# LIFTING THE INTERNATIONAL WHALING COMMISSION'S MORATORIUM ON COMMERCIAL WHALING AS THE MOST EFFECTIVE GLOBAL REGULATION OF WHALING

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#### INTRODUCTION

The blue whale is the largest mammal on Earth.<sup>1</sup> The average blue whale weighs as much as 25 full grown elephants or 150 large oxen and produces over 40 tons of oil.<sup>2</sup> Along with oil, every part of the whale has value and can be used to produce commercial goods ranging from food, soap, gelatin, film, detergent, lipstick, and perfume, to paint, crayons, tennis rackets, and industrial lubricants.<sup>3</sup> Whales are like huge chunks of gold floating in the ocean.

Because of their potential value, whales have been hunted for many centuries. As technology advanced, the whaling hunt evolved into a global rush.<sup>4</sup> An uncontrolled hunting of whales continued and whale populations declined drastically.<sup>5</sup> By the 1930's, whalers had depleted most whale stocks and species around the world.<sup>6</sup> The decreasing number of whales threatened whaling industries worldwide.<sup>7</sup> The need for an international regulation of whale hunting heightened and eventually led to the adoption of the International Convention for the Regulation of Whaling ("ICRW") in 1946, which established the International Whaling Commission ("IWC").<sup>8</sup>

The IWC attempted to control whaling activities by setting catch limits, conducting scientific research, and regulating whaling vessels and equipment. However, the IWC had no teeth to enforce its regulations and could not prevent further decimation of the whale population.<sup>9</sup> Meanwhile, the whaling industry was changing. Nations whaling for oil no longer found the business profitable as cheaper substitutes for whale oil replaced the market.<sup>10</sup> As some nations left the whaling market, others expanded their whaling activities to increase the production of meat and other whale products.<sup>11</sup> As a result, whaling and non-

<sup>2</sup> Id.

<sup>4</sup> Patricia Bimie, INTERNATIONAL REGULATION OF WHALING: FROM CONSERVATION OF WHALING TO CONSERVATION OF WHALES AND REGULATION OF WHALE-WATCHING, VOL. 1, 64-74 (1985).

5 Id.

<sup>6</sup> See generally Tonnessen & Johnsen, supra note 1.

8 ICRW, Dec. 2, 1946, 161 U.N.T.S. 72 [hereinafter ICRW].

<sup>9</sup> See, e.g., IWC Powerless to Stop Japan's Whale Slaughter, West Australian Newspapers, Feb. 20, 2006.

<sup>10</sup> Tonnessen & Johnsen, *supra* note 1, at 10.

11 Id.

<sup>&</sup>lt;sup>1</sup> J.N. Tonnessen & A.O. Johnsen, THE HISTORY OF MODERN WHALING, 3 (R.I. Christorphersen trans., Norwegian 1982).

<sup>&</sup>lt;sup>3</sup> Examples of the various uses of the fin and sperm whales can be seen at: http://www.e-kujira.or.jp/gahou/makkou.html and http://www.e-kujira.or.jp/gahou/nagasu.html.

<sup>&</sup>lt;sup>7</sup> Patricia Birnie, INTERNATIONAL REGULATION OF WHALING: FROM CONSERVATION OF WHALING TO CONSERVATION OF WHALES AND REGULATION OF WHALE-WATCHING, VOL. 1, 102 (1985).

whaling nations conflicted within the IWC.<sup>12</sup> Nations were soon classified as pro-whaling or anti-whaling, depending on their perception of whaling and whale resource management.<sup>13</sup> By the end of the 1970's, the anti-whaling nations had gained the majority within the IWC. In 1982, the IWC adopted a moratorium, or a zero quota agreement, on all commercial whaling by a three-quarters majority vote.<sup>14</sup>

This paper examines the economic and social forces behind the shift in the trend of whale management, and argues for the lifting of the moratorium at the Annual IWC Convention. Part I of this paper gives a brief history of whaling and the background leading to the establishment of the IWC. Part II explains the legal framework and the function of the IWC. Part III analyzes the adoption and the current state of the moratorium on commercial whaling. Since the IWC implemented the zero quota agreement, there has been a decade-long deadlock among the member nations. Taking this into account, Part IV argues that the IWC should now lift the moratorium on a limited basis. The moratorium should be lifted based on abundant and reliable science confirming that certain stocks of whales have recovered enough to allow sustainable whaling. In fact, due to a change in dynamics within the IWC, the pro-whaling nations may now constitute the necessary three-fourths vote to reverse the moratorium. Finally, Part V discusses the measures the IWC must take after lifting the moratorium to ensure that commercial whaling activities will never threaten whale stocks again. Specifically, Part V argues that the IWC must implement appropriate catch levels, establish a competent international inspection and observer system, and set up an effective enforcement scheme.

## I. THE HISTORY OF WHALING AND EARLY REGULATIONS

## A. The History of Whaling

The history of whaling goes back thousands of years.<sup>15</sup> Humans may have hunted whales as early as about 2200 BC.<sup>16</sup> Throughout history, humans have hunted whales for food, oil, clothing, tools, fashion items, and building

<sup>13</sup> Id.

<sup>14</sup> See Commercial Whaling Catch Limits, available at http://www.iwcoffice.org/conservation/catches.htm.

<sup>15</sup> Birnie, *supra* note 6, at 63.

<sup>&</sup>lt;sup>12</sup> See infra, Part III. A.

<sup>&</sup>lt;sup>16</sup> *Id.* at 65. Whales have inspired artists since the Stone Age, and drawings of whales dating back to about 2200 BC have been found in Norway. *Id.* Rock carvings found in Scandinavia indicate that the first non-commercial whaling could have begun as early as 10,000 BC. *E.g.*, A.B.C. Whipple, THE WHALERS, 43 (1979); Ivan Sanderson, FOLLOW THE WHALE (1956).

materials.<sup>17</sup> The first organized hunt for whales was conducted in 700 A.D. by the Basques, followed by the Flemish and Normans.<sup>18</sup> The Dutch and the British soon joined the hunt, quickly expanded their activities, and eventually took over the Basque whaling industry.<sup>19</sup> Other coastal nations such as Spain, France, and Norway followed in the 9th century to capture and make use of this abundant resource,<sup>20</sup> while the British, Dutch, and Germans expanded their whaling activities to the North Atlantic.<sup>21</sup> Japan and Russia claim to have started coastal whaling in the 12th century, and the Americans in the 16th century.<sup>22</sup>

In the early whaling era, coastal whaling from land stations was the norm.<sup>23</sup> The basic technique of coastal whaling involved the use of hand-thrown harpoons and nets from rowing boats.<sup>24</sup> The captured whales were generally processed in sheltered coastal waters.<sup>25</sup> However, coastal whaling could not keep up with the flourishing whale industry as the demand for all whale products increased.<sup>26</sup> Having depleted coastal stocks, whalers soon improved their techniques and ventured into pelagic whaling.<sup>27</sup> Whalers expanded their hunting grounds from the near coasts to the far reaches of the oceans.<sup>28</sup>

The spread of pelagic whaling carried whaling techniques to many other coastal countries.<sup>29</sup> Russia established land stations in Korea and many more land stations opened up in Australia, New Zealand, Canada, and South Africa.<sup>30</sup> Japan had a long-standing tradition of coastal fisheries and whaling throughout

<sup>23</sup> Birnie, *supra* note 6, at 70.

<sup>24</sup> See Ray Gambell, The International Whaling Commission and the Contemporary Whaling Debate, in CONSERVATION AND MANAGEMENT OF MARINE MAMMALS, 179 (John R. Twiss Jr. & Randall R. Reeves eds., 1999).

<sup>25</sup> Tonnessen & Johnsen, *supra* note 1, at 39-41 (explaining how whales are processed at shore stations); Birnie, *supra* note 6, at 66.

<sup>26</sup> Tonnessen & Johnsen, *supra* note 1, at 227-246 (explaining how the growing demand for whale oil lead to the expansion of global whaling grounds); Birnie, *supra* note 6, at 66.

<sup>27</sup> See Tonnessen & Johnsen, supra note 1, at 227-246, 346.

<sup>28</sup> See Tonnessen & Johnsen, *supra* note 1, at 346 (stating that the transfer to new methods of pelagic whaling occurred quickly. For example, pelagic operations in the Antarctic had increased from approximately 11% to 79% in just 4 years).

<sup>29</sup> Birnie, *supra* note 6, at 71.

<sup>30</sup> Id. at 72.

 $<sup>^{17}</sup>$  Tonnessen & Johnsen, *supra* note 1, at 50-54 (describing products, markets, and prices of whale based products).

<sup>&</sup>lt;sup>18</sup> Whipple, *supra* note 9, at 43.

<sup>&</sup>lt;sup>19</sup> Id. at 46; Birnie, supra note 6, at 66.

 $<sup>^{20}</sup>$  See generally Alexander Starbuck, History of the American Whale Fishery, Vol. 1 (1964).

<sup>&</sup>lt;sup>21</sup> See generally id.

<sup>&</sup>lt;sup>22</sup> See generally id.

its islands.<sup>31</sup> However, the United States expanded its hunt into the far Pacific and set up land stations for pelagic whaling on Japan's coasts.<sup>32</sup> The character of whaling changed from subsistence-taking and small-scale commercialism in small coastal communities to full-scale commercialism around the world.<sup>33</sup>

The advent of modern whaling techniques revolutionized the whaling industry, setting off a frantic race among whaling nations to chase and capture whale stocks around the world.<sup>34</sup> The focus of commercial whaling shifted to the open seas, as new sailing technology changed the character of pelagic whaling.<sup>35</sup> With new technology, land stations were no longer necessary because whales were processed entirely aboard the factory ships, allowing nations to expand their operations to oceans far beyond their territorial waters.<sup>36</sup> For instance, a new device to pull large whales onto the deck allowed whaling ships to hunt out at sea for months at a time.<sup>37</sup> Steam and diesel ships enabled the capture of faster swimming species of whales.<sup>38</sup> In addition, the development of harpoon guns dramatically improved efficiency.<sup>39</sup> For example, the shell harpoon carries an explosive head that detonates inside of the whale, causing destruction so severe that the whale would die very quickly.<sup>40</sup> Sonar devices and helicopters facilitate capture by accurately tracking whales.<sup>41</sup> These

<sup>32</sup> See supra, note 31.

<sup>33</sup> Birnie, *supra* note 6, at 73. For example, Norway took only 4,592 whales worldwide in 1904. By 1914, the Norwegian whaling industry had expanded into 60 companies, 31 factory ships, 145 catcher boats and 22 shore stations – the catch amounting to 14,917 whales. *Id.* 

<sup>34</sup> See Birnie, supra note 6, at 64-74 (summarizing expansion of whaling in three time periods); Tonnessen & Johnsen, supra note 1, at 687 (stating that "keener and keener competition to acquire steadily declining supplies" of whales lead to technological advancement. This book provides a thorough examination of the history of modern global pelagic whaling).

<sup>35</sup> See supra, note 35; infra, notes 37-42.

 $^{36}$  Tonnessen & Johnsen, *supra* note 1, at 41-42 (describing the floating factories used for pelagic whaling).

 $^{37}$  See id. at 264-268 (describing the development of patents for devices to haul the whale on board factory ships).

<sup>38</sup> See id. at 688-692 (describing the advantages of using faster ships for whaling, such as it tires the whales out sooner, making them easier to catch. Diesel engines are more economical to build and operate than steam engines because of lower fuel consumption and lighter weight.)

<sup>39</sup> Birnie, supra note 6, at 71; Tonnessen & Johnsen, supra note 1, at 690-692.

<sup>40</sup> Birnie, *supra* note 6, at 71; Tonnessen & Johnsen, *supra* note 1, at 690-692 (describing invention of shell harpoons).

<sup>41</sup> See also, Tonnessen & Johnsen, *supra* note 1, at 276 (stating that helicopters can be useful in observing ice conditions and marking whales as well).

<sup>&</sup>lt;sup>31</sup> In 1854, US Admiral M. Perry came to Japan and demanded it to open its ports to supply fuel and water to American whaling vessels. One of its demands was to allow the US to set up a land station for hunting and processing whales off of Japan's shore. See Masahiro Nishiwaki, Failure of Past Regulations and the Future of Whaling, in THE WHALING ISSUE IN U.S.-JAPAN RELATIONS, 45 (John R. Schmidhauser & George O. Totten III eds., 1978); Shikego Masaki, Japanese World-View on Whales and Whaling, in WHALING ISSUES AND JAPAN'S WHALE RESEARCH (Institute of Cetacean Research 1993); see also Whipple, supra note 9, at 83 ("A mission of mercy to forbidden isles").

new methods were so successful that a huge number of whaling companies sprang up in numerous whaling states.<sup>42</sup>

The simple technology available in the 17th and 18th centuries had nearly depleted numerous whale stocks, but the advent of modern whaling techniques in the 19th century accelerated this phenomenon.<sup>43</sup> Right whales had almost disappeared from the North Atlantic by the 17th century, and bowhead whales followed suit by the 19th century.<sup>44</sup> As some species became scarce, American and European whaling fleets swiftly discovered other species to exploit and raced to capture them.<sup>45</sup> Once the stocks of black right whales were depleted in the North Atlantic, European and American fleets turned to the humpback whales off the east coast of North America and successfully depleted the stock in the 18th century.<sup>46</sup> These whalers then moved on to South Africa for the southern right whale and proceeded to pursue the sperm whale off of Australia, Tasmania, and New Zealand,<sup>47</sup> The chase for the extremely profitable sperm whales led America, France, Britain, and Portugal away from the Indian Ocean and toward the Atlantic and Pacific.<sup>48</sup> Eventually, significant commercial whaling focused on the Antarctic waters.<sup>49</sup> As a result, whaling activities rendered sperm, humpback, right, bowhead, and gray whales nearly extinct by the early 20th century.

Whaling nations had little incentive to protect whale stocks because the freedom to exploit the resources of the high seas was both an international custom and a generally accepted principle.<sup>50</sup> However, as the supply of whales diminished, so did the production of whale products and the profitability of the whaling businesses.<sup>51</sup> Many states began to realize that the only practical way for the companies to maintain their whaling businesses was to accept some form of regulation and cooperation.<sup>52</sup> Unfortunately, regulation proved difficult to

<sup>48</sup> See *id.*; Edouard A. Stackpole, WHALES & DESTINY, THE RIVALRY BETWEEN AMERICA, FRANCE, AND BRITAIN FOR CONTROL OF THE SOUTHERN WHALE FISHERY, 175 (1972).

<sup>49</sup> See generally Tonnessen & Johnsen, *supra* note 1, at 157, 277 (describing the expansion and development of Antarctic Whaling); DOUGLAS M. JOHNSTON, INTERNATIONAL LAW OF FISHERIES 397 (1985).

