive’s discretion in interpreting and enforcing the ICRW.

If one focuses only on the durability of the ICRW’s initial legal form, then the tale that this article tells may be of limited appeal. Stasis is not the stuff of drama. Additionally, the contrast between the ICRW’s constancy and the dynamics of what are now the WTO and the EU will reflect poorly on the ICRW in the eyes of many. Naturally, many of those who analyze international legal phenomena tend to believe in its
potential importance—though no longer with the nearly messianic zeal of a Woodrow Wilson bent upon cabining the war psychoses of bleddry Europeans, nor the impassioned eloquence of a Robert Jackson determined to bring both justice and due process to Nazi war criminals, nor the modernized idealism of a Mikhail Gorbachev seeing the rule of law as way to manage international relations so as to avoid the horrific potentialities of superpower conflict or the mind-numbing actualities of Cold War defense expenditures. Rather, those who believe in international law are now more likely to express a guarded optimism, a measured inference from current trends, a gentle hope. The WTO and the EU display a monotonic increase in the law-ness of their subject matters, with their current incarnations (especially for the EU) appearing to present excellent imitations of highly developed domestic legal systems. The legal structure of the ICRW, and its constancy, are vividly international—a throwback, except of course that it is a "throwback" rather more representative of the current reality of international institutions than the WTO or the EU.

Any disappointment with the legal structure of the ICRW or its durability, however, ignores an important underlying fact. Despite the constancy of its basic legal structure, the ICRW as an institution has not only changed as an institution but changed in a direction that is in fact quite consistent with greater power and prominence for international law. The ICRW's initial incarnation was more or less as a club of whalers, while its current incarnation is as a bastion of environmentalism that has been strong enough to stand up not only to commercial whaling interests but also to rational but non-zero efforts to allow whaling supported by scientists, traditional conservationists, and everyone else. The initial incarnation of the ICRW took for granted that even the largest whales were fair game for the harpoon and the factory ship, while the contemporary political debate surrounding the ICRW revolves around whether the smallest, most plentiful species of whale might become the subject of limited quotas allocated to non-factory whalers. The context for this dramatic shift in the substance of the ICRW has not been accompanied by a dramatic increase in legalization as defined by legalization theory, but the legal structure of the ICRW—including, of course, its highly precise and formally binding legal rules—has nonetheless been a perfectly stable platform from which to effect other, dramatic, substantive changes.