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RESURRECTING THE INTERNATIONAL WHALING COMMISSION: SUGGESTIONS TO STRENGTHEN THE CONSERVATION EFFORT

I. INTRODUCTION

Despite strong international opposition from non-whaling nations and conservationist groups, Japanese whaling fleets set sail in August 2000 to hunt 160 minke along with 50 Bryde's and ten sperm whales¹ in what the country has deemed a scientific research expedition.² Tremendous success of Japanese restaurants specializing in expensive whale-meat cuisine, however, has created a newly inflamed dispute dominated by the majority of non-whaling nations, including the United States and the United Kingdom, who openly oppose Japan's expanded efforts at what appears to be "commercial" whaling in contravention of international whaling regulations.³ Fifteen nations engaged in a diplomatic protest in Tokyo on August 21, 2000 to express profound disappointment at Japan's increased

1. There are seventy-six species of whales, dolphins and porpoises that belong to the order Cetacea. Whales are generally divided into two categories: (1) the Odontoceti, the toothed whales; and (2) the Mysticeti, also known as Baleen whales, so named for a filter like structure hanging from their upper jaws. See International Whaling Commission, *Great Whales*, at <http://www.iwcoffice.org> (last visited Mar. 21, 2002). Minke whales, the smallest of the Baleen whales, range up to thirty-three feet. *Id.* Bryde's whales can yield as much meat in the Japanese market as five minke whales and adult sperm whales, the largest of the toothed whales, can reach lengths of sixty feet and weigh up to forty-five tons. *Id.* See also Suvendrini Kaku-chi, *Blowing Their Top: Greens React Angrily as Japan Ups the Ante in the Whale Hunt Row*, ASIA WEEK, Oct. 13, 2000, available at <http://www.asiaweek.com> (last visited Mar. 21, 2002). This is the first time Japan has included sperm whales and Bryde's whales in its research program since 1971 and 1979, respectively. Both species are protected under the U.S. Marine Mammal Protection Act, and sperm whales are listed as endangered under the Endangered Species Act. See Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1321-1421 (2000); Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2000).

2. Calvin Sims, *Japan, Feasting on Whale, Sniffs at 'Culinary Imperialists' of U.S.*, N.Y. TIMES, Aug. 10, 2000, at A1.

3. *Id.*

whaling activities and to urge the country to halt lethal research whaling.⁴ This group included representatives of The Netherlands, Ireland, New Zealand, Austria, Brazil, the U.K., Finland, France, Germany, Italy, Mexico, Monaco, Sweden, Switzerland and the U.S.⁵

Currently, Japan is the most vocal proponent in favor of commercial whaling and the world's single largest consumer of whale meat.⁶ Conservationist groups and anti-whaling nations are convinced that Japanese research whaling is a thinly disguised covert operation intended to boost supplies of whale meat in a marketplace where it fetches more than ten times the price of pork or beef.⁷ Japanese officials, however, continually deny these allegations and argue that the scientific research is necessary to determine the effect these whales have on the Japanese fishing industry.⁸ Nevertheless, these arguments have failed to convince the international community that Japan's efforts are legitimate.

For centuries, whales provided valuable natural resources in the form of food and fuel to the world's population, and the whaling industry contributed substantially to the economic wealth of countries such as Norway, England, The Netherlands, the U.S., Japan and Russia.⁹ By the mid-twentieth century, scientific evidence revealed that the historic overexploitation of whale stocks had rendered a number of species severely endangered and still others commercially extinct. The International Convention for the Regulation of Whaling ("ICRW" or

4. *Fifteen Nations Ask Japan to Stop Research Whaling*, CNN.COM (Aug. 21, 2000), at <http://www.cnn.com/2000/NATURE/08/21/japan.whaling.reut> (last visited Mar. 21, 2002).

5. *Id.*

6. Judith Berger-Eforo, Note, *Sanctuary for 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, 450 (1996).

7. *Japan, Three Other Nations to Set-Up Whale Committee*, MARINE MAMMAL NEWS (on file with author).

8. Eric Talmadge, *No Apologies: Japan Says Killing of Whales is for Research Purposes*, ABC NEWS.COM (Sept. 5, 2000), at http://abcnews.go.com/section/science/DailyNews/whale_meat_000905.html.

9. Berger-Eforo, *supra* note 6, at 443. Today, the pro-whaling nations still consider whales a viable resource for food, oil, leather and medicine. *Id.* at 441.

"Convention")¹⁰ was initially created as a whaling cartel in response to these devastating statistics to ensure the sustainable development of whale stocks throughout the world. As public opinion shifted in the 1970's, several states joined the Convention to influence its policies in favor of whale preservation. The dichotomy between the few states who still hunt whales and those opposed to whaling has created intense conflict within the Convention.