<sup>50</sup> See generally Birnie, supra note 6, at 76-77 (stating that philosophy behind legal concepts applied to whaling allow the freedom of states to take and consume them without any restraints).

<sup>51</sup> See Stackpole, supra note 37, at 133-158.

<sup>&</sup>lt;sup>42</sup> Birnie, *supra* note 6, at 71-72. Whaling companies sprang up in the early 20th century in countries such as Norway, Iceland, Ireland, Britain, France, Spain, Germany, Russia, Canada, USA, Japan, Korea, Australia, New Zealand, South Africa, Panama, Chile, Brazil, and Peru.

<sup>&</sup>lt;sup>43</sup> See Birnie, supra note 6, at 70.

<sup>44</sup> Id. at 66-67

<sup>45</sup> See id. at 70-74.

<sup>&</sup>lt;sup>46</sup> *Id.* at 69.

<sup>47</sup> İd.

<sup>52</sup> See id. at 71.

achieve due to the same principle of freedom that led to the over-exploitation of whale species in the first place.<sup>53</sup>

## B. Pre-IWC Attempts to Regulate Whaling

## 1. Private Agreements Among Whaling Companies

During the entire history of whaling, operations conducted in the high seas were justified under the doctrine of *mare liberum*, or freedom of access to the high seas.<sup>54</sup> This doctrine allowed fishermen of all states to access the living resources of the high seas.<sup>55</sup> The concept that the seas are free and open for any nation to fish dominates the law of the high seas and is still a basic concept of the law of the sea today.<sup>56</sup> This freedom can be limited only with the consent of participating states through multinational or international agreements.<sup>57</sup> Thus, the doctrine of the freedom of the seas has led to much over-exploitation of marine resources, causing a particularly disastrous effect on whale stocks.<sup>58</sup>

<sup>55</sup> The legal basis of this doctrine is that fish in the ocean are plentiful and a limitless common property resource. This doctrine has been applied to resources that can be used by more than one user at the same time, such as air, or which cannot be easily confined, such as wildlife. A common property resource implies that no single user has a right to the resource, so no one can prevent others from exploitation. Birnie, *supra* note 6, at 78.

<sup>56</sup> *Id.* at 104. For example, coastal states increasingly extended their national jurisdiction over fisheries in the 1960's and 70's based on this notion, and the 200 mile exclusive economic zone was given legal acceptance in the 1982 United Nations Law of the Sea Convention. United Nations Convention on the Law of the Sea III art. 56, Oct. 21, 1982, 21 I.L.M. 1261. However, nations agreed to restrict the freedom to fish by recognizing the duty to conserve the living resources and to cooperate with other nations so far as it relates to the exploitation of marine resources. *Id.* art. 65.

<sup>57</sup> See Birnie, supra note 6, at 81.

<sup>58</sup> Traditionally, laws relating to fisheries have been distributive (determining who is to have ownership of or access to the resources), rather than conservatory (preserving the resource) or prohibitory (preventing the resource from being exploited at all whether for conservatory, ethical, or moral reasons). Birnie, *supra* note 6, at 77.

<sup>&</sup>lt;sup>53</sup> See generally Birnie, supra note 6, at 90-91 (stating that abuse of freedom based on this conceptual theory lead to serious depletion of fishery resources, because "states disregarded the interests others had in maintaining the resources").

<sup>&</sup>lt;sup>54</sup> *Id.* at 77, 84. Originally, Grotius invented this doctrine in order to justify the right of the Dutch to sail freely to the East Indies. He was concerned with rights over the open sea, and argued that no single state could establish a title to the high seas. *See also* HUGO GROTIUS, THE FREEDOM OF THE SEAS OR THE RIGHT WHICH BELONGS TO THE DUTCH TO TAKE PART IN THE EAST INDIAN TRADE, (Ralph Van Deman Magoffin trans., Oxford University Press 1916) (1608). However, Grotius' concepts have been misunderstood and reinterpreted with respect to fishing, since Grotius recognized that fish are exhaustible and so control of these activities were necessary. Birnie, *supra* note 6, at 88.

The earliest response to the over-exploitation of whales came in the form of quota agreements among private whaling companies in an effort to control the price of whale oil in the market.<sup>59</sup> Since no regulations existed to limit the number of whales that could be killed, factories to be operated, or oil to be produced, companies produced excessive amounts of oil.<sup>60</sup> For example, in 1930, 150,000 tons of whale oil had remained unsold in Norway alone, and the whale oil market fell into a serious depression.<sup>61</sup> Whaling companies feared that the whaling market would soon disappear unless the balance of supply and demand was redressed.<sup>62</sup> Whaling companies realized that unlimited catches and over-production would lead to disaster for the whaling industry. In response, whaling companies came together to negotiate voluntary limitations on output.<sup>63</sup> This led to the first inter-company agreements to regulate oil production.<sup>64</sup>

However, inter-company agreements turned out to be a failure from the start.<sup>65</sup> A majority of whaling companies was not interested in limiting their production and refused to participate in the agreement.<sup>66</sup> Because these companies were left unregulated, the price of whale oil did not rise to expected levels, and many of the companies lost ground to foreign competitors.<sup>67</sup> With the failure of voluntary agreements, attention gradually focused on the necessity of compulsory regulation by governments in order to effectively preserve the whaling industry.<sup>68</sup>

<sup>&</sup>lt;sup>59</sup> See id. at 118-120 (regarding the advent of inter-company production agreements); Stackpole, *supra* note 37, at 133.

<sup>&</sup>lt;sup>60</sup> See Stackpole, supra note 37, at 151 (stating that the produce of whale oil of the Southern Whale Fishery increased 8 folds over a period of five years).

<sup>&</sup>lt;sup>61</sup> Tonnessen & Johnsen, *supra* note 1, at 285; Birnie, *supra* note 6, at 119.

<sup>&</sup>lt;sup>62</sup> See Birnie, supra note 6, at 118-119.

<sup>&</sup>lt;sup>63</sup> *Id.* at 119. *See generally* Stackpole, *supra* note 37, at 133-158 (describing the increased production of whale oil and the effect on oil prices).

<sup>&</sup>lt;sup>64</sup> See Birnie, supra note 6, at 118-120 (describing inter-company production agreements).

<sup>&</sup>lt;sup>65</sup> See id. at 119 (suggesting that it was difficult to reach an equitable solution acceptable to all because of the structure of the industry).

<sup>&</sup>lt;sup>66</sup> See id. (noting there were problems concerning the choice of methods and priority because each company wanted the largest share).

<sup>&</sup>lt;sup>67</sup> See Birnie, supra note 6, at 121.

<sup>&</sup>lt;sup>68</sup> Tonnessen & Johnsen, *supra* note 1, at 367 (stating that the first attempts at an international agreement parallel the collapse of the whale oil market).

## 2. International Agreements Before World War II

The pressure for an international movement prompted the League of Nations to take initiative in the 1930's.<sup>69</sup> As a result, 26 nations adopted the International Whaling Convention in 1931.<sup>70</sup> The 1931 Convention applied regulations for the first time to all the waters of the world.<sup>71</sup> The Convention required contracting parties to license their vessels and abide by certain limitations on equipment.<sup>72</sup> It also prohibited the taking of right whales, calves, immature or undersized whales, and females accompanied by calves according to size and species.<sup>73</sup> The quota agreements that were subsequently adopted used other calculation methods, or restricted the hunting season, areas, or equipment allowed.<sup>74</sup> Within a few years, superior methods for gathering statistical information led to more effective agreements based on more accurate and available data.

For the first time, the 1937 Convention included countries with shore-based coastal whaling and with Antarctic fleets, thus allowing for negotiation of a more effective and comprehensive agreement than the one created during the 1931 Convention.<sup>75</sup> The 1937 agreement banned the taking of gray and right whales, imposed a size restriction on blue whales, adopted a seasonal ban in certain areas, and introduced an inspector system to facilitate enforcement.<sup>76</sup> Furthermore, in 1938 and 1939, the IWC adopted protocols to restrict the killing of the quickly disappearing humpback whales.<sup>77</sup> Throughout the decade, the

<sup>70</sup> Convention for the Regulation of Whaling 1931, Sep. 24, 1931, 155 L.N.T.S. 349. The International Whaling Convention of 1931 was signed by 26 states and ratified by all but 8, and was subsequently adhered to by 10 other states.

<sup>71</sup> Convention for the Regulation of Whaling 1931, *supra* note 60, art. 9.

<sup>72</sup> Id. art. 8 (regarding licensing of vessels); Id. art. 6-7 (setting limitations on equipment).

<sup>73</sup> *Id.* art. 4-5. This Convention was not very effective, as its scope was largely limited. It did not prescribe enforcement measures or penalties, nor did it specifically protect any species except right whales. It also lacked clarity in how to define "undersized" or "immature". *Id.* 

<sup>74</sup> See, e.g., Birnie, supra note 6, at 123 (discussing 1936 Agreement restricting vessels, seasons, location, and oil production).

<sup>75</sup> Convention for the Regulation of Whaling 1937, June 8, 1937, 190 L.N.T.S. 79. Attending nations were: Australia, Germany, Irish Free State, New Zealand, United Kingdom, and United States. The International Agreement for the Regulation of Whaling was adopted in 1937.

<sup>76</sup> *Id.* art. 1, 4, 5, 13, 14.

<sup>77</sup> See Protocol Amending the International Agreement for the Regulation of Whaling, June 24, 1938, 196 L.N.T.S. 131. The 1939 Conference was informal and did not adopt any formal agreement

<sup>&</sup>lt;sup>69</sup> See id. at 361, 365. The International Council for the Exploration of the Sea (ICES), had a strong role in calling the League of Nations to take action. ICES was established in 1902 by an informal exchange of letters between the concerned governments. It collected statistics and biological data of whales and seals. After World War I, a whaling committee was set up in 1927 within ICES, which prompted the League of Nations to call a Conference in 1930 to promote the rational exploitation of the seas' resources. ICES proposals were instrumental in bringing about the 1931 Convention. Birnie, *supra* note 6, at 109, 116

IWC put in place several quota agreements, including the one which became the basis of the quota system in effect today.<sup>78</sup> The new international approach to the regulation of whaling was innovative and created a momentum for more countries to consider cooperation in whaling regulation through international agreements.<sup>79</sup>

Unfortunately, negotiations and agreements in the 1930's ultimately were ineffective and ended in failure.<sup>80</sup> Many newly emerging whaling states did not accept the agreements, or the agreements were rendered ineffective as countries continued to reject important measures contained in them.<sup>81</sup> In the era leading up to World War II, the motivation for regulation of traditional whaling states waned as these states became more reluctant to restrict their whalers, when other states continued to let their whalers hunt freely.<sup>82</sup> At this time, little reliable scientific research was available, and regulation was often based on inadequate information about stock size, age, maturity, and reproduction of the whales.<sup>83</sup> Overall, although some species and sizes of whales were protected, catch levels remained high.<sup>84</sup> As one whale species declined, the whalers just moved on to others.

Interestingly, the whale populations recovered somewhat during World War II.<sup>85</sup> Nations converted many whaling vessels for naval military purposes, and many coastal whaling companies fell victim to enemy attack.<sup>86</sup> Pelagic expeditions ceased.<sup>87</sup> By the end of the war, a large number of whaling vessels had been sunk, damaged, or converted, and the war proved to be the best whale conservation measure of all.<sup>88</sup>

<sup>87</sup> Id.

because of the outbreak of World War II later in the year.

<sup>&</sup>lt;sup>78</sup> See, e.g., Tonnessen & Johnsen, *supra* note 1, at 399-407 (describing conflicts of British-Norwegian quota agreements in the early 1930's); *id.* at 433 (regarding production agreement negotiations in mid 1930's). Eventually, the concept of the Blue Whale Unit was adopted, to be allotted to all expeditions. *See* Birnie, *supra* note 6, at 120.

<sup>&</sup>lt;sup>79</sup> Tonnenssen & Johnsen, *supra* note 1, at 367 ("it was generally believed that the League of Nations and the numerous international agreements would ensure world peace and a peaceful development" of world markets).

<sup>&</sup>lt;sup>80</sup> Birnie, *supra* note 6, at 128-130.

<sup>&</sup>lt;sup>81</sup> Id.

<sup>&</sup>lt;sup>82</sup> Id.

<sup>&</sup>lt;sup>83</sup> Id. at 128.

<sup>&</sup>lt;sup>84</sup> Id. at 129.

<sup>&</sup>lt;sup>85</sup> Id. at 131.

 $<sup>^{86}\,</sup>$  Tonnessen & Johnsen, supra note 1, at 475 (indicating that 63% of whaling vessels were lost to the war).

<sup>&</sup>lt;sup>88</sup> Id. (stating that only few vessels "could be re-employed for whaling". Whaling equipment was removed from ships to be used for war service, and many were too damaged to be worth restoring for whaling. As a result, the total world production of oil during the first year of the war was approximately 343,000 less than the previous year).

### 3. The Establishment of the IWC

The war had changed the status of many states in the world. The United States emerged as a new controlling political power.<sup>89</sup> Germany and Japan, the newer whaling states before the war, were defeated.<sup>90</sup> At the conclusion of World War II, the United States desired to take a leading stance on post-war whaling regulations.<sup>91</sup> In 1946, the United States called an International Whaling Conference in Washington.<sup>92</sup> As a result of this Conference, 15 nations adopted the International Convention for the Regulation of Whaling ("ICRW"), and it entered into force in 1948.<sup>93</sup> Japan, Germany, and non-whaling states did not take part at this time.<sup>94</sup> Japan later joined the ICRW in 1951 by accession.<sup>95</sup>

#### II. LEGAL FRAMEWORK AND FUNCTION OF THE IWC

Nations adopted the ICRW against a background of chronic post-war shortages of food and fats, a situation that continued for some time.<sup>96</sup> In order to address the devastating effects of the war, the Convention sought to advance international cooperative efforts in whale conservation.<sup>97</sup> Thus, the IWC was established with high expectations of creating a more functional regulation scheme by codifying existing regulations and implementing procedures to modify regulations as necessary.<sup>98</sup>

94 Id.

<sup>95</sup> See Member Nations and Commissioners Chart, available at http://www.iwcoffice.org/commission/members.htm.

<sup>96</sup> IWC Paper No. 6 (1945). There was a statistical world deficit of oil and fats of about 1 million tons when consumption was increasing, and the Conference was convened to address the "need for doing everything possible to increase the production of whale oil during the next two years". Statement by Mr. Harrison, UK Ministry of Food. IWC Paper No. 5 (1945), "Prospective World Supplies of Oils and Fats", UK.

98 Id.

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<sup>&</sup>lt;sup>89</sup> See Birnie, supra note 6, at 166-67.

<sup>&</sup>lt;sup>90</sup> See generally id.