Since 1946, the ICRW has been the only multilateral international agreement focused solely on the regulation of whale stocks. As one of the earliest treaties designed to address the management of a specific natural resource shared across state borders, the ICRW, along with several others like it,¹¹ signified the start of an era in which states would become cognizant of the existence of environmental commitments beyond their own territories. Specifically, the ICRW has served as an important instrument calling the world's attention to the historic overexploitation of whales. Yet, its credibility has been marred by a series of failures in protecting the animals from further exploitation. As a result of these widely publicized failures, the Convention has garnered unfavorable reviews by world observers and may itself be in danger of extinction.¹²

The International Whaling Commission ("IWC" or "Commission") was created pursuant to the ICRW to implement the Convention's objectives.¹³ Thus far, the IWC has been the "sole international body with the authority to regulate commercial whaling operations around the world."¹⁴ Unfortunately, this role can only be described as symbolic, given the apparent inability of the IWC independently to enforce its regulations or to

10. International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849 [hereinafter ICRW].

11. These include, for example, the 1933 London Convention on Preservation of Fauna and Flora in their Natural State, Nov. 8, 1933, 172 L.N.T.S. 241, and the 1940 Washington Convention on Nature Protection and Wild Life Preservation, Oct. 12, 1940, 56 Stat. 1354, 161 U.N.T.S. 193. See also Edith Brown Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 GEO. L.J. 675, 676 (1993).

12. See Berger-Eforo, *supra* note 6, at 440.

13. ICRW, *supra* note 10, art. III.

14. Kieran Mulvaney, *The International Whaling Commission and the Role of Non-Governmental Organizations*, 9 GEO. INT'L ENVTL. L. REV. 347, 347 (1997).

sanction member nations engaging in activities that undermine the Commission's goals. The IWC's structural design appears to build on the traditional horizontal theory of international law. This theory suggests that states will, in their own self-interest, recognize the importance of complying with IWC regulations and act accordingly. However, as the focus of the Commission's agenda shifted from sustainable development of the natural resource represented by whales to complete conservation of dwindling whale stocks in the late 1970's, pro-whaling nations began to explore ways to subvert compliance with IWC regulations and capitalize on the profitability of whale meat and byproducts in their own markets.¹⁵

Several provisions of the Convention effectively dilute the IWC's authority and facilitate the ability of pro-whaling nations to subvert compliance with IWC regulations. First, an "opt out" provision in the treaty makes it virtually impossible for the Commission to curtail the actions of member nations who oppose a specific regulation.¹⁶ Essentially, this clause provides that a member nation in opposition to any amendment instituted by the IWC need only file a timely objection to be considered exempt from that regulation.¹⁷ Second, the ICRW's only enforcement mechanism for addressing violations of IWC regulations is squarely based on the concept of self-policing. Specifically, Article IX of the Convention stipulates that each member nation shall punish violations of any regulation carried out by persons under their jurisdiction.¹⁸ Further, to complicate matters, the IWC has no ability to monitor whaling activities in waters under its auspices. Fishing and whaling fleets, such as those sent out by Japan in August 2000, often operate unnoticed and unobserved in international waters.¹⁹

This Note will explore the current crisis facing the IWC in light of Japan's increased efforts to profit from the exploitation of whale stocks in contravention of the ICRW. Part II will briefly outline the general history of the commercial whaling

15. Berger-Eforo, *supra* note 6, at 449-450.

16. ICRW, *supra* note 10, art. V(3).

17. *Id.*

18. *Id.* art. IX(1).

19. See David S. Ardia, *Does the Emperor Have No Clothes? Enforcement of International Law Protecting the Marine Environment*, 19 MICH. INT'L L. 497, 498 (1998).

industry and the effects the industry has had on international whale stocks. Part III will present an overview of the Convention and examine the changing role of the IWC throughout the whaling controversy. It will include an analysis of the recent transition in IWC policy from a position of sustained development for future harvest to one of protection and conservation. Part IV will discuss the existing framework for enforcement under the ICRW and the difficulties that framework has created in the international arena. Part V will examine the attempts by the U.S. to enter the whaling controversy by utilizing domestic policy to enforce IWC regulations against member nations. This section will also explore the failure of unilateral action as an effective remedy to the problems inherent in the Convention. Finally, Part VI will suggest possible solutions to the controversy in light of current developments in international environmental law. Approximately 900 international legal instruments exist that have at least one provision regarding the environment.²⁰ Since the ICRW entered into force in 1949, the scope of similar agreements has increased and the duties of the parties to these agreements have become more comprehensive.²¹ Subsequently, countries have learned a great deal about the process of negotiating these types of agreements and their substantive content.²² The IWC may benefit from these agreements by incorporating modern policies into its existing framework to provide a more comprehensive enforcement mechanism based largely on international cooperation in monitoring whaling efforts throughout the world's oceans.

II. A BRIEF HISTORY OF WHALING: THE DEMISE OF LEVIATHAN

"The history of human interaction with whales has been marked by a seemingly irreconcilable tension between adulation of, and even awe for, the 'monarchs of the deep' and the counterpoised desire to commercially exploit cetacean species for economic gain."²³ Unfortunately, this desire for economic

20. See Brown Weiss, *supra* note 11, at 678.

21. *Id.* at 679.

22. *Id.* at 684.