<sup>&</sup>lt;sup>91</sup> Id.

<sup>&</sup>lt;sup>92</sup> Id.

<sup>&</sup>lt;sup>93</sup> ICRW, *supra* note 7. The 15 signatories were: Argentina, Austria, Brazil, Canada, Chile, Denmark, France, the Netherlands, New Zealand, Norway, Peru, South Africa, the Soviet Union, the United Kingdom, and the United States. The ICRW entered into force when 8 of the signatory states ratified the Convention.

<sup>&</sup>lt;sup>97</sup> Birnie, *supra* note 6, at 166.

## A. Purpose of the ICRW

The Preamble of the ICRW states that its purpose is to "provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry."<sup>99</sup> The Preamble acknowledges that "the history of whaling has seen over-fishing of one area after another and of one species of whale after another."<sup>100</sup> However, the Preamble also points out that "whale stocks are susceptible of natural increases if whaling is properly regulated."<sup>101</sup> The Preamble suggests that regulation may be an appropriate means of addressing the need to protect all species from further depletion. The goal of the ICRW is to "achieve the optimum level of whale stocks as rapidly as possible without causing widespread economic and nutritional distress."<sup>102</sup> In order to achieve this goal, the ICRW establishes the IWC as the regulatory body with administrative and rule-making powers.<sup>103</sup> The Preamble suggests that the ultimate aim of the IWC was to develop and preserve the whaling industry, and to focus conservation efforts on avoiding economic and social disaster.<sup>104</sup>

## B. Framework of the IWC

The ICRW, quite short and consisting of only eleven articles, establishes the framework of the IWC.<sup>105</sup> While the IWC may adopt new regulations, or revise or terminate previous regulations, it does not have the authority to amend the Convention itself.<sup>106</sup> Membership to the IWC is not restricted to states presently or formerly engaged in whaling. Any state may become a member if it signs and ratifies or adheres to the Convention.<sup>107</sup> Each member state has one vote, but non-voting experts and advisers can also address the plenary meetings.<sup>108</sup> Member states may withdraw from the Convention by giving proper notice.<sup>109</sup> Observers are permitted to attend the annual meetings, but they are limited to those from non-party states and international organizations.<sup>110</sup>

<sup>101</sup> Id.

<sup>106</sup> Id.

<sup>110</sup> ICW Rule B2(b) (1981). More than 50 NGO's send observers, and they have made an impact on IWC policies, as will be discussed later in this paper. See IWC/34/3DI; Birnie, *supra* note 6, at 175.

<sup>&</sup>lt;sup>99</sup> ICRW, *supra* note 7, pmbl.

<sup>&</sup>lt;sup>100</sup> *Id*.

<sup>&</sup>lt;sup>102</sup> *Id.* The ICRW does not define "optimum level".

<sup>&</sup>lt;sup>103</sup> *Id.* Art. III establishes the IWC.

<sup>&</sup>lt;sup>104</sup> See Birnie, supra note 6, at 169-172.

<sup>&</sup>lt;sup>105</sup> ICRW, *supra* note 7, art. III.

<sup>&</sup>lt;sup>107</sup> ICRW, supra note 7, art. X.

<sup>&</sup>lt;sup>108</sup> ICRW, supra note 7, art. III, para. 1.

<sup>&</sup>lt;sup>109</sup> ICRW, supra note 7, art. XI.

1. Schedules

One of the most important functions of the IWC is to pass binding regulations, which form an integral part of the Convention.<sup>112</sup> The binding regulations are set forth in the Schedule and the IWC can adopt regulations to amend the Schedule by a three-fourths vote.<sup>113</sup> However, Article V of the Convention makes it clear that amendments to the Schedule must be "necessary to carry out the objectives and purposes of this Convention and to provide for the conservation, development, and optimum utilization of the whale resources."<sup>114</sup> They must also "be based on scientific findings," and "take into consideration the interest of the consumers of whale products and the whaling industry."<sup>115</sup> Objecting states may opt out of the binding effect of an amendment by filing a timely objection.<sup>116</sup> The amendment will not be enforced against any member that files a timely objection.<sup>117</sup>

Because the Schedule is binding upon the member states, it covers a broad range of whaling regulations. The substantive part of the Schedule can be split up into five categories: 1) quota limitations on the size and species hunted; 2) areas open and closed for whaling; 3) seasonal and geographical limitations for pelagic operations; 4) treatment after killing whales; and 5) supervision and control.<sup>118</sup> Each category of regulation is a highly contested matter because the taking of whales has such profound political, economic, and social implications for the member states.<sup>119</sup>

The Schedule is a flexible instrument of regulation, adaptable to policies that change over time.<sup>120</sup> The Schedule has become longer, more complex, and increasingly sophisticated as more measures have been incorporated and accumulated.<sup>121</sup> For example, the Schedule now includes a longer list of species provisions for international observers and national inspectors; an extensive list

<sup>&</sup>lt;sup>112</sup> ICRW, supra note 7, art. I, para. 1.

<sup>&</sup>lt;sup>113</sup> ICRW, supra note 7, art. I; art. III, para. 2; art. V, para. 1.

<sup>&</sup>lt;sup>114</sup> ICRW, *supra* note 7, art. V, para. 2.

<sup>&</sup>lt;sup>115</sup> Id.

<sup>&</sup>lt;sup>116</sup> ICRW, *supra* note 7, art. V, para. 3.

<sup>&</sup>lt;sup>117</sup> Id.

<sup>&</sup>lt;sup>118</sup> ICRW, Schedule, As amended by the Commission at the 57th Annual Meeting, Ulsan, Republic of Korea (June 20-24, 2005), *available at* http://www.iwcoffice.org/commission/schedule.htm (last visited March 25, 2006).

<sup>&</sup>lt;sup>119</sup> See generally Stackpole, supra note 37, at 140. In particular, there is always controversy regarding the annual fixing of catch quotas. The IWC's early efforts to conserve whales were not very successful because the quotas, in order to reach an agreement, were being set at levels too high that did not corroborate with scientific evidence.

<sup>&</sup>lt;sup>120</sup> ICRW, supra note 7, art. V.

<sup>&</sup>lt;sup>121</sup> See ICRW Schedule, supra note 117.

of the wide range of statistical and biological information required; new management and identification procedures in specified areas; criteria for allocation of categories of stocks; and catch limits.<sup>122</sup> The Schedule has allowed great changes in the IWC's practices up to the present.<sup>123</sup>

## 2. Recommendations

Unlike the Schedule, recommendations are not binding.<sup>124</sup> However, they enable the IWC to play a major role in guiding the whaling policies of its members.<sup>125</sup> The IWC may make recommendations to its members "on any matters which relate to whales or whaling and to the objective and purposes of this Convention" by a simple majority vote.<sup>126</sup> In past meetings, recommendations to prohibit the trade of whale products, whaling tactics, vessels, gear, and personnel with non-member states have been passed.<sup>127</sup> Recommendations have also required the use of more humane killing methods.<sup>128</sup> Recommendations work in combination with the Schedule to address various issues to establish an effective regulation scheme.

## 3. Committees

The IWC may establish Committees to pursue its objectives.<sup>129</sup> Apart from the required establishment of the Scientific, Technical, and Finance and Administration Committees, the IWC may set up any committees it considers necessary.<sup>130</sup> These committees are composed of members and experts or advisers.<sup>131</sup> As the knowledge necessary for the management of whale fisheries greatly expanded since the beginning of the IWC, these committees have played increasingly important roles.<sup>132</sup> The work of the Scientific Committee, in particular, has become crucial to the adoption and implementation of new management policies laid down by the IWC.

<sup>&</sup>lt;sup>122</sup> See id.

<sup>&</sup>lt;sup>123</sup> One of the biggest changes is the accommodation of the policy shift of the IWC, eventually leading to the adoption of the moratorium on commercial whaling in 1981.

<sup>&</sup>lt;sup>124</sup> ICRW, *supra* note 7, art. VI.

<sup>&</sup>lt;sup>125</sup> ICRW, *supra* note 7, art. III, para. 2; art. VI.

<sup>&</sup>lt;sup>126</sup> ICRW, supra note 7, art. III, para. 2; art. VI.

<sup>&</sup>lt;sup>127</sup> Birnie, *supra* note 6, at 189.

<sup>&</sup>lt;sup>128</sup> Id.

<sup>&</sup>lt;sup>129</sup> ICRW, supra note 7, art. III, para. 4.

<sup>&</sup>lt;sup>130</sup> Id.

<sup>&</sup>lt;sup>131</sup> Id.

<sup>&</sup>lt;sup>132</sup> Birnie, supra note 6, at 176.

Amendments to the Schedule must be based on "scientific findings", and thus the findings of the Scientific Committee should be the basis of all IWC regulation.<sup>133</sup> The general role of the Scientific Committee is to review, "the current scientific and statistical information with respect to whales and whaling,... the current scientific research programs of Governments, other international organizations, or of private organizations . . . [and] scientific permits and scientific programs for which Contracting Governments plan to issue scientific permits."<sup>134</sup> In addition, the Scientific Committee may "consider such additional matters as may be referred to it by the Commission" and "submit reports and recommendations to the Commission."<sup>135</sup> The Scientific Committee works through several sub-committees.<sup>136</sup> These sub-committees prepare basic documents regarding identification and classification of stocks for the Scientific Committee's consideration.<sup>137</sup>

The Scientific Committee is composed of voting members and outside scientific experts who are appointed non-voting advisers.<sup>138</sup> Advisers are often called from relevant scientific international organizations such as the Food and Agriculture Organization ("FAO"), the United Nations Environment Programme ("UNEP"), and the International Union for Conservation of Nature ("IUCN").<sup>139</sup> In addition, non-member governments and other qualified scientists may be invited to be observers at Scientific Committee meetings and participate as non-voting members.<sup>140</sup> These observers may also present and discuss papers for consideration, take part in sub-committees, and receive IWC papers.<sup>141</sup> This structure allows consideration of a wide variety of views from both members and non-member scientific experts.

<sup>&</sup>lt;sup>133</sup> ICRW, supra note 7, art. V, para. 2(b).

<sup>&</sup>lt;sup>134</sup> IWC Committee Rules, Rule M, para. 4.

<sup>&</sup>lt;sup>135</sup> IWC Committee Rules, Rule J.

<sup>&</sup>lt;sup>136</sup> See The Scientific Committee, in IWC Information, available at: http://www.iwcoffice.org/commission/iwcmain.htm#committee.

<sup>137</sup> Id.

<sup>&</sup>lt;sup>138</sup> See Birnie, supra note 6, at 177-179 (describing the general structure and role of the Scientific Committee).

<sup>&</sup>lt;sup>139</sup> The membership of the IUCN includes both governmental and non-governmental bodies, both scientifically and non-scientifically qualified. Birnie, *supra* note 6, at 177.

<sup>&</sup>lt;sup>140</sup> See Observers, available at: http://www.iwcoffice.org/meetings/observers.htm.

<sup>&</sup>lt;sup>141</sup> Id.

III. THE IWC SHIFTS FOCUS FROM PRESERVING THE WHALING INDUSTRY TOWARD PROTECTION OF WHALES – THE MOVEMENT TO STOP WHALING

Despite its efforts, the IWC Regulations could not stop the gradual, global decimation of whale stocks. The quota system faced some fundamental problems, such as the inaccuracy of estimating numbers of allowable catch quotas and the difficulty of allocating the quota among whaling states.<sup>142</sup> States were generally reluctant to give up their pre-existing allocations, and over-fishing continued. Faced with this situation, the IWC was powerless to monitor and enforce the quotas. The continuing exhaustion of whales around the world raised concerns. In the 1970's, timely economic and political changes led to a shift in the global perception of whales and whaling. These changes boosted the movement to protect whales and became the driving force behind the adoption of the moratorium, a zero quota on commercial whaling, at the annual conference in 1982.

A. Adoption of the Moratorium

1. Introduction in 1972

A resolution proposing a zero quota on commercial whaling was first introduced at the annual IWC meeting held in London in 1972.<sup>143</sup> At this time, the resolution failed to achieve the necessary three-fourths majority vote to amend the Schedule. A resolution calling for a moratorium on commercial whaling was presented at annual meetings throughout the 1970's, but the whaling nations were sufficient in number to block the majority required to adopt the resolution.<sup>144</sup> Thus, the zero quota resolution was unsuccessful.

However, a significant worldwide shift occurred in the whaling industry in the 1970's and the perception of whales changed. Two main changes brought about this shift. First, the decline of the whaling industry brought significant economic changes.<sup>145</sup> Secondly, the political atmosphere changed drastically due to the rise of environmental and animal rights movements.<sup>146</sup>

<sup>&</sup>lt;sup>142</sup> See William Aron, William Burke & Milton M.R. Freeman, *The Whaling Issue*, 24 MARINE POL'Y 179, 187 (2000).

<sup>&</sup>lt;sup>143</sup> Id.

<sup>&</sup>lt;sup>144</sup> Id.

<sup>&</sup>lt;sup>145</sup> See infra Part III. A. 2.

<sup>&</sup>lt;sup>146</sup> See infra Part III. A. 3.

## 2. Economic Changes: Decline of the Whaling Industry

The current deadlock among IWC member states stems from the divide between the nations that shifted to anti-whaling and the nations that continued to whale. Around the 1970's, many industrialized countries, including the United States, Britain, and Australia, stopped commercial whaling and became avid opponents of whaling.<sup>147</sup> However, despite that change, other industrialized whaling countries, such as Norway, Japan, Greenland, and Iceland, continue whaling to this day.<sup>148</sup> A fundamental difference explains this discrepancy: those nations that gave up whaling principally whaled for oil, whereas whaling is embedded in the culture and traditional diet of the nations that continue to whale.<sup>149</sup>

Most of the pre-1970 whaling nations hunted whales for their oil, and despite their long histories of whaling, their cultures did not include whale meat or other whale products.<sup>150</sup> Until the late 1960's, whale oil was in great demand on a global scale due to its value in serving industrial and military purposes.<sup>151</sup> Thus, the first agreements to regulate whaling emerged among whale oil producers in an effort to control the demand and supply in the whale oil market.<sup>152</sup> The IWC was established for the same purpose in 1946.<sup>153</sup> Eventually, the demand for whale oil decreased with the discovery and production of petroleum.<sup>154</sup> The industries that had previously depended on whale oil began using non-whale sources of oil, and petroleum-based products became available at cheaper prices. Thus, the "whaling-for-oil" industry could no longer operate at a profit, and many states abandoned whaling as it became commercially impractical.

On the other hand, the social norms of whaling countries, such as Norway, Japan, Iceland, and Greenland, include whale meat and other derivative whale products, in addition to the use of whale oil.<sup>155</sup> While these states and other aboriginal groups traditionally hunted whales for food and used every part of the whale, other whaling states took only the oil, occasionally the bones, and threw

<sup>152</sup> Birnie, supra note 6.

<sup>153</sup> Tonnessen & Johnsen, *supra* note 1, at 10.

<sup>154</sup> Id.

<sup>155</sup> See id. at 53 (describing the various uses for whale parts and their prices).

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<sup>&</sup>lt;sup>147</sup> See Aron, supra note 142.

<sup>&</sup>lt;sup>148</sup> Id.

<sup>&</sup>lt;sup>149</sup> Id.

<sup>&</sup>lt;sup>150</sup> Id.

<sup>&</sup>lt;sup>151</sup> Whale oil was used for soap, lubrication, lighting, linoleum, paint, textiles, and for tempering steel. Tonnessen & Johnsen, *supra* note 1, at 10. The U.S. Department of Defense opposed adding the sperm whale to the endangered species list because the oil from sperm whales was valuable for use as a lubricant in submarine guidance systems. Aron, *supra* note 117, at 190.

away everything else.<sup>156</sup> Unlike the nations that abandoned whaling, the traditional whaling nations, due to their climate and geography, relied heavily on marine resources for nutrition and to support their economy.<sup>157</sup> Whales were a nutritious and inexpensive source of food all year round, fresh during the whaling season and frozen after the season ended.<sup>158</sup> Therefore, nations hunting whales primarily for food and cultural needs were not affected by the decreasing demands of whale oil. As many nations left the whaling business, countries such as Japan expanded production by buying the IWC quotas and whaling vessels from the former whaling nations. Thus, the total number of whales hunted did not decrease in proportion to the nations exiting the whaling business.

Whaling has a tremendous social value for the whaling countries as well. Whaling is an ancient, honorable profession that is deeply embedded in cultural and religious traditions.<sup>159</sup> For example, in Japan, many whalers in the small coastal whaling communities descend from generations of whalers, and are expected to respect their ancestors by continuing the family occupational tradition.<sup>160</sup> A failure to fulfill this expectation is considered a disgrace and a source of deep shame.<sup>161</sup> For this reason, Japanese whalers are eager to continue their trade and polish their skills as a matter of pride and respect. These fundamental differences in the purpose and perception of whaling are at the root of the clash between pro-whaling and anti-whaling states to this day.

<sup>&</sup>lt;sup>156</sup> Whaling Tradition, NEW YORK TIMES, available at www.nytimes.com/fodors/fdrs\_feat\_617\_3.html. The Japanese regarded whales as gifts from heaven; the meat of the great creatures is high in nutritional value, and all parts of the whale are utilized without waste. See Shigeko Misaki, *Responsible Management of Renewable Resources: Case for Whaling, in* WHALING FOR THE 21ST CENTURY (The Institute of Cetacean Research, 1996).

<sup>&</sup>lt;sup>157</sup> IWC, Report on the Socioeconomic Implications of a Zero-catch Limit, Norwegian Small-Type Whaling in Cultural Perspective, at 72, IWC/44/SEST1 (1992). The Japanese regarded whales as gifts from heaven; the meat of the great creatures is high in nutritional value, and all parts of the whale are utilized without waste. See Misaki, supra note 122.

<sup>&</sup>lt;sup>158</sup> Whale meat is rich in protein and iron, and low in unsaturated fatty acids, cholesterol, and calorie content. See Arne Kalland, Japanese Position on Whaling and Anti-Whaling Campaign, THE INST. OF CETACEAN RESEARCH, 1998. In Japan, many people were saved from starvation and malnutrition after World War II by protein acquired from the whale meat. Misaki, supra note 122. See generally Whales and Traditions of Diet, JAPAN WHALING ASS'N, 1987.

 $<sup>^{159}</sup>$  Socio-economic impact of countermeasures in the four Japanese STCW communities, TC/42/SEST2.

<sup>&</sup>lt;sup>160</sup> L. Manderson & H. Hardacre, Small-type coastal whaling in Ayukawa, 1998-99, IWC/41/SE3.

<sup>&</sup>lt;sup>161</sup> Id. at 21-27.

## 3. Political Changes: Environmental and Animal Rights Movements

During the 1970s, international environmental and animal-welfare movements gained momentum and aggressively targeted whaling.<sup>162</sup> Many organizations opposed whaling, but for different reasons. The three main positions against whaling are conservation, preservation, and animal welfare.<sup>163</sup> The first group, *conservationists*, accepts that species can be utilized as long as it is done in a sustainable manner.<sup>164</sup> Conservationists look at the natural environment as a system and seek to secure species habitats and biodiversity. The second group, preservationists, opposes whaling for moral and ethical reasons.<sup>165</sup> Preservationists are against the killing of whales because they believe that whales are extremely intelligent and social mammals that have advanced communication and learning skills.<sup>166</sup> Despite the difficulty of proving exactly how uniquely intelligent whales are compared to other mammals, the public is easily convinced with magnificent images and the aweinspiring size of whales'.<sup>167</sup> As a result, the public has become increasingly accepting of the idea that whales have a special status deserving protection, thus, providing support for preservationists.<sup>168</sup> Finally, the animal welfare activists are concerned with the treatment of animals focusing on the pain and suffering

<sup>166</sup> Id.; see, e.g., Aron, supra note 117, at 186; Anthony D'Amato & Sudhir K. Chopra, Whales: Their Emerging Right to Life, 85 AM. J. INT'L L. 21, 23 (1991).

<sup>167</sup> Some studies conclude that whales do not possess special talents that make them unique in the animal world. For example, relative to their large body size, the great whales have relatively small brains compared to other animals. The sperm whale, with the largest brain among the whale species, has only one-fourth the brain mass per body weight compared to a cow. Margaret Klinowska, *How Brainy are Cetaceans?*, 32 OCEANUS 14 (1993). Although the weight of the brain may not be an accurate indicator of an animal's intelligence, "there are myriads of different factors to determine the brain function", and "the anatomy of the cetacean brain is actually quite primitive". Margaret Klinowska, *Are Cetaceans Especially Smart?*, NEW SCIENTIST, October 29, 1988.

<sup>168</sup> Thanks to the growing popularity of whale watching, shows at aquatic parks such as Sea World, frequent appearances in hit movies such as Free Willy and Finding Nemo, many people now consider whales as a special kind of animal, something akin to pet dogs or thoroughbreds. See Peter J. Stoett, Of Whales and People: Normative Theory, Symbolism, and the IWC, 8 J. INT'L WILDLIFE L. & POL'Y 151,(2005) (stating that the imagery of whales is common in theme parks, movies, millions of toys, posters, and other cuddly representations).

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<sup>&</sup>lt;sup>162</sup> Kalland, *supra* note 124

<sup>&</sup>lt;sup>163</sup> See infra notes and accompanying text. These terms are used in this text to loosely group the different rationales for convenience purposes and are not intended to carry any particular technical, biological, or scientific meaning.

<sup>&</sup>lt;sup>164</sup> See Peter J. Stoett, Of Whales and People: Normative Theory, Symbolism, and the IWC, 8 J. INT'L WILDLIFE L. & POL'Y 151, (2005).

<sup>&</sup>lt;sup>165</sup> This group includes animal rights advocates, who are against the killing of animals (in general) that have a certain level of mental and behavioral sophistication. *See, e.g.*, TOM REGAN, THE CASE FOR ANIMAL RIGHTS (1983). Advocates of animal rights would find the killing of an animal inappropriate except for in extremely limited circumstances.

caused by the killing of animals.<sup>169</sup> The activists in this group believe that whales have a great sensitivity to pain and an ability to suffer. Based on this belief, the animal welfare activists oppose whaling and inhumane killing methods.<sup>170</sup>

Many animal welfare and animal rights advocates, as well as environmental organizations, collaborate closely on whaling issues. However, the distinction between the groups is important. Conservationists view the whaling problem as the exploitation of endangered species. Thus, conservationists are concerned with the scientific justification for sustainable commercial whaling. From their view, the justification for commercial whaling hinges on scientific evidence, and if science supports a sustainable harvest, they do not oppose commercial whaling. At the time of the moratorium, the lack of scientific evidence supporting a sustainable harvest drove conservationists to oppose whaling. On the other hand, scientific findings have no impact on preservationists. From the moral protectionist view of a preservationist, even the best scientific evidence that supports sustainable whaling becomes totally irrelevant. Preservationists are only focused on putting an end to the killing of whales, and they have tried to achieve this goal with various strategies.

The most effective strategy has been destroying the market for whale products. This has been done through international conventions, boycotts, and propaganda against the use of whale products. First, the 1979 IWC resolution and the Convention of International Trade of Endangered Species of Wild Fauna and Flora made legal international trade of whales virtually impossible.<sup>171</sup> Second, whaling nations have been threatened with boycotts on several occasions. Public pressure led to general boycotts of products and services of whaling nations, including Japanese cameras and TV sets, Norwegian and Icelandic fish products, and Russian vodka.<sup>172</sup> Once the public came to accept the special status of whales, anti-whaling groups launched massive propaganda campaigns to promote views that it is evil to kill whales and immoral to eat them.<sup>173</sup> For example, anti-whaling organizations broadcasted video footage of

<sup>&</sup>lt;sup>169</sup> See, e.g., PETER SINGER, ANIMAL LIBERATION: A NEW ETHICS FOR OUR TREATMENT OF ANIMALS 171 (2002 paperback ed.). Singer is a utilitarian and believes that there can be no moral justification for killing an animal if a being suffers. In determining whether a certain animal is capable of suffering, Singer suggests two indicators: the behavior of the being, and the similarity of the being's nervous system to humans.

<sup>&</sup>lt;sup>170</sup> *Id.* Unlike Regan, Singer does not base opposition to killing whales on their having moral rights, but bases his view on the ability of animals to suffer. *See also* Aron, *supra* note 117, at 186.

<sup>&</sup>lt;sup>171</sup> The IWC resolution of 1979 prohibited members from buying whale products from nonmember states. *See* 1979 IWC REPORT.

<sup>&</sup>lt;sup>172</sup> See William Aron, William Burke & Milton M.R. Freeman, *The Whaling Issue*, 24 MARINE POL'Y 179, 180 (2000).

<sup>&</sup>lt;sup>173</sup> See, e.g., Peter J. Stoett, Of Whales and People: Normative Theory, Symbolism, and the IWC, 8 J. INT'L WILDLIFE L. & POL'Y 151, (2005) (describing the "emotional marketing" and propaganda

whaling activities to a wide audience and had a strong effect.<sup>174</sup> As a result of these strategies, anti-whaling states eventually received enough votes for the three-quarter majority required to impose the whaling moratorium.<sup>175</sup>

## 4. Adoption of the Moratorium in 1982

By the late 1970's, the whaling industry was waning and most whaling nations were closing down due to the lack of profit. The emergence of a global movement against whaling became a strong impetus for the IWC to vote on a total moratorium on commercial whaling in 1982.<sup>176</sup> Former whaling countries, having lost their economic interest in whaling, no longer had any reason to counter the public pressure to vote against whaling at the IWC meetings. Active recruitment of non-whaling nations by the United States and other anti-whaling IWC members, along with strong backing from the environmentalist and animal protection community, more than doubled the IWC membership from the original 14 nations to 39 nations by 1982.<sup>177</sup> Enough members had been recruited by the anti-whaling forces to tilt the balance of the vote. The IWC passed a resolution calling for a blanket moratorium on commercial whaling to take effect in the 1985-86 whaling season.<sup>178</sup>

tactics by preservationalist groups).

<sup>176</sup> Kalland, *supra* note 124, at 11-26.

<sup>&</sup>lt;sup>174</sup> Sidney J. Holt, *The Whaling Controversy*, 54 FISHERIES RESEARCH 145, 147 (2002); see, e.g., Sickest Dinner Ever Served: Japs Feast on Whale, BRIT. DAILY STAR, May 11, 1991, at A1

<sup>&</sup>lt;sup>175</sup> An article discusses how Greenpeace was "helping to pack" the IWC between 1978 and 1982 through an operation that added at least half a dozen new member countries to the commission's membership to achieve the three-fourths majority necessary for the moratorium on commercial whaling to pass. *See* Leslie Spencer, Jan Bollwerk & Richard C. Morais, *The Not So Peaceful World of Greenpeace*, FORBES MAGAZINE, Nov. 11, 1991, at 174-80.

<sup>&</sup>lt;sup>177</sup> In addition to the growing membership of both pro-whaling and anti-whaling states, the increase in the number of observer states and organizations indicates the public attention given to the whaling controversy at this time. By the 31st annual meeting in 1979, membership had expanded to 23, and there were 20 accredited observer states and 34 international organizations, 27 of them NGO's. Non-member governments represented at this conference were Belgium, Costa Rica, Germany, Indonesia, Portugal, Switzerland, and Tonga. Among the international organizations present were: FAO, ICES, ICSEAF, IUCN, UNEP. The numerous political difficulties made the IWC agenda longer and more complex every year. Birnie, *supra* note 6, at 504.

<sup>&</sup>lt;sup>178</sup> See William Aron, William Burke & Milton M.R. Freeman, *The Whaling Issue*, 24 MARINE POL'Y 179, 180 (2000).

## B. Current State of the Moratorium

## 1. Exceptions to the Moratorium: Current Whaling Nations

IWC member states may continue whaling legally under the moratorium by making a timely objection or by successfully claiming an exception. A provision in the ICRW allows nations to opt out of whaling regulations by objecting to them in a timely manner.<sup>179</sup> A nation may also whale during the moratorium based on quotas, under the aboriginal whaling exception or the scientific research exception.<sup>180</sup>

Currently, Norway and Japan are the most criticized whaling nations within the IWC.<sup>181</sup> Norway timely objected to the adoption of the moratorium and continues to catch minke whales for profit under the objection.<sup>182</sup> Japan initially objected to the 1982 decision, but withdrew its objection due to political pressure from the United States. Japan withdrew in exchange for an agreement that Japan would escape from punitive United States' domestic laws designed to enhance the authority of the IWC.<sup>183</sup> Japan currently catches minke and sperm whales under special permits issued under the scientific research exception of the ICRW.<sup>184</sup> Japan markets the meat from the scientific samples in accordance with an ICRW requirement to fully utilize the carcasses after research.<sup>185</sup> The whaling activities in these countries are legal under international law and are in accordance with the IWC.<sup>186</sup>

<sup>&</sup>lt;sup>179</sup> ICRW, *supra* note 7, art. III.

<sup>&</sup>lt;sup>180</sup> See ICRW Schedule, *supra* note 101. For details about the Scientific Permit Whaling exception, see http://www.iwcoffice.org/conservation/permits.htm. For details about the Aboriginal Subsistence Whaling exception, see http://www.iwcoffice.org/conservation/aboriginal.htm.

<sup>&</sup>lt;sup>181</sup> See Edith Brown Weiss et al., International Environmental Law and Policy, 1015 -19 (1998).