23. William C. Burns, *The International Whaling Commission and the Future of Cetaceans: Problems and Prospects*, 8 COLO. J. INT'L ENVTL. L. & POL'Y 31, 31 (1997).

gain has resulted in the devastation of numerous species of whales throughout the past centuries.²⁴ As a result, the historic overexploitation of whales has been described as "the most infamous example of human mismanagement of the earth's natural resources."²⁵

Whales have inhabited the Earth for over seventy million years.²⁶ Prior to the development of the commercial whaling industry in the thirteenth century, approximately four million whales populated the world's oceans.²⁷ In 1975, that figure was only slightly larger than two million, of which about 1.2 million were sufficiently mature for capture.²⁸ More importantly, however, some research indicates that these statistics severely underestimate the effect that commercial whaling has had on several of the largest whale species. Before the advent of the commercial whaling industry, for example, an estimated 210,000 blue whales, the largest of the whale species, roamed the oceans.²⁹ At present, scientific evidence indicates that the population of blue whales may have decreased to approximately 450 animals.³⁰ Additionally, humpback whale stocks are now estimated at only 1% of their pre-whaling levels.³¹ Some researchers believe that four of the nine species of great

24. *Id.* at 31. There is evidence that whaling dates back as early as the year 1500 B.C.; however, many scholars identify the Basques of Biscay as the first civilization to transform whaling into an organized industry in the thirteenth century. See Patricia Birnie, *International Legal Issues in the Management and Protection of the Whale: A Review of Four Decades of Experience* 29 NAT. RES. J. 903, 904 (1989). By the sixteenth century, the Basques' whaling techniques had spread across the Atlantic. *Id.* Americans began whaling in the eighteenth century and by the nineteenth century had developed "one of the world's leading whaling fleets," which in turn depleted whale stocks on both coasts of the United States. *Id.* The American whaling operations began to decline in the mid-nineteenth century with the development of the petroleum industry. *Id.* Soon thereafter, Norway assumed dominance of the whaling industry with the aid of technological advancements such as the exploding harpoon gun. *Id.*

25. SIMON LYSTER, *INTERNATIONAL WILDLIFE LAW* 17 (1985).

26. Burns, *supra* note 23, at 32.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

whales are "severely endangered" and that two of these species have been rendered commercially extinct.³²

The early twentieth century witnessed the development of the modern whaling industry and the subsequent devastation of whale stocks throughout the world. During this period, scientific and technological advancements such as steam engines and exploding harpoon guns led to more efficient kills over a larger geographic area³³ and damaged whale populations almost to the brink of extinction.³⁴ One of the more significant developments in the industry at this time was the use of the factory ship as the primary method of whale harvest.³⁵ Essentially, this form of whaling provided for a processing plant at sea — an entire whale could be hunted, captured and processed even before the ship entered port. Specifically, whalers on individual ships could harvest the economically viable parts of the captured whale and discard the rest at sea, thus increasing the amount of whale meat and other byproducts that could be stored in the ship's hold while still at sea.³⁶ This proved economically disastrous for the hunting and fishing industries in many countries that soon recognized that the economic success of their whaling efforts depended largely on worldwide availability of whale stocks.³⁷

Limited attempts to regulate whaling were instituted as early as 1918.³⁸ These attempts continued throughout the 1930's, but were wholly unsuccessful.³⁹ Finally, in 1946, acknowledging that the viability of commercial whaling could only be ensured by international cooperation, fifteen nations⁴⁰ gathered in Washington D.C. to draft the ICRW.

32. Burns, *supra* note 23, at 32-33.

33. Howard Scott Schiffman, *The Protection of Whales in International Law: A Perspective for the Next Century*, 22 BROOK. J. INT'L L. 303, 308 (1996).

34. Berger-Eforo, *supra* note 6, at 444.

35. *Id.*

36. *Id.*

37. *Id.*

38. Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L L. 21, 29 (1991).

39. *Id.*

40. They were: Argentina, Australia, Brazil, Canada, Chile, Denmark, France, The Netherlands, New Zealand, Norway, Peru, The Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ire-

III. THE INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING

The ICRW begins with a Preamble that announces in general terms the objects and purposes of the Convention. It recognizes the interest of the nations "in safeguarding for future generations the great natural resources represented by the whale stocks," and acknowledges historic over-fishing of whales and the subsequent need for regulation "without causing widespread economic and nutritional distress."⁴¹ Finally, the Preamble states the main objective of the ICRW as "proper and effective conservation and development of whale stocks" enabling the "orderly development of the whaling industry."⁴² To effectuate these policies, the ICRW established the IWC,⁴³ intended to "provide for the conservation, development, and optimum utilization of the whale resources."⁴⁴

A. *The International Whaling Commission*

The IWC was created by voluntary agreement among the member nations to function as the sole governing body with authority to act under the ICRW and to implement its economic and environmental goals. To that end, the IWC was empowered to amend the Convention's Schedule of Regulations, ("Schedule")⁴⁵ by designating protected species, open and closed whaling seasons and waters for whaling, determine size limits, methods and intensity of whaling, types of gear to be used, methods of measurement and maximum catch returns.⁴⁶ In an

land, the United States of America, and the Union of South Africa. ICRW, *supra* note 10, art. XI.

41. *Id.* pmbl.

42. *Id.*

43. *Id.* art. III.