<sup>&</sup>lt;sup>182</sup> Japan, Norway, Peru, and the USSR objected to the moratorium. Russia resumes whaling from time to time both commercially and claiming the aboriginal subsistence exception. Peru has since withdrawn its objection.

<sup>&</sup>lt;sup>183</sup> Holt, *supra* note 135, at 146. The United States used the Pelly Amendment to the Fishermen's Protection Act of 1967, enacted by the U.S. Congress in 1971, as a device to compel nations to withdraw their objections to the moratorium adopted by the IWC in 1982. JOSEPH J. KALO ET AL., COASTAL AND OCEAN LAW, 564 (2d ed. 2002); 22 U.S.C. § 1978(a).

<sup>&</sup>lt;sup>184</sup> Art. VIII, para.1 of the Convention gives to any contracting government the right to grant its nationals "a special permit authorizing that national to kill, take and treat whales for purposes of scientific research".

<sup>&</sup>lt;sup>185</sup> Art. VIII, para.2 says that whales taken under scientific whaling permits "shall so far as practicable be processed".

<sup>&</sup>lt;sup>186</sup> See Aron, supra note 117, at 188; Holt, supra note 135, at 148.

## 2. Conflict Arising from the Annual Continuation of the Moratorium

As the term implies, the moratorium was adopted as a temporary measure, or a pause, in commercial whaling.<sup>187</sup> Those supporting the moratorium assumed that it would be lifted once whales recovered enough to resume sustainable catches.<sup>188</sup> By that time, the IWC would be able to correct the mismanagement of resources that led to the reduction of various stocks of whale species. The IWC would accomplish this by developing a reliable scientific database and management system to enable future whaling operations to be carried out in a rational manner.<sup>189</sup> Although the IWC did not set a specific time period for this zero quota, the Schedule provided that the IWC would review the ban "based upon the best scientific advice" and undertake a comprehensive assessment of the ban by 1990 at the latest.<sup>190</sup> However, the moratorium turned out to be more than a temporary measure. Since 1995 to the present, it has been extended year after year, although the Scientific Committee has rejected the adoption of the moratorium from the outset.<sup>191</sup>

The temporary hiatus in commercial whaling has been continuing for over 20 years due to a deadlock caused by the lack of agreement in reversing the moratorium. For the past several years, the Scientific Committee has advised that some species no longer need blanket protection.<sup>192</sup> Pro-whaling nations that desire to resume some commercial whaling argue that the moratorium violates the basic principles of the ICRW when it is no longer supported by scientific evidence.<sup>193</sup> The purpose of the ICRW and IWC, as stated in the Preamble and through its regulations, is to achieve the proper conservation of whale stock for

<sup>190</sup> Section 10(e) of the Schedule states:

This provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits.

<sup>191</sup> William Aron, William Burke & Milton M.R. Freeman, *The Whaling Issue*, 24 MARINE POL'Y 179, 181, 184 (2000) (stating that the moratorium continues to be in effect although scientific evidence fully shows that some stocks of whales can maintain a sustainable harvest).

<sup>192</sup> Id.

<sup>193</sup> Id.

<sup>&</sup>lt;sup>187</sup> See William Aron, William Burke & Milton M.R. Freeman, *The Whaling Issue*, 24 MARINE POL'Y 179, 180 (2000) (stating that a 10 year moratorium was adopted in order to reverse the mismanagement by the IWC and to get its house in order to enable future whaling operations rationally).

<sup>&</sup>lt;sup>188</sup> In fact, the Scientific Committee report points out that several large populations of nonendangered whale species existed which could support a sustainable harvest without any biological threat to those particular stocks and species. The report rejects a moratorium on all commercial whaling as too drastic and having no scientific justification. IWC, 23 IWC Report 23-39 (1973). See also *id.* at 182.

<sup>&</sup>lt;sup>189</sup> Aron, *supra* note 117, at 181.

the continuation of the whaling industry.<sup>194</sup> Therefore, the pro-whaling nations argue that an indefinite moratorium contradicts the basic assumption and purpose of the ICRW.

## 3. Deadlock within the IWC

The moratorium was supported by two distinct and conflicting goals. First, the pro-whaling states sought to restore whale stocks to allow future sustainable catches. Second, the anti-whaling states wanted to stop all killing of whales, regardless of increased whale populations. The moratorium seemed to be beneficial for both groups in a time when whale stocks were dwindling. However, these conflicting goals will cease to coexist once the whale population reaches a point where whaling could resume at a sustainable level.<sup>195</sup> Now that we have reached this point, member states have clashed more aggressively than ever before.<sup>196</sup>

Currently, there are three conflicting positions regarding the moratorium among the member states within the IWC. First, the anti-whaling states take a conservation only view. These states, including the United States, United Kingdom, Australia, and New Zealand, oppose all whaling, even if the stocks are scientifically proven to be sustainable.<sup>197</sup> Second, the pro-whaling states are in favor of lifting the moratorium to resume whaling at sustainable levels based on scientific findings. States taking this position are Japan, Norway, Russia, and China. A third group of states believes that sustainable whaling may be proper but is reluctant to lift the moratorium. They feel that lifting the moratorium is premature because of insufficient scientific evidence supporting sustainable whaling, and because of the IWC's inability to enforce quotas. None of these

<sup>197</sup> See, e.g., Chris Johnson, Australia's Bid to Ban All Whaling, ADVERTISER (Australia), May 18, 2005, (stating "Australia will join Britain, the United States and New Zealand in a high-level diplomatic mission taking Tokyo to task over its whaling expansion plan"); Maria Moscaritolo, Whaling Failing the Whales, ADVERTISER (Australia), May 18, 2005, (stating "the protection of whales is on shaky ground as pro-whaling Japan escalates its bid for a larger catch. Australia is among the handful of countries determined to stand in its way"); 'S. Kalland, *The Crisis of Good Faith.*, THE INTERNATIONAL HARPOON, No. 2, October 21,1997, available at http://www.highnorth.no/Library/Policies/National/th-cr-of.htm (stating that Australia, the US, UK, Netherlands, and New Zealand are "fundamentally opposed to any form of commercial whaling").

<sup>&</sup>lt;sup>194</sup> ICRW Preamble.

<sup>&</sup>lt;sup>195</sup> See Louise Daly, IWC Deadlocked by Intransigence on Both Sides, AGENCE FRANCE-PRESSE, May 30, 1999.

<sup>&</sup>lt;sup>196</sup> See, e.g., Only a Legal Challenge Will Stop the Whale Harvest, CANBERRA TIMES, Nov. 15, 2005 (opposing Japan's scientific research in the Antarctic); Chris Johnson, Iceland Joins "Scientific" Whale Kill, WEST AUSTRALIAN NEWSPAPERS, Aug. 2, 2005 (criticizing Iceland for the abhor practice of whaling, and praising the Australian Environment Minister for conveying his outrage directly to Iceland's ministers); see also Anne M. Creason, Culture Clash: The Influence of Indigenous Cultures on the International Whaling Regime, 35 CAL. W. INT'L L.J. 83 (2004) (comparing conflicting cultural beliefs of Japan and New Zealand).

three positions has the requisite three-fourths majority vote to amend the Schedule to lift the moratorium. The IWC has been in a dead-lock, and the moratorium continues.

IV. THE MORATORIUM ON COMMERCIAL WHALING SHOULD NOW BE LIFTED

## A. A Moratorium on Whaling is No Longer Necessary: Whale Stocks Have Recovered And Can Support Sustainable Whaling.

The moratorium is no longer justifiable because there is credible scientific evidence supporting the sustainable use of whale resources, which have successfully recovered to abundant levels. The IWC issues whale population estimates based on the Scientific Committee's detailed assessment for eight groups of whale stocks: the minke, fin, gray, bowhead, humpback, blue, right, and pilot whales.<sup>198</sup> The findings of the Scientific Committee are reported in the annual IWC and Scientific Committee reports.<sup>199</sup> The National Oceanic and Atmospheric Administration (NOAA) also publishes stock assessment reports by species.<sup>200</sup> IWC and NOAA reports are generally reliable scientific reports based on studies administered by impartial scientists from reputable research institutions.<sup>201</sup> These reports show that the populations of many species had recovered greatly by 1990.<sup>202</sup>

The reports indicate that species such as the small minke, pilot, large sperm, gray, and some regional stocks of the sei, Byrde's, and fin whale are sufficiently abundant to resume whaling at sustainable levels without serious concern for their future.<sup>203</sup> The small minke, pilot, and large sperm whales each have populations of about a million.<sup>204</sup> Although the sperm whale remains listed as "endangered" under the Endangered Species Act, the sperm whale is the most numerous of the large whale species, estimated between 200,000 and

<sup>203</sup> See id.

<sup>204</sup> Id.

<sup>&</sup>lt;sup>198</sup> The IWC gives whale population figures only for stocks which the IWC Scientific Committee has carried out detailed assessments by region for statistical certainty. Population estimates are available for various regions of minke, fin, bowhead, and gray whales. These are published in the IWC Commission Reports, available from the IWC.

<sup>&</sup>lt;sup>199</sup> See IWC website.

<sup>&</sup>lt;sup>200</sup> NOAA is an organization set up under the U.S. Department of Commerce to provide oversight and guidance on the conservation of marine mammals, endangered species, and their habitats. NOAA's stock assessment reports are available at: http://www.nmfs.noaa.gov/pr/PR2/Stock\_Assessment\_Program/individual\_sars.html (last viewed May 14, 2005).

<sup>&</sup>lt;sup>201</sup> Both IWC and NOAA use these reports to make important decisions on the management of marine resources, such as the adopting resolutions and making endangered species determinations.

<sup>&</sup>lt;sup>202</sup> See NOAA Stock Assessment Reports, supra note 152.

1,500,000.<sup>205</sup> In 1994, the Eastern Northern Pacific Gray whale was officially considered recovered and removed from the List of Endangered and Threatened Wildlife under the ESA with an estimated population size of 21,000.<sup>206</sup> The most accurate estimate for the gray whale is around 26,000, according to the IWC and NOAA reports.<sup>207</sup> Likewise, some regional stocks of the sei, Byrde's, and fin whale seem to have recovered healthy population levels ranging from 25,000 to 85,000.<sup>208</sup> Furthermore, minke whales are very abundant and are not considered "depleted" under the Marine Mammal Protection Act ("MMPA"), or as "threatened" or "endangered" under the ESA.<sup>209</sup> Since 1990, the Scientific Committee has reported that the numbers of the Southern Hemisphere Minke whale stock are over 760,000.<sup>210</sup> The committee also reported that a total annual catch quota of up to 4,800 whales could be permitted without adverse effects to the size of its stock.<sup>211</sup> Similarly, in 1996, the North Atlantic Minke whale stock was estimated at around 149,000.<sup>212</sup> Many depleted stocks of other whale species are reported to be recovering at encouraging rates.<sup>213</sup>

<sup>207</sup> The IWC Scientific Committee report estimates about 26,635 animals. 1999 IWC Doc. SC/51/AS10. The 5 year gray whale status review, required under the ESA, reported a continued annual growth of 2.5%, and an estimated stock of 26,600 individuals. D.J. Rugh, M.M. Muto, S.E. Moore & D.P. DeMaster, STATUS REVIEW OF THE EASTERN NORTH PACIFIC STOCK OF GRAY WHALES, U.S. Dept. of Commerce, NOAA Technical Memorandum NMFS-AFSC-103, 17 (1999), *available at* http://nmml.afsc.noaa.gov/CetaceanAssessment/GrayWhale/GrayWhales.pdf (last viewed May 14, 2005).

<sup>208</sup> See NOAA Stock Assessment Reports, supra note 152.

<sup>209</sup> See generally Paul Rincon, 'No Surge' in Minke Whale Numbers, BBC NEWS, Feb. 20, 2005, available at http://news.bbc.co.uk/1/hi/sci/tech/4282627.stm (last visited May 14, 2005). In fact, the IWC Report at the time of the moratorium indicates that the Scientific Committee found from the outset that such a drastic measure had no scientific justification because there existed large populations of minke whales which could support a sustainable harvest. IWC REP. 23-39 (1973).

<sup>210</sup> CHAIRMAN'S REPORT OF THE FORTY-THIRD ANNUAL MEETING, FORTY-SECOND REPORT OF THE INTERNATIONAL WHALING COMMISSION 11, 24 (1990); IWC/43/114.

<sup>211</sup> Id.

<sup>212</sup> IWC/47/76.

<sup>213</sup> See, e.g., Adrian E. Raftery & Judith E. Zeh, Estimating Bowhead Whale Population Size and Rate of Increase from the 1993 Census, 93 J. AM. STAT. ASS'N 451, 451-63 (1998) (concluding that bowheads are recovering at a healthy rate, "indicating that stocks of great whales that have been decimated by commercial whaling can recover after it ends"); P.B. Best, Increase Rates in Severely Depleted Stocks of Baleen Whales, 50 J. MARINE SCI. 169, 169-86 (1993) (discussing abundant stocks of mike whales in the North Atlantic and the Southern Ocean).

<sup>&</sup>lt;sup>205</sup> See http://www.nmfs.noaa.gov/pr/species/mammals/cetaceans/spermwhales.htm (last visited May 14, 2005). It is curious why it is still listed as endangered under the ESA, compared to the gray whale, which was removed at an estimate of 21,000.

<sup>&</sup>lt;sup>206</sup> 59 Fed. Reg. 31094 (June 16, 1994). The gray whale was one of the first species to be depleted, and protective measures were put in place from early on by the IWC, ESA, MMPA, and regional sanctuaries. An assessment report including a history of the protection of gray whales is available at: http://www.nmfs.noaa.gov/pr/species/mammals/cetaceans/gray\_whale.doc (last visited May 14, 2005).

Population levels and replacement yields are critical elements in determining whether a stock has recovered enough to resume sustainable use.<sup>214</sup> The smaller the population, the more vulnerable it becomes. Severely reduced populations have a limited gene pool and may become weaker with time.<sup>215</sup> They may not be able to withstand natural environmental challenges such as changes in ocean temperature.<sup>216</sup> They may also near extinction and become too few to reproduce.<sup>217</sup> The replacement yield represents the number of new animals added to the population each year in excess of those lost from natural and human causes.<sup>218</sup> Species such as the bowhead whale have extremely low replacement yield rates, meaning that very few new whales are being added to the stock.<sup>219</sup> Because the replacement yield is an indicator of the growth rate, scientists can utilize the figures to minimize the risks of over-fishing and exploitation.<sup>220</sup>

The fact that some endangered species of whales have recovered suggests that a carefully monitored and controlled hunt of those species is possible without threatening their survival.<sup>221</sup> Because replacement yield rates for most whales are estimated between 2-4%, even with some scientific uncertainty, a harvest rate of no more than 1% will ensure a safe whale population.<sup>222</sup> Regular population surveys can be undertaken so that specific annual harvest rates can be adjusted to accommodate scientific uncertainty and unexpected natural mortalities.<sup>223</sup> The moratorium on commercial whaling should be lifted on a limited basis for at least the minke, sperm, and gray whales, as they are scientifically shown to be sufficient in number to resume sustainable use.