44. *See id.* art. V(2).

45. Article I(1) of the ICRW incorporates the Schedule (as amended) into the Convention as an integral part thereof. ICRW, *supra* note 10, art. I(1). The schedule has been described as a flexible instrument of regulation that is easily adaptable to changing policies. PATRICIA BIRNIE, *INTERNATIONAL REGULATION OF WHALING: FROM CONSERVATION OF WHALING TO CONSERVATION OF WHALES AND REGULATION OF WHALE-WATCHING* 196 (1985).

46. ICRW, *supra* note 10, art. V(1). The Schedule contains detailed regulations governing the protection and exploitation of whales.

effort to reinforce its dedication to the sustainable development of whale stocks for future harvest, the Convention requires that any amendments to the Schedule be "based on scientific findings," taking into consideration the "interests of consumers of whale products and the whaling industry."⁴⁷ Two things deserve special note: (1) participation in the IWC is not limited only to states involved in commercial whaling; and (2) the whaling controversy is a direct consequence of the influx into the IWC of conservation-minded nations during the 1970's.⁴⁸ As one observer noted:

Most of the current issues . . . derive from the ambiguous philosophies on which the ICRW was based, set out in its preamble – the conflict between conservation of whales purely for purposes of industrial sustenance and conservation of whales for their own sake as uniquely huge marine mammals with valuable and attractive characteristics about which and from which man has still much to learn to his own benefit.⁴⁹

Traditionally, the IWC meets annually and is composed of one voting representative from each party who may be accompanied by experts and advisors.⁵⁰ The IWC's Rules of Procedure allow non-parties and intergovernmental organizations to attend the meetings and to be represented by observers if they have submitted a written request to the Secretary thirty days before the meeting or if they have attended previous meetings.⁵¹ Non-governmental international organizations that maintain offices in more than three countries may attend the annual meetings of the IWC.⁵²

1. The Evolution of the International Whaling Commission

The history of the IWC's regime has been marked by two distinct periods of differing ideologies. The first significant period in the history of the IWC begins with its creation in 1946 and extends until the 1981 decision to enact a moratorium on all

47. *Id.* art. V(2).

48. D'Amato & Chopra, *supra* note 38, at 39.

49. Birnie, *supra* note 24, at 914.

50. ICRW, *supra* note 10, art. III(1).

51. *Rules of Procedure of the International Whaling Commission*, IWC, ¶ B(2)(a)-(b) (2000).

52. *Id.*

commercial whaling. Throughout this period, the IWC's administration was marked by a series of failed attempts to regulate the commercial whaling industry through a quota-based system.⁵³ The second period, from the 1981 moratorium until the present, represents the transformation of the IWC from an agency solely concerned with the regulation of whale stocks for sustained development and future harvest to an agency with an environmental conscience.

From its inception until the late 1960's, the IWC attempted to maintain world commercial whaling through a system of quotas in an effort to allow individual whale stocks to replenish in number.⁵⁴ The IWC, dominated by pro-whaling nations, rarely took the recommendations of its Scientific Committee seriously when developing these quotas, despite increasing evidence that certain whale species were being depleted to dangerously low levels.⁵⁵ As a result, "[w]hale stocks were regularly over-exploited, and scientific advice concerning sustaining catch limits was frequently ignored. When populations were finally protected from further hunting, it was usually after they had already collapsed."⁵⁶ Failure of the IWC to effectively regulate whale stocks throughout this period prompted several authorities to conclude that "all large whales could be driven to the point of extinction in a few years if stringent conservation measures were not immediately adopted."⁵⁷

The 1970's witnessed a number of encouraging developments as the decade marked the beginning of the global anti-whaling movement. As the international movement in opposition to the slaughter of marine mammals gained momentum during this decade, a number of non-whaling and anti-whaling states joined the Convention and eventually gained a majority over a dwindling number of pro-whaling nations.⁵⁸ More crucially, nations like the United States, which were previously considered major whaling forces, became strong anti-whaling compo-

53. D'Amato & Chopra, *supra* note 38, at 22.

54. *Id.* at 34-35.

55. See Burns, *supra* note 23, at 35 (providing a detailed account of the IWC's quota system throughout this period).

56. Alexander Gillespie, *The Ethical Question in the Whaling Debate*, 9 GEO. INT'L ENVTL. L. REV. 355, 355 (1997).

57. Burns, *supra* note 23, at 41.

58. Gillespie, *supra* note 56, at 356.

nents of the Commission. The new conservation-minded states began to advocate greater restrictions on whaling, citing new scientific studies demonstrating the advanced intellectual capacity of whales. These nations, along with the global community, called for the IWC to reform its policies and to incorporate newly discovered scientific data regarding whales in its proposed regulations.⁵⁹ Still, the Commission was reluctant to abandon its traditional methods of regulation.

Starting in the early 1970's, the Commission was bombarded with startling declarations made by other international conventions recognizing the dire plight of whales and, in effect, highlighting the Commission's repeated failures.⁶⁰ In 1972, the United Nations Conference on the Human Environment at Stockholm ("Stockholm Conference")⁶¹ adopted a proposal that recommended a ten-year moratorium on commercial whaling to allow whale stocks to recover.⁶² Immediately, Japan opposed the recommendation and labeled the resolution dramatic and emotional.⁶³ The IWC argued that a "blanket moratorium" could not be scientifically justified.⁶⁴ Nonetheless, the protectionist sentiment embodied in the Stockholm Conference increased pressure on the IWC to change its policies and provoked the growing internal conflict between anti-whaling and pro-whaling states within the Commission.⁶⁵ In 1977, the first report of the Convention on International Trade in Endangered Species ("CITES")⁶⁶ was released. The report characterized certain whales already protected by the IWC as "endangered spe-

59. Berger-Eforo, *supra* note 6, at 442. According to the author, international public support for the anti-whaling movement coincided with scientific discoveries regarding the intellectual capacity of whales. *Id.*

60. D'Amato & Chopra, *supra* note 38, at 38.

61. Stockholm Declaration on the Human Environment, U.N. Doc. A/Conf.49/14/Rev.1, 11 I.L.M. 1416 (1972). *See also* D'Amato & Chopra, *supra* note 38, at 36.

62. Stockholm Action Plan, Recommendation 33, UN Doc. A/CONF.49/14/Rev.1, 11 I.L.M. 1421 (1972).

63. D'Amato & Chopra, *supra* note 38, at 38.

64. *Id.* at 39.

65. *Id.*

66. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 6, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES].

cies.”⁶⁷ By 1981, CITES had identified more species of whales as being in danger of extinction than the IWC had even recognized as a “protected species.”⁶⁸ “Outflanked on its left by CITES, the IWC reacted by moving ever closer to the CITES position.”⁶⁹ Finally, the United Nations Convention on the Law of the Sea (“UNCLOS”), completed in 1982, provided *inter alia* that “[s]tates shall cooperate with a view to the conservation of marine mammals and in the case of [whales] shall in particular work through the appropriate international organizations for the conservation, management and study.”⁷⁰

Faced with rapidly declining whale stocks and under pressure from the international community to increase protection of whales, the IWC started to move away from a position of management to one of conservation and, finally, preservation.⁷¹ By 1981, it became clear that the protectionist sentiment articulated in the Stockholm Conference, the CITES regulations and UNCLOS had gained dominance within the IWC.

The clash between the pro-whaling and the anti-whaling states culminated in the establishment of a moratorium on all commercial whaling at the thirty-fourth annual meeting of the IWC.⁷² The moratorium was adopted by a vote of twenty-five to seven with five abstentions and mandated that commercial whaling quotas be set at zero starting in the 1985-whaling season.⁷³ The amendment stated that the effects of the moratorium on whale stocks would be examined five years later to ascertain the effectiveness of the moratorium and determine whether a return to higher quotas was feasible.⁷⁴ The whaling nations were granted a three year phase-out period to gradu-

67. D'Amato & Chopra, *supra* note 38, at 43.

68. *Id.*

69. *Id.*

70. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3.

71. See Sarah Suhre, Note, *Misguided Morality: The Repercussions of the International Whaling Commission's Shift from a Policy of Regulation to One of Preservation*, 12 GEO. INT'L ENVTL. L. REV. 305, 310 (1999).

72. *Chairman's Report of the Thirty-Fourth Meeting of the International Commission on Whaling*, at 17-42, IWC Doc. No. 21 (1982).

73. *Thirty-Fourth Meeting*, IWC (1982).

74. D'Amato & Chopra, *supra* note 38, at 48.

ally bring their practices to an end and manage impending economic ramifications of the moratorium.⁷⁵

In efforts to appease the traditional whaling nations, the moratorium went into effect with two compromise clauses – aboriginal subsistence whaling⁷⁶ and scientific whaling. Despite these clauses, Japan immediately lodged a timely objection to the moratorium and continued to engage in the practice of commercial whaling.⁷⁷ Japan's objection effectively rendered the IWC powerless to enforce the moratorium against the country pursuant to the opt-out provision of the ICRW.⁷⁸ Soon after the moratorium entered into force, Japan began a systematic program of scientific research concerning the marine mammals under the auspices of the government-linked Institute for Cetacean Research ("Institute").⁷⁹ Investigators from the Institute, which analyzes data from the hunts, captain all Japanese whaling vessels.⁸⁰ The Institute is "expected to function as a center of research efforts made by independent researchers,"⁸¹ such as national laboratories, universities, voluntary research

75. Suhre, *supra* note 71, at 310.

76. The aboriginal subsistence whaling exception has not created the controversy implicated by the scientific research exception. Individuals who claim this exception are allowed to hunt whales subject to certain IWC imposed quotas and must meet the following requirements: (1) whaling for purposes of local aboriginal, indigenous or native people who share strong, community, family, social and cultural ties related to a continuing traditional dependence on whaling and on the use of whales; (2) traditional uses of whale product by local aboriginal, indigenous or native communities to meet their nutritional, subsistence and cultural requirements; and (3) subsistence catches of whales made by aboriginal subsistence whaling operations. The International Whaling Commission, *Aboriginal-Subsistence Whaling*, at <http://www.iwcoffice.org> (last visited Mar. 21, 2002). It should be emphasized that meeting these requirements is quite difficult. Therefore, it is extremely unlikely that a country wishing to subvert the goals of the IWC in favor of commercial whaling will invoke the aboriginal subsistence whaling exemption.

77. Berger-Eforo, *supra* note 6, at 456.

78. See discussion, *infra* Part IV.A.

79. Institute for Cetacean Research, *About ICRW*, at <http://www.whalesci.org.abouticr.html> (last visited Mar. 21, 2002) [hereinafter Institute for Cetacean Research]. The Institute for Cetacean Research is a nonprofit organization under the control of the Ministry of Agriculture, Forestry and Fisheries, Government of Japan. *Id.*

80. See Talmadge, *supra* note 8.

81. Institute for Cetacean Research, *supra* note 79.

institutions and individual researchers. In addition to coordinating research efforts, the Institute is in charge of marketing the whale meat and other byproducts once the whales are processed and data is collected to national suppliers.⁸² Sales average between \$27 and \$36 million per year, and the proceeds are used to fund additional research.⁸³

Despite allegations that the research programs are "bogus," Japanese officials argue that the research is necessary to determine the impact of whales on fish populations in Japanese waters⁸⁴ and that it will reveal valuable information concerning the viability of world food supplies.⁸⁵ Conservationists concede that Japan's scientific whaling expeditions can be justified under IWC rules; however, they maintain that Japan is using research whaling to satisfy the demand for whale meat in the marketplace.⁸⁶

IV. THE EXISTING FRAMEWORK FOR ENFORCEMENT UNDER THE ICRW

In spite of its expansive goals and theoretically sound framework, the IWC has repeatedly failed to create a successful protocol for the regulation of commercial whaling. While the Commission has played a significant role in bringing the world's attention to the plight of the whale, many provisions have left it unable to enforce its own regulations. First, any country that disagrees with a particular IWC regulation may, by filing an objection, delay its implementation and exempt itself from the regulation pursuant to the opt-out clause of the ICRW.⁸⁷ Second, IWC rules, including the moratorium, only preclude the harvest of whales for commercial, not scientific, purposes.⁸⁸ The exception allows lethal research to be performed on whales and provides that the whale meat may be utilized in any manner so long as it is not exported outside of the researching country.⁸⁹ The so-called *scientific* whaling ac-

82. See Talmadge, *supra* note 8.

83. *Id.*

84. *Id.*

85. Kakuchi, *supra* note 1.

86. See discussion *infra*, Part IV.B.

87. ICRW, *supra* note 10, art. V(3).

88. *Id.* art. VIII.

89. *Id.*

tivities of Japan have proved that this loophole renders the moratorium ineffective. Third, all authority to punish infractions is vested within the country having jurisdiction over the violations.⁹⁰ No procedure exists by which the IWC can itself enforce its regulations at an international level. Finally, the IWC is afforded no mechanism for monitoring the activities of whaling ships in the waters under its auspices. As a result, illegal whaling operations and inaccurate reporting occur without the knowledge of the Commission.

A. The Opt Out Provision: Taking the "Teeth" Out of the Commission

The ICRW provides for a prolonged objection procedure that has often been criticized for "taking the teeth"⁹¹ out of the Commission. The procedure allows one state to delay implementation of a regulation in all member states for three months. In addition, by simply lodging a timely objection, the state itself is completely exempted from the regulation.⁹² Specifically, Article V(3) states:

Each of such amendments shall become effective with respect to the Contracting Governments ninety days following notification of the amendment by the Commission . . . except that if any Government presents to the Commission objection to any amendment prior to the expiration of this ninety-day period the amendment shall not become effective with respect to any of the Governments for an additional ninety days . . . thereafter, the amendment shall become effective with respect to all Contracting Governments which have not presented objection but shall not become effective with respect to any Govern-

90. *Id.* art. IX(1).

91. The IWC recognizes that the provision has been criticized for rendering the Commission "toothless," but argues that the Convention would never have been signed without it. See The International Whaling Commission, *The Objection Procedure*, at <http://www.iwcoffice.org> (last visited Mar. 21, 2002). Further, the IWC contends that even without the right, a government would just as likely withdraw from the Convention to avoid being bound by a disagreeable regulation. *Id.*

92. ICRW, *supra* note 10, art. V(3).

ment which has so objected until such date as the objection is withdrawn.⁹³

Clearly, this provision reflects the traditional international legal theory that a sovereign state is only bound to that which it has explicitly agreed. However, the provision has left the IWC with little authority to impose regulations on countries like Japan who demonstrate an intent to return to commercial whaling despite international opinion. The provision has essentially given whaling countries *carte blanche* authority to ignore regulations imposed by the IWC rather than face potentially unpleasant ramifications. Historically, members have used the objection procedure to avoid otherwise applicable quotas, to reject the classification of stocks where it would reduce whaling activities and to ignore IWC imposed standards on humane killing.⁹⁴ For example, one of the Commission's first conservationist measures was defeated in 1954 when Canada, Japan, the U.S. and the U.S.S.R. lodged formal objections to the prohibition on the taking of blue whales in the North Pacific.⁹⁵ The bloc was comprised of the only four countries engaged in hunting blue whales in the North Pacific.⁹⁶ Thus, the IWC action never entered into force. Similar objections have been lodged at each IWC meeting during its forty-year history rendering most of the regulations highly ineffective.⁹⁷