<sup>215</sup> Id.

<sup>216</sup> Id.

<sup>217</sup> See generally IWC, REPORT OF THE IWC WORKSHOP ON CLIMATE CHANGE AND CETACEANS (1996); William C.G. Burns, From the Harpoon to the Heat: Climate Change and the International Whaling Commission in the 21st Century, 13 GEO. INT'L ENVTL. L. REV. 335, 339-48 (2001) (explaining the grave threats that cetaceans face from climate change this century).

<sup>218</sup> Aron, *supra* note 117, at 183.

<sup>219</sup> Kim E.W. Shelden & David J. Rugh, *The Bowhead Whale*, Balena mysticetus. *Its Historic and Current Status*, 57 MARINE FISHERY REV. 1, 3-4 (1995). This report estimated the population size of bowheads to be around 8,000. *Id*. It concludes that bowhead whale stocks are so slow to recover that some might not recover at all. *Id*. Calving intervals of 3-4 years and the possibility that bowheads do not begin to reproduce until they are 20 years old may be part of the cause for the slow recovery rates. *Id*. *But see* Raftery & Zeh, *supra* note 165, at 451-63 (finding an annual rate of increase of the population from 1978 to 1993 at 3.2%, the estimated population size being 8,200, which was accepted by the IWC based on this report) This report concludes that bowheads are increasing at a healthy rate. *Id*.

<sup>221</sup> Aron, *supra* note 117, at 183-84.

<sup>222</sup> Id.

<sup>223</sup> Id.

<sup>&</sup>lt;sup>214</sup> Aron, *supra* note 117, at 183.

<sup>&</sup>lt;sup>220</sup> Aron, *supra* note 117, at 183.

## Spring 2006] Lifting the International Whaling Moratorium

# B. The Moratorium Should Be Lifted Because the IWC is an Effective Way to Control Whaling.

As long as whaling nations remain members of the IWC, the IWC can regulate their whaling activities so that whale stocks will not be depleted again. With the moratorium continuing despite the increasing amount of scientific data supporting the resumption of whaling, the whaling nations are showing increasing frustration with the moratorium.<sup>224</sup> The failure to resolve the current deadlock within the IWC could lead to a breakup or even a complete dissolution of the IWC.<sup>225</sup> If whaling nations withdraw from the IWC and resume whaling without effective international controls, the effect on whale populations could be disastrous.<sup>226</sup> However, by allowing whaling to resume, the IWC can maintain current membership and effectively regulate whaling activities. The IWC can control the amount, method, and location of the activities to prevent unreasonable exploitation.

The possibility of a withdrawal of the whaling nations due to the current state of affairs in the IWC is very real.<sup>227</sup> Iceland left the IWC in 1992 to resume commercial whaling and has expressed interest in exporting whale meat and other whale parts to profitable markets such as Japan.<sup>228</sup> Although Iceland returned to the IWC a decade later, other countries such as Japan, Norway, and the Netherlands have also previously threatened to leave.<sup>229</sup> In fact, Japan had anticipated leaving the IWC if the deadlock is not resolved by 2006.<sup>230</sup>

<sup>226</sup> Christopher D. Stone, *Legal and Moral Issues in the Taking of Minke Whales*, THE INTERNATIONAL LEGAL WORKSHOP (1996) *available at* http://luna.pos.to/whale/icr\_legal\_sto.html (last visited May 13, 2005).

<sup>227</sup> See Whaling Nations May Quit Commission, THE AGE, May 31, 1999.

<sup>228</sup> Reuters, *Iceland's Parliament Votes to Resume Whaling by 2000*, ORANGE COUNTY REG., March 13, 1999.

<sup>229</sup> Norway Reacts Against Whaling Ban Lift, NORDIC BUS. REP., June 7, 1999; Keith Bradsher, Japan Won't Hunt Whales, Miyazawa Says, N.Y. TIMES, July 3, 1992, at D14. Previously, Norway, Japan, and the Netherlands threatened to withdraw in 1959 over a dispute on the division of quotas.

<sup>&</sup>lt;sup>224</sup> Norway reacted to the moratorium by announcing its resumption of commercial whaling at the 44th IWC meeting. See IWC, CHAIRMAN'S REPORT OF THE 44TH ANNUAL MEETING OF THE INTERNATIONAL WHALING COMMISSION, Preface (1992). In Japan, the Ministry of Foreign Affairs expresses the difficulty for the current anti-whaling majority in the IWC to show understanding of Japan's position for sustainable whaling. See Hogei ni Taisuru Gaimusho no Tachiba [The Ministry Whaling], of Foreign Affairs Position on available at: http://www.mofa.go.jp/mofaj/gaiko/whale/tachiba.html (last visited Mar. 29, 2005). Other documents published by MOFA regarding whaling are available at http://www.mofa.go.jp/mofaj/gaiko/whale/index.html (last visited Mar. 29, 2005); see also Ié Tanaka, Hogei wo Meguru Yuganda Tatakai [The Ugly War on Whaling], available at: http://tanakanews.com/a0731whale.htm (last visited Mar. 29, 2005).

<sup>&</sup>lt;sup>225</sup> See generally Judith Berger-Eforo, Sanctuary of the Whales: Will This Be the Demise of the International Whaling Commission or a Viable Strategy for the Twenty-First Century?, 8 PACE INT'L L. REV. 439 (1996); Louise Daly, IWC Deadlocked by Intransigence on Both Sides, AGENCE FRANCE-PRESSE, May 30, 1999.

Some frustrated countries have established or discussed regional regulatory frameworks for whaling that would replace the IWC. For example, in 1992, Iceland, Norway, Greenland, and the Faroe Islands (Denmark) established the North Atlantic Marine Mammal Committee ("NAMMCO") in response to the "inappropriate whale protectionist tendencies of the IWC".<sup>231</sup> The purpose of NAMMCO is the conservation, rational management, and study of marine mammals in the North Atlantic through regional consultation and cooperation.<sup>232</sup> Like the IWC, NAMMCO has a Scientific Committee which provides advice on catch limits and conservation based on the best available scientific findings.<sup>233</sup> Similarly, China, Japan, South Korea, and Russia have also discussed the possibility of such a collaborative effort in the North Pacific.<sup>234</sup> Regional approaches to the management of whales may be more practical, cost-effective, and more respectful of local cultural and socio-economic differences as compared to the IWC. On the other hand, the global nature of whaling and the highly migratory nature of whales suggest that an effective worldwide regulatory system under the IWC would be more effective in overall conservation of whales in the long term.<sup>235</sup>

By doing nothing, the IWC risks losing control over members that wish to engage in whaling.<sup>236</sup> If the IWC cannot regulate the industry, the interests of pro-whaling and anti-whaling nations will both go unaddressed.<sup>237</sup> In the absence of international regulation, the resumption of whaling by the pro-whaling states could be potentially devastating. If whaling once again becomes a profitable industry, unregulated whaling may uncontrollably deplete targeted whale stocks, only to repeat history and drive the whales to near extinction

<sup>233</sup> Rules of Procedure for the NAMMCO Scientific Committee.

<sup>234</sup> See also Alex Kirby, Japan Plans Pro-whaling Alliance, BBC NEWS (July 14, 2004), available at http://news.bbc.co.uk/1/hi/sci/tech/3892909.stm (last visited May 14, 2005).

<sup>235</sup> Aron, *supra* note 117, at 181.

<sup>236</sup> See generally Matanich, supra note 178, at Part III.3.B. (stating that if the IWC will lose its credibility if it continues to serve neither the whaling interests nor the interests that seek to control whaling).

<sup>237</sup> Matanich, *supra* note 178, at 56.

See also Johanna Matanich, A Treaty Comes of Age for the Ancient Ones: Implications of the Law of the Sea for the Regulation of Whaling, 8 INT'L LEGAL PERSP. 37, FN 117 (1996).

<sup>&</sup>lt;sup>230</sup> Alex Kirby, Japan Sets 2006 Whaling Ultimatum, BBC NEWS (July 19, 1994), available at http://news.bbc.co.uk/1/hi/sci/tech/3907415.stm (last visited May 14, 2005).

<sup>&</sup>lt;sup>231</sup> 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, 164 (1995). See Directory: NAMMCO at http://www.oceanlaw.net/orgs/nammco.htm.

<sup>&</sup>lt;sup>232</sup> NAMMCO Agreement, Article 2, available at: http://www.nammco.no/agreement.htm (last visited Mar. 28, 2006). Non-member states and organizations may also participate in NAMMCO meetings as observers. Observers may make statements and submit relevant documents to the meetings. See NAMMCO Agreement, Article 8; NAMMCO Rules of Procedure, Rules 20-23.

again. Eventually, the prospect of a lucrative market may lure the nations away from fulfilling their obligation to refrain from trading. Alternatively, the restraints on trading under other treaties may eventually be voted out. The interests of both pro-whaling nations and anti-whaling nations must be addressed if the IWC is to be effective.

Whaling nations must remain a part of the IWC in order for the IWC to protect the world's whale stocks from over-exploitation. Initially, the total ban on commercial whaling was adopted to address the endangered status of whales. Now, in light of scientific evidence showing that some whales have recovered to a point where whaling could resume, the battle has shifted to moral, preservationist. and emotional arguments.<sup>238</sup> However, even the preservationists will agree that closely-regulated and monitored hunting is better than an uncontrollable global whaling crisis without the IWC. It is time to lift the moratorium and replace it with a resolution allowing nations to hunt non-endangered whales in a sustainable manner. An effective commercial whaling regime would be implemented to support the resolution.

# C. There is Enough Support to Lift the Moratorium at the Annual IWC Meeting.

The IWC finally may be able to resolve the deadlock among the member states over the moratorium.<sup>239</sup> At each annual meeting, pro-whaling states have tried to lift the moratorium, while the anti-whaling states successfully opposed those efforts.<sup>240</sup> However, the pro-whaling nations are gaining a majority in the IWC and will most likely overturn the moratorium in the near future.<sup>241</sup> In fact, there is considerable discussion that the pro-whaling states will have enough votes at the next annual meeting to finally lift the moratorium.<sup>242</sup> Nations supporting the pro-whaling view have increased in recent years, from only 9 in

<sup>241</sup> Tom Clifford, Slaughter Ahead as Whaling Ban May End, GULF NEWS, Mar. 16, 2005; see Peter Alford, Moby-Dick Meets Skippy, AUSTRALIAN, July 24, 2004.

<sup>242</sup> Matthew Denholm, Japan Comes Close to Win on Whaling, AUSTRALIAN, Feb. 17, 2006; see Clifford, supra note 187; see IFAW, supra note 185.

<sup>&</sup>lt;sup>238</sup> See infra.

<sup>&</sup>lt;sup>239</sup> See, e.g., International Fund for Animal Welfare, Kiribati Joins the International Whaling Commission, Jan. 17, 2005, available at http://www.ifaw.org/ifaw/general/default.aspx?oid=126330 (last visited Mar. 29, 2005).

<sup>&</sup>lt;sup>240</sup> See, e.g., High North Alliance, IWC Meeting Ends in Failure, available at http://www.highnorth.no/news/nedit.asp?which=259 (last visited May 14, 2005). See generally IWC Condemns Norway's 'Commercial Whaling' in North Atlantic, AGENCE FRANCE PRESSE ENGLISH WIRE, May 20, 1998; IWC Condemns Japan's 'Scientific' Whaling in Antarctic, AGENCE FRANCE PRESSE ENGLISH WIRE, May 20, 1998 (stating that the IWC has repeatedly passed the same resolutions condemning Japan and Norway at its yearly meetings without effect).

2000, to 15 in 2002, and then 21 in 2003.<sup>243</sup> As of 2005, as many as 35 nations are in favor of resuming sustainable whaling, which may be enough to reach the three-quarters majority needed to pass the new resolution.<sup>244</sup>

The membership of the IWC is still small, and the number of pro-whaling and anti-whaling states is now delicately balanced.<sup>245</sup> One new country joining on either side could make a big difference in the outcome of votes regarding the moratorium.<sup>246</sup> Interestingly, the IWC was in a similar state when anti-whaling countries pushed the moratorium through in 1982.<sup>247</sup> In the years leading up to the vote in 1982, anti-whaling states actively recruited allies to join the convention in the hope of tipping the balance to pass the moratorium.<sup>248</sup> Many of the 23 countries that joined during 1979-1982 were Latin American. Caribbean, or landlocked states, that have never engaged in whaling.<sup>249</sup> Even after the moratorium was adopted, countries have joined in opposition to whaling. For instance, Austria has openly declared that its purpose in joining the IWC was to seek the elimination of all commercial whaling and "to agreement."250 transform the whaling agreement to a preservation Notwithstanding the history that anti-whaling states recruited allies aggressively in order to adopt the moratorium, anti-whaling states are now accusing the prowhaling states, particularly Japan, of utilizing the same tactic to overturn the vote.251

Recently, anti-whaling nations have criticized Japan for using generous aid packages to buy the votes of developing countries to support its position on whaling.<sup>252</sup> This is because many of the nations that have joined the IWC in

<sup>247</sup> See Transition of Member Nations of the IWC, at http://luna.pos.to/whale/iwc\_member.html.

<sup>&</sup>lt;sup>243</sup> Tom Clifford, Slaughter Ahead as Whaling Ban May End, GULF NEWS, Mar. 16, 2005.

<sup>&</sup>lt;sup>244</sup> Clifford, *supra* note 187. At the 2005 annual meeting, Japan narrowly lost key votes because of tardiness or invalid votes due to a failure to pay membership dues. Denholm, *supra* note 221. The final vote at the 2005 meeting was 23 in favor, 29 against, and 5 abstentions. The International Whaling Commission's 57th annual meeting in Ulsan, Republic of Korea 2005, *available at* http://www.iwcoffice.org/meetings/meeting2005.htm.

<sup>&</sup>lt;sup>245</sup> Donnan, *supra* note 188.

<sup>&</sup>lt;sup>246</sup> IFAW, *supra* note 185; Donnan, *supra* note 188.

<sup>&</sup>lt;sup>248</sup> Donnan, *supra* note 188. During this time, membership grew from 17 to almost 40 nations. See id.

<sup>&</sup>lt;sup>249</sup> See Transition of Member Nations of the IWC, at http://luna.pos.to/whale/iwc\_member.html.

<sup>&</sup>lt;sup>250</sup> Austria Joins IWC to Put Stop to Whaling, HIGH NORTH NEWS, No. 9 (Dec. 12, 1994).