Arguably, the opt out clause was included in the treaty to ensure the national sovereignty of member governments. This compromise, common to many international agreements, has left the IWC powerless to address the concerns of the majority of nations committed to the conservation of whales beyond their territorial borders. The Commission's lack of authority is especially significant given Japan's exceptionally poor international environmental record.⁹⁸ Japan has often adopted an ex-

93. *Id.*

94. Dean M. Wilkinson, *The Use of Domestic Measures to Enforce International Whaling Agreements: A Critical Perspective*, 17 DEN. J. INT'L L. & POL'Y 271, 276 (1989).

95. *Sixth Report*, at 5, IWC (1955).

96. Lyster, *supra* note 25, at 27.

97. *Id.*

98. See Berger-Eforo, *supra* note 6, at 456. For example, Japan has been criticized for not using "dolphin safe" netting in its tuna fishing operations and for continuing to import ivory over international objection. *Id.*

pansive foreign policy to obtain much-needed natural resources in spite of international efforts to protect these limited resources.⁹⁹ The right to extract natural resources from the global commons is critical to Japan's survival as a nation. As a result, Japan refuses to concede on the whaling issue for fear it might adversely affect the country's tradition of exploration and exploitation of the seas.¹⁰⁰

B. The Scientific Exception: A Loophole in the Convention

It has been argued that almost every phrase of the ICRW has been at issue during the forty years that have passed since the Convention entered into force.¹⁰¹ At present, perhaps the most controversial of the ICRW provisions is the scientific research exception. Pursuant to Article VIII, paragraph 1 of the Convention, any country that wishes to conduct scientific research on whales may invoke the scientific research provision as an exception to an IWC regulation.¹⁰² This provision provides:

Notwithstanding anything contained in this Convention, any Contracting Government may grant to any of its nationals a special permit authorizing that nation to kill, take, and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit and the kill, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of the Convention.¹⁰³

Prior to 1986, countries wishing to subvert IWC quotas on specific whale stocks modestly utilized the procedures delineated in Article VIII.¹⁰⁴ With the imposition of the moratorium on commercial whaling, however, countries like Japan have systematically invoked the exception to effectively continue the practice of commercial whaling. The exception has become a major loophole utilized to undermine IWC regulations and con-

99. *Id.*

100. *Id.*

101. See Birnie, *supra* note 24, at 913.

102. ICRW, *supra* note 10, art. VII.

103. *Id.*

104. Lyster, *supra* note 25, at 27.

servation decisions during the moratorium since "researching" countries are permitted to use the whale meat collected after experimentation in any manner they deem acceptable as long as the meat is not exported outside of the country.¹⁰⁵ Since the moratorium entered into force in 1986, Japan, Norway and Iceland¹⁰⁶ have issued scientific permits to their nationals.¹⁰⁷ For the last five years, only Japan has issued permits.¹⁰⁸ All permits must be submitted to the IWC's Scientific Committee for review to determine whether the study is methodologically sound, but the country retains the ultimate responsibility for issuance.¹⁰⁹

Recent activities conducted and endorsed by the Japanese government under the country's scientific research program have enraged the international community and conservationist groups who argue that the research is only a thinly-veiled attempt to maintain the profitability of the commercial whaling industry.¹¹⁰ As early as 1987, Japan announced that it would take large male sperm whales from the Atlantic under the scientific research exception in order to determine the whales' primary prey.¹¹¹ The activity generated a great deal of controversy since the scientific community had known for over a century that the primary prey of the sperm whale is the squid.¹¹²

105. Berger-Eforo, *supra* note 6, at 449-50.

106. Iceland withdrew from the Convention with effect on June 30, 1992. *Id.*

107. The International Whaling Commission, *The IWC, Scientific Permits and Japan*, at <http://www.iwcoffice.org> (last visited Mar. 21, 2002) [hereinafter *Scientific Permits*].

108. *Id.*

109. *Id.* The Scientific Committee's review is concentrated on the following areas: (1) whether the permit adequately specifies its aims, methodology and the samples to be taken; (2) whether the research is essential for rational management, the work of the Scientific Committee or other critically important research needs; (3) whether the methodology and sample size are likely to provide reliable answers to the questions being asked; (4) whether the questions can be answered using non-lethal research methods; (5) whether the catches will have an adverse effect on the stock; and (6) whether there is the potential for scientists from other nations to join the research program. *Id.*

110. See Burns, *supra* note 23, at 46.

111. Wilkinson, *supra* note 94, at 278.

112. *Id.*

Moreover, an expansive amount of data already existed in both Japan and the Soviet Union to support the assertion.¹¹³

More recently, Japan has argued that scientific research is justified to determine accurate population levels of certain whale stocks, which it believes to be at harvestable levels.¹¹⁴ These “feasibility studies” are conducted by taking large numbers of lethal samples from endangered whales in order to gain a more complete understanding of sustainable catch limits.¹¹⁵

At the 2000 annual meeting, Japan submitted an extensive proposal whereby 100 minke whales, 50 Bryde’s whales and ten sperm whales would be sampled each year.¹¹⁶ The stated objective of this proposal, known as “JARPEN II,” is to obtain information to contribute to conservation and sustainable use of marine living resources (including whales) in the western North Pacific.¹¹⁷ JARPEN II raised a considerable deal of disagreement within the Committee that culminated in a majority adoption of a resolution strongly urging Japan to reconsider issuing the permit.¹¹⁸ The resolution notes that according to the Scientific Committee, JARPEN II “did not address questions of high priority relevant to management, did not make full use of existing data, and revealed many methodological problems,” and it proposes that the information on stock structure, which might be relevant, could be achieved using non-lethal means.¹¹⁹ Nevertheless, in October 2000, five Japanese whaling ships returned to port amid great celebration with forty-three Bryde’s whales five sperm whales and forty minke whales in their holds.¹²⁰

113. *Id.*

114. *See* Sims, *supra* note 2.

115. *Id.*

116. *Scientific Permits*, *supra* note 107.

117. *Id.*

118. International Whaling Commission, *IWC Resolution 2000-5: Resolution on Whaling Under Special Permit in the North Pacific Ocean*, at <http://www.iwcoffice.org> (last visited Mar. 21, 2002).

119. *Id.*

120. Kakuchi, *supra* note 1.

C. Discovering and Punishing Infractions: The Problems with National Monitoring and Self-Policing

Oceans cover an extraordinarily vast portion of the Earth's surface.¹²¹ Even so, in a seemingly impossible task, the IWC was given authority over all waters in which whaling is carried on by factory ships, land stations or whale catchers.¹²² This authority extends inside states' 200-mile exclusive economic zone ("EEZ") and even into territorial seas and inland waterways.¹²³ As a consequence, monitoring the activities of whaling boats in these waters has proven difficult, if not impossible. In addition, the power to address infractions (if discovered) is placed directly in the hands of the state of jurisdiction.¹²⁴ No mechanism exists by which the IWC can directly issue sanctions against countries in violation of the Convention. As a result, many violations are unnoticed or under-reported and essentially unpunished on an international level.

Because the IWC lacks the resources to monitor such a large geographical expanse, it requires that each member country report the number of whales of each species captured, the number thereof lost at sea, each whale's sex and length and whether any females contained a fetus.¹²⁵ Since the IWC lacks any authority to punish pro-whaling nations for violating the reporting regulations, these nations, acting in their own interests, are prone to under-report these statistics to the Commission. These instances of under-reporting have had dire effects for all nations since the reported statistics are incorporated into the Schedule and used to calculate global whale populations.

Perhaps the most stunning example of under-reporting by a country came when a former scientist in the Soviet Fisheries Ministry uncovered the existence of secret documents indicat-

121. Oceans cover approximately 71% or 360 million square kilometers of the Earth's surface. The average depth of the world's oceans is about 3,730 meters (12,230 ft.) and maximum depths can exceed eleven kilometers. See THE COLUMBIA ENCYCLOPEDIA (6th ed. 2000), available at <http://www.bartleby.com/65/oc/ocean/html> (last visited Mar. 21, 2002).

122. ICRW, *supra* note 10, art. I(2).

123. Lyster, *supra* note 25, at 21.

124. ICRW, *supra* note 10, art. I(2).

125. *Id.* at Schedule as amended at the 51st Annual Meeting in 1999, art. VI, ¶ 27 [hereinafter Schedule].

ing that the U.S.S.R. had ordered the systematic slaughter of humpback whales over a twenty year period.¹²⁶ The documents proved that the Soviet Union killed 48,477 humpback whales from 1948 until 1973.¹²⁷ The country officially reported to the IWC that only 2,710 humpbacks had been killed during that period.¹²⁸ Data collected by the IWC alerted their suspicion that the Soviet Union was engaged in this deceptive practice over the years. Still, devoid of an effective enforcement mechanism, the Commission was forced to incorporate the country's reported statistics into their own figures, thus destroying the reliability of their calculations.¹²⁹

Absence of an international body empowered to address infractions of the ICRW aggravates monitoring deficiencies. Since pro-whaling states are fully aware that the Commission cannot compel them to perform their treaty obligations, they are quick to violate regulations. The Convention leaves enforcement entirely in the hands of member states. Accordingly, each state is required to take "appropriate measures" to ensure the application of the provisions of the Convention and to punish infractions that occur in the course of operations carried out by persons or vessels under its jurisdiction.¹³⁰ However, the ICRW never specifies the types of measures that might be deemed appropriate. The only leverage the Commission retains is the power to "make recommendations to any or all contracting Governments on any matter that relates to whales or whaling and to the objectives and purposes of this Convention."¹³¹ The IWC has utilized this illusory authority throughout the years, but its concerns have frequently been overlooked.

126. 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, 171 (1995).

127. *Id.*

128. *Id.*

129. *Id.*

130. ICRW, *supra* note 10, art. IX(1).

131. *Id.* art. VI