<sup>&</sup>lt;sup>251</sup> See, e.g., Fears Japan Will Hijack Whaling Committee, ADVERTISER (Australia), May 17, 2005 (stating that "A Japanese drive to recruit supporters at the International Whaling Commission may enable it to shut down the body's conservation committee").

<sup>&</sup>lt;sup>252</sup> See, e.g., id.; Shawn Donnan, Money, Influence, and the Future of the World's Whales, CHRISTIAN SCI. MONITOR, July 10, 2000, available at http://csmonitor.com/cgibin/durableRedirect.pl?/durable/2000/07/10/text/p8s2.html (last visited Mar. 29, 2005); Greenpeace Japan, "IWC Kokusai Hogei linkai Nenji Soukai de no Nihon Seifu no Hyou-kai" [The Japanese Government's Vote-Buying at the IWC Annual Meeting] (1999), available at

recent years are developing countries in Africa, South Pacific, and the Caribbean.<sup>253</sup> These nations have received aid from Japan, and some have never had a tradition of whaling.<sup>254</sup> However, even nations that do not whale have an interest in the sustainable management of natural resources. Japan's aid has helped educate developing nations, including those that are opposed to whaling, of the importance of scientific research in the sustainable use of their resources.<sup>255</sup>

Whether the recruiting tactic is acceptable behavior under international law involves a complex analysis beyond the focus of this paper. However, the current moratorium is properly in effect because it was adopted pursuant to the rules and procedures set forth in the ICRW. The membership provisions of the ICRW do not place specific restrictions on IWC membership.<sup>256</sup> Any nation may join the agreement and participate in IWC functions simply by giving notification in writing and paying its annual membership dues.<sup>257</sup> In this way, the ICRW allows states with no direct interest in whaling to join the IWC and participate in the voting. Thus, it is consistent with the purpose of the IWC, and the anti-whaling nations' occasional reluctance of welcoming non-whaling nations is unfounded. If the current members vote to reverse the moratorium following proper rules and procedures of the ICRW, the resumption of commercial whaling would become effective regardless of whether any vote-garnering tactics were used.

## V. FUTURE OF THE IWC

Once the moratorium is lifted and commercial whaling resumes on a limited basis, a proper management scheme is essential in order to maintain the credibility and force of the IWC. Much more reliable methods of setting and allocating quotas are necessary, as well as stronger controls and enforcement mechanisms. Without implementing these measures, many nations that now

http://www.greenpeace.or.jp/campaign/oceans/factsheet/5\_html (last visited Mar. 29, 2005).

<sup>&</sup>lt;sup>253</sup> See Transition of Member Nations of the IWC, at http://luna.pos.to/whale/iwc\_member.html; see also IWC Members and Commissioners at http://www.iwcoffice.org/commission/memners.htm.

<sup>&</sup>lt;sup>254</sup> The African Republic of Guinea joined in 2000, which many observers say was brought in by Japan, despite never having a tradition on whaling. Donnan, *supra* note 188. Morocco is also alleged to have been brought in by Japan. *Id.* Aid statistics from the Organization for Economic Cooperation and Development (OECD) are *available at* http://www.oecd.org/dac/stats. Japan has been consecutively the world's largest aid donor from 1990 to 2001, to over 150 countries. *See Japan Strives to Align Policies and Resources with New Aid Vision, available at* http://www.oecd.org/document/38/0,2340,en\_2649\_34485\_22139942\_1\_1\_1\_00.html (last visited May 14, 2005).

<sup>&</sup>lt;sup>255</sup> See IWC 57 Briefing Note, available at http://www.icrwhale.org/eng/57BriefingNote.doc.

<sup>&</sup>lt;sup>256</sup> ICRW, *supra* note 7, art. X, para. 2.

<sup>&</sup>lt;sup>257</sup> ICRW, supra note 7, art. X.

believe that the science justifies the lifting of the moratorium may not have enough faith in the IWC to vote for a resolution lifting the moratorium, based on the past failures of the IWC. The new management scheme must effectively control sustainable whaling activities, so that whales will not be depleted as before.

The future of the IWC is hopeful after it lifts the moratorium. The IWC has envisioned an effective observation and inspection scheme, and an accurate management procedure based on science. First, the implementation of the rigorous and comprehensive Revised Management Procedure will set effective catch quotas for the conservation of whales.<sup>258</sup> In addition, the Revised Management Scheme will provide an international monitoring and inspection system to ensure that whaling activities are in compliance with the IWC regulations, particularly the quota.<sup>259</sup> The IWC may also consider cooperation with the United Nations in providing stronger enforcement measures that will control the new whaling era. The IWC has the potential to provide a strong system for the future of whaling.

#### A. Calculating and Implementing Appropriate Catch Levels

Following the adoption of the moratorium, the Scientific Committee recognized the need to revamp its old management objectives and procedures. The first management scheme, adopted in 1974, was called the New Management Procedure ("NMP").<sup>260</sup> This management scheme aimed to ban whaling of all over-exploited stocks, while permitting limited commercial catches of abundant stocks at levels that would not threaten those populations.<sup>261</sup> However, the NMP required scientific data that was difficult to obtain, such as the exact population size of each whale species.<sup>262</sup> This led to the downfall of the NMP. Although the NMP was used for almost two decades, the scientific data on which it relied was not accurate enough to stop the IWC from adopting excessive whale quotas.<sup>263</sup>

<sup>&</sup>lt;sup>258</sup> See Conservation and Management Section at http://www.iwcoffice.org/commission/iwcmain.htm for a brief introduction. See infra, Part V.A.1. for a discussion on the RMP.

<sup>&</sup>lt;sup>259</sup> See Conservation and Management Section at http://www.iwcoffice.org/commission/iwcmain.htm for a brief introduction. See infra, Part V.A.1. for a discussion on the RMS.

<sup>&</sup>lt;sup>260</sup> See William Aron, William Burke & Milton M.R. Freeman, *The Whaling Issue*, 24 MARINE POL'Y 179, 180 (2000).

<sup>&</sup>lt;sup>261</sup> *Id.* (aron)

<sup>&</sup>lt;sup>262</sup> Id. (aron)

<sup>&</sup>lt;sup>263</sup> See generally G.P. Donovan, Scientific Editor, IWC, The International Whaling Commission and the Revised Management Procedure, available at: http://www.highnorth.no/library/managment\_regimes/iwc/th-in-wh.htm (stating that 'shaky' stock

The moratorium required the Scientific Committee to complete a comprehensive assessment of whale stocks and to develop a replacement for the NMP.<sup>264</sup> The aim of the replacement was to construct a procedure that would automatically produce yearly catch limits for a given whaling operation.<sup>265</sup> These limits would be based on periodic population estimates, rates of depletion, historical catch data, and other data such as accompanying standard errors.<sup>266</sup> The Scientific Committee recognized the limited availability and inaccuracy of the scientific data.<sup>267</sup> Taking this into account, the Scientific Committee successfully completed a comprehensive new methodology called the Revised Management Procedure ("RMP") to ensure that appropriate catch levels will be set once the moratorium is lifted.<sup>268</sup>

When implementing a quota system, it is important to set an appropriate level of catch, or the actual number of the quota, but it is also crucial to consider what each quota unit represents. A quota unit can simply stand for the number of animals that could be taken, or it can be based on the yield for value, such as the relative amount of meat or oil that can be obtained from each species. The failure of past calculations using the amount of oil produced as the base quota unit indicates that the quota unit should incorporate certain economic factors. The best approach from a conservation view point would be to set quota units on a per species basis. Once the base quota unit is set, calculating an appropriate quota level backed by sound science will be possible under the RMP.<sup>269</sup>

## 1. The Revised Management Procedure Will Ensure that the IWC Will Adopt an Appropriate Quota

The RMP, which the IWC adopted in 1994, is very protective of whales, and it takes the precautionary approach to resource utilization.<sup>270</sup> Its management objectives are: 1) to set catch limits as stable as possible; 2) to not

estimates were used to calculate catch limits under the NMP, and that the procedure did not last long as its limitations became apparent).

<sup>&</sup>lt;sup>264</sup> *Id.* (aron) William Aron, William Burke & Milton M.R. Freeman, *The Whaling Issue*, 24 MARINE POL'Y 179, 180 (2000).

<sup>&</sup>lt;sup>265</sup> Tore Schweder, Protecting Whales by Distorting Uncertainty: Non-precautionary Mismanagement?, 52 FISHERIES RESEARCH 217, 220 (2001).

<sup>&</sup>lt;sup>266</sup> Id.

<sup>&</sup>lt;sup>267</sup> See Revised Management Procedure, Taking Uncertainty into Account, at http://www.iwcoffice.org/conservation/rmp.htm.

<sup>&</sup>lt;sup>268</sup> Id.

<sup>&</sup>lt;sup>269</sup> See Revised Management Procedure, at http://www.iwcoffice.org/conservation/rmp.htm.

<sup>&</sup>lt;sup>270</sup> J.G. Cooke, The International Whaling Commission's Revised Management Procedure as an Example of a New Approach to Fishery Management, in WHALES, SEALS, FISH AND MAN (1995).

allow catches on stocks below 54% of the estimated carrying capacity; and 3) to obtain the highest possible continuing yield from the stock.<sup>271</sup> The RMP is stock-specific and it requires regular systematic surveys as a requirement for continued whaling.<sup>272</sup> The procedure determines safe catch limits based on the estimates of current abundance taken at regular intervals, and information about past and present catches.<sup>273</sup> Scientific uncertainty is treated in a risk-averse manner, and the Committee has carried out intensive testing of the procedure for over eight years in response to numerous assumptions and problems.<sup>274</sup> The U.S. National Marine Fisheries Service has also tested the procedure by checking quotas calculated for Norway.<sup>275</sup> The RMP has been the most rigorously tested management procedure developed for a natural resource, and it is more conservative than anything that has been implemented before.<sup>276</sup>

The RMP is also one of the most comprehensive conservation management procedures developed for any living marine resource.<sup>277</sup> It fully takes into account the effects that any future environmental change may have upon the whale stocks.<sup>278</sup> Thus, this new management scheme offers effective protection for the whales from regulated harvesting as well as from various environmental impacts on whale populations.<sup>279</sup> The RMP will continue to monitor those stocks and species that require protection by not allowing harvests, while abundant stocks would benefit from careful regulation.<sup>280</sup> The RMP will ensure that lifting the moratorium and resuming whaling would not expose any whale stocks to biological threats or risks of extinction.<sup>281</sup>

<sup>273</sup> Id.

<sup>274</sup> Id.

<sup>275</sup> See Schweder, supra note 199, at 223. The report of the review commissioned by the NMFS is available in IWC/46/24. Other details are available in IWC REP. 1998.

<sup>276</sup> See IWC, supra note 202. For example, annual catches after the initial survey will be less than half a percent of the estimated population size

<sup>277</sup> Id.

<sup>278</sup> See Aron, supra note 117, at 182.

<sup>279</sup> Id.

<sup>280</sup> See Aron, supra note 117, at 183.

<sup>281</sup> See generally IWC, supra note 202.

<sup>&</sup>lt;sup>271</sup> IWC, Revised Management Procedure, *available at* http://www.iwcoffice.org/conservation/rmp.htm (last visited May 12, 2005) (The most rigorously tested management procedure for a natural resource yet developed).

<sup>&</sup>lt;sup>272</sup> Id.

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2. Quota Units Should Be Set By Species, Not By the Blue Whale Unit Approach

The "Blue Whale Unit" (BWU), created by the IWC, was a unified measurement based on the obtainable amount of oil.<sup>282</sup> Under this system, each company was allotted a fixed quota in terms of the amount of oil that was obtainable from each species of whale.<sup>283</sup> Instead of allotting quotas by oil barrelage, which did not encourage companies to maximize the yield of oil per whale, the BWU system incentivized the use of the whole carcass and reduced the amount of waste. This system was somewhat successful, as it resulted in the killing of 13,500 fewer whales.<sup>284</sup> However, the BWU did not turn out to be suitable for conservation purposes.<sup>285</sup>

The BWU system, meant to regulate whale stocks, actually contributed to the decimation of the whales.<sup>286</sup> The catch effort under a BWU system will be directed towards the species from which the quantity of oil can be obtained most economically, until the depletion of that stock. Then, the next most economically efficient stock would become the target, and the exploitation of whale stocks will continue in sequence.<sup>287</sup> For example, catching one blue whale is more economical than catching two fin whales, and catching two fin whales is still more economical than catching six sei whales.<sup>288</sup> Whalers will go after the most economical blue whales first, until blue whales become so few that it becomes much more difficult to search and hunt. Then, hunting efforts will be redirected to the second most economic species, the fin whales. The process will repeat, and each stock will be depleted in the end. This is exactly what happened in the first two decades since the implementation of the BWU, from 1946 to 1966.<sup>289</sup>

The failure of the BWU in the past provides some guidance on what kind of quota units should be adopted in the future management of whales. The BWU was set in an era when the primary market value of whales came from their

<sup>&</sup>lt;sup>282</sup> One BWU was equivalent to one blue whale, two fin whales, two and a half humpback whales, or six sei whales. See J.N. Tonnessen & A.O. Johnsen, THE HISTORY OF MODERN WHALING, 3 at 5 (R.I. Christorphersen trans., Norwegian 1982); see also, Regulations for Maritime Hunting Operations in the Waters of the South Pacific, Article 21. The BWU was used as a standard of measurement in various regulations, not just by the IWC.

<sup>&</sup>lt;sup>283</sup> Birnie, *supra* note 6, at 120.

<sup>&</sup>lt;sup>284</sup> Id. at 121.

<sup>&</sup>lt;sup>285</sup> Matthias Tomczak, Jr., *The IWC and the Decimation of Whale Stocks*, 4 MARINE POL'Y 79, 81 (1980).

<sup>&</sup>lt;sup>286</sup> Id.

<sup>&</sup>lt;sup>287</sup> Tomczak, *supra* note 214, at 81.

<sup>&</sup>lt;sup>288</sup> See supra, note 270.

<sup>&</sup>lt;sup>289</sup> See id. at 80, Figure 1: Composition of whale catches in the Antarctic pelagic whaling area, compiled from FAO YEARBOOK OF FISHERY STATISTICS.

oil.<sup>290</sup> Today, it is unlikely that a quota unit based on whale oil will be utilized when the moratorium is lifted. However, it is possible that a similar quota unit may be adopted based on the most profitable market for whales today – whale meat.<sup>291</sup> Under this approach, the value of the quota unit should be based on an economic analysis of the required effort versus the catch yield relative to various marketable whale parts, not just focusing on the primary value. This will prevent a repetition of the failures of the BWU.

The best approach would be to set separate quotas for each harvestable species, as this would avoid concentration on one particular species. The drawback to this approach is that it requires a thorough, detailed data analysis for each species, which imposes substantial research costs.<sup>292</sup> However, a catch quota unit that lumps together different species of whales does not provide protection for individual species, and is ineffective from a conservation standpoint.<sup>293</sup> Therefore, the long-term benefits would be well worth the costs in adopting the most effective quota unit method.

#### **B.** Effective Inspection and Stronger Enforcement

Although the IWC adopted the completed RMP in 1994, it decided to postpone implementation until an effective inspection and observation scheme was in place to ensure that nations did not exceed agreed catch limits.<sup>294</sup> The IWC established a working group to develop the Revised Management Scheme (RMS) for this purpose.<sup>295</sup> In addition to humane killing techniques, the RMS will include scientific as well as non-scientific measures, for inspecting, monitoring, and enforcing catch limits.<sup>296</sup> This comprehensive scheme will ensure that agreed catch limits are not exceeded once the RMP is implemented and the moratorium on commercial whaling is lifted.

## 1. The Revised Management Scheme

The IWC set up the RMS Working Group to create an effective inspection and observation scheme. This scheme would ensure that total catches over time are within the limits set under the RMP.<sup>297</sup> Based on the areas where

<sup>&</sup>lt;sup>290</sup> Birnie, *supra* note 6, at 120-22.

<sup>&</sup>lt;sup>291</sup> See Tonnessen & Johnsen, supra note 1.

<sup>&</sup>lt;sup>292</sup> See generally Holt, supra note 135, at 148.

<sup>&</sup>lt;sup>293</sup> Id.; Tomczak, supra note 214, at 82; Elliot, supra note 211.

<sup>&</sup>lt;sup>294</sup> See Revised Management Procedure, at http://www.iwcoffice.org/conservation/rmp.htm.

<sup>&</sup>lt;sup>295</sup> See Revised Management Scheme, at http://www.iwcoffice.org/conservation/rms.htm.

<sup>&</sup>lt;sup>296</sup> See IWC, supra note 202; id.

<sup>&</sup>lt;sup>297</sup> IWC, *Revised Management Scheme, available at* http://www.iwcoffice.org/conservation/rms.htm (last visited May 12, 2005).

fundamental differences have existed in the past, the focus of the enforcement process was divided up into three subgroups – costs, catch verification, and compliance.<sup>298</sup> The RMS has not been completed yet, but the working groups have made expeditious progress in recent years.<sup>299</sup>

## a. Costs

The resources necessary to implement the RMS will inevitably come at a cost. These resources include, 1) national inspectors; 2) international observers; 3) vessel monitoring systems; and 4) catch verification procedures.<sup>300</sup> The working group on costs has estimated the cost of these components and considered how they might be apportioned among member states.<sup>301</sup> The group has also presented options for factoring the funding into the current financial contributions scheme.<sup>302</sup>

## b. DNA Testing

Catch verification is at the heart of the RMS and it would provide the information necessary to ensure that the total catches are within the set limits. First, qualities such as the size, species, sex, age, physical condition, and weight, and other health conditions of the whale must be verified at the time of catch. Since a DNA test can easily confirm such characteristics, inspectors or observers can conduct the DNA test on the ship or at port with standardized sampling methods and proper training.<sup>303</sup>

<sup>302</sup> See id.

<sup>&</sup>lt;sup>298</sup> See IWC 54TH ANNUAL MEETING REPORT (2002).

<sup>&</sup>lt;sup>299</sup> See CHAIRMAN'S PROPOSAL FOR A WAY FORWARD ON THE RMS, Doc. IWC/56/26 (2004). At the 56th Annual Meeting in 2004, the IWC passed a resolution aimed at having a draft text ready for adoption at the 57th Annual Meeting. RESOLUTION ON COMPLETION OF THE REVISED MANAGEMENT SCHEME & INTERSESSIONAL PLAN OF WORK, Resolution 2004-6, IWC 56th Annual Meeting (2004), *available at* http://www.iwcoffice.org/meetings/resolutions/resolution2004.htm (last visited May 10, 2005). See also RMS WORKING GROUP MEETING REPORTS, *available at* http://www.iwcoffice.org/commission/rmsworkgroup.htm (last visited May 10, 2005). However, the working group was not able to put forward a proposal for an RMS at the 2005 meeting. The International Whaling Commission's 57th annual meeting in Ulsan, Republic of Korea 2005, *available at* http://www.iwcoffice.org/meetings/meeting2005.htm.

<sup>&</sup>lt;sup>300</sup> See REPORTS OF THE WORKING GROUPS ON COSTS, Meeting in Antigua, April/May 2003.

<sup>&</sup>lt;sup>301</sup> See id.

<sup>&</sup>lt;sup>303</sup> See Annex II.E Report of the Specialist Group on the DNA Register/Market Sampling Scheme Approach (SGDNA) of the Chair's Report of the 2005 RMS Working Group Meeting for details on DNA testing. This report is available at http://www.iwcoffice.org/\_documents/commission/rmsdocs/rms3annex11.E.pdf.

The RMS includes the development and maintenance of a DNA register of all whales killed.<sup>304</sup> Once a reliable and accurate DNA register is established, conducting market sampling and comparing the samples against the database of DNA profiles in the register would help combat unreported catches and monitor trade in whale products. Scientists and environmental groups such as Greenpeace and IFAW have already used DNA fingerprinting to identify and track down sources of illegal shipments of whale meat at whaling nations' ports and points in the market chain.<sup>305</sup>

## c. International Observer Scheme

Next, to preserve the effectiveness of the quotas, an international observer must report an accurate count of the number of whales that were actually caught on each expedition.<sup>306</sup> A neutral observer and an accurate reporting system will minimize the risk of illegal catches, underreporting, or falsification of records. In fact, the IWC's implementation of an international observer scheme in 1972 led to the discovery of over 30,000 unreported catches by the Soviet Antarctic whaling fleet in earlier decades.<sup>307</sup> An observer scheme is now a widely accepted requirement of international fishery operations, and it should also be applied to whaling operations.<sup>308</sup>

The placement of neutral international observers onboard ships or in charge of reporting will most effectively eliminate the problem of cheating. The previous IWC observer scheme was ineffective because the observers placed on the ships were either from the same nation as the flag under which the whaling vessel sailed, or could easily be influenced with a small tip. Also, with the development of modern technology, an electronic surveillance system can be placed on every whaling vessel to reassure that the whale hunt is carried out lawfully.<sup>309</sup> Under an electronic surveillance system, the whaling vessels would be equipped with a black box, registering information on the vessel's speed,

<sup>309</sup> *IWC Condemns Norway's 'commercial whaling' in North Atlantic*, AGENCE FRANCE PRESSE, May 20, 1998.

<sup>&</sup>lt;sup>304</sup> See Revised Management Scheme, at http://www.iwcoffice.org/conservation/rms.htm.

<sup>&</sup>lt;sup>305</sup> See, e.g., Darby, Andrew, DNA of Protected Whales Found at Japanese Market, The Sydney Morning Herald, July 20, 2004; Tim Radford, Whale Count Wrong, DNA Study Reveals, The Guardian, July 25, 2003; Trade in Protected Whales: Research and Evidence, available at http://www.ifaw.org/ifaw/general/default.aspx?oid=99342.

<sup>&</sup>lt;sup>306</sup> See Revised Management Scheme, at http://www.iwcoffice.org/conservation/rms.htm.

<sup>&</sup>lt;sup>307</sup> See 47 IWC REP. 137-38; 48 IWC REP. 139-43.

<sup>&</sup>lt;sup>308</sup> See, e.g., Convention on the Conservation of Antarctic Marine Living Resources (2004/05); Northwest Atlantic Fisheries Organization, Conservation and Enforcement Measures, Article 23 (2004); Agreement on the International Dolphin Conservation Program (2003); Small Cetacean Bycatch Response Strategy (UK, 2003); Joint NAMMCO Control Scheme for the Hunting of Marine Mammals (1996); United Nations Fish Stocks Agreement on Straddling and Highly Migratory Fish Stocks (1995).

position, and the date and time of each harpoon fired.<sup>310</sup> Eventually, this system may replace the observers on board each vessel.<sup>311</sup>

## 3. Relationship with the United Nations for Stronger Enforcement

The IWC could not effectively enforce its rules because the ICRW left enforcement entirely up to the nations. The ICRW merely required the states to take "appropriate measures to ensure the application of the provisions" and the "punishment of infractions... in operations carried out by persons or by vessels under its jurisdiction."<sup>312</sup> Because there was no form of international enforcement mechanism, violations proved difficult to verify. In addition, without international supervision, the suspicion that other parties were not enforcing the Convention contributed to the lack of political will to cooperate.<sup>313</sup> Thus, the IWC could not force the member states to comply with its regulations.

The IWC needs an effective international arrangement to encourage compliance. The international arrangement would include various elements such as sanctions, penalties, and the establishment of procedures for a fair and objective hearing on such matters.<sup>314</sup> This may be possible under the auspices of the United Nations.

## a. Becoming a United Nations Body

It seems possible for the IWC to become a United Nations body under the United Nations Charter. The Charter declares that the aim of the United Nations is to "establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained."<sup>315</sup> The General Assembly can make recommendations for the purpose of "promoting international cooperation" in the economic, social, and cultural fields.<sup>316</sup> These broad aims cover the conservation of whale resources, and the United Nations has actually already passed several resolutions that relate to whales and other marine mammals in general.<sup>317</sup> Thus, whaling is an activity

<sup>316</sup> U.N. Charter art. 13, para. 1(b).

<sup>&</sup>lt;sup>310</sup> Id.

<sup>311</sup> Id.

<sup>&</sup>lt;sup>312</sup> ICRW, supra note 7, art. IX.

<sup>&</sup>lt;sup>313</sup> Birnie, *supra* note 6, at 198.

<sup>&</sup>lt;sup>314</sup> Cf. In the past, the United States has tried several times to impose unilateral trade sanctions to further the objectives of international marine resource management agreements. However, trade sanctions risk being challenged under World Trade Organization (WTO) rules, and most attempts have ended in failure. See Kalo, supra note 143, at 563-575 (discussing the US's attempt to impose import restrictions to enforce whaling policies); 648-689 (discussing the same re dolphin-tuna policy and sea turtle-shrimp policies).

<sup>&</sup>lt;sup>315</sup> U.N. Charter pmbl.

<sup>&</sup>lt;sup>317</sup> For example, the United Nations has passed a number of Resolutions concerning the law of

the United Nations is willing and able to cover, and the IWC, as a United Nations body, would oversee the regulation of whaling.

Specialized agencies may be created under the United Nations by agreement with the United Nations Economic and Social Council, upon approval by the General Assembly.<sup>318</sup> Then, the United Nations may directly or indirectly make recommendations for the coordination of the agency's policies and activities.<sup>319</sup> It becomes the responsibility of the General Assembly and the Economic and Social Council to ensure that the specialized agency fulfills its obligations and functions.<sup>320</sup> As a result, the IWC will have more force in implementing its new whaling regulations after the moratorium is lifted.

## b. Cooperation with a Related United Nations Organization

As an alternative to becoming a United Nations body, the IWC can work in coordination with a related United Nations specialized agency, like the United Nations Food and Agriculture Organization ("FAO"). The interests of the FAO are related to the IWC because the goals of the FAO include the conservation of marine mammals, including whale stocks.<sup>321</sup> The FAO Constitution allows the IWC to be incorporated into the FAO, which would bring several advantages to the IWC.

The FAO Constitution sets forth the goals of the FAO and the means in which to achieve them. It requires the FAO to "promote... and recommend national and international action with respect to... the conservation or natural resources and the adoption of improved methods of agricultural production".<sup>322</sup> It defines "agriculture" to include "fisheries, marine products, forestry, and primary forest products".<sup>323</sup> Furthermore, it allows the FAO to place "other public international organizations dealing with questions relating to food and agriculture under the general authority of the Organization" upon agreement and approval.<sup>324</sup> Finally, the FAO has the power to provide for cooperation with related organizations by entering into agreements with them to maintain common services and staff arrangements.<sup>325</sup> By striking an agreement with the

- <sup>323</sup> FAO Const., art. l, para.1.
- <sup>324</sup> FAO Const., art. XIII.

the sea in general, and the three United Nations Conferences on the Law of the Sea include provisions regarding the conservation of marine mammals.

<sup>&</sup>lt;sup>318</sup> U.N. Charter art. 57; art. 63, para. 1.

<sup>&</sup>lt;sup>319</sup> U.N. Charter art. 63, para. 2.

<sup>&</sup>lt;sup>320</sup> Id.

<sup>&</sup>lt;sup>321</sup> The FAO was established in 1945. It has attended IWC meetings as an observer.

<sup>&</sup>lt;sup>322</sup> FAO Const., art. I, para. 2.

<sup>&</sup>lt;sup>325</sup> FAO Const., art. XII. Staff arrangements include common arrangements for recruitment, training, service conditions, and interchange of staff. *Id*.

FAO, the IWC could remain an autonomous body within the FAO framework, not an FAO department.

The IWC would benefit in several ways from such an arrangement with the FAO, or a similar United Nations organization. First, the United Nations organization could become responsible for financing, supporting, and guiding the activities of the IWC, depending on the degree of integration or incorporation. Secondly, it avoids the duplication of functions and allows expansion into new aspects by the sharing of expertise and information. For instance, scientific research toward the common goal of protecting whale species need not be done separately, and databases can be shared to save costs and allow more resources for analysis. Furthermore, since the IWC has more expertise and input regarding the whaling industry, the expertise would be helpful to the FAO when balancing the interest of the whaling industry with efforts to protect whale stocks. Third, many more countries who are members of the United Nations would become aware of the IWC's work and aims. As a result, the IWC could have a greater influence on world opinions regarding conservation and similar matters. There may be resistance in the IWC among nations with different views regarding the future management of whales. However, a relationship with the United Nations is an efficient way of implementing stronger enforcement and compliance measures, which would benefit all nations.

## CONCLUSION

Momentum has been building for changes to occur in the IWC that will greatly impact the future of whaling. There is no doubt that the moratorium will be lifted in a future IWC meeting. When commercial whaling is allowed to resume, how the IWC handles the new era of whaling is critical to the peaceful coexistence of humans and whales.

Although differences in opinions created many conflicts that led to a deep divide within the members of the IWC, the fact remains that none of the nations want the whales to become extinct. This is the common ground in the social, cultural, and economical web that whales present to the nations around the world. While it is inevitable that politics will always play an influential role in the decisions regarding the management of whales, moral views and ugly cultural attacks should have little to do with adopting effective conservation measures. The development of effective international environmental laws and resources depends upon trust in other nations. The efforts of all IWC nations will foster an effective international sustainable resource management and conservation regime in the years to come. At this time, lifting the moratorium on commercial whaling will lead to the most effective global regulation of whaling by the IWC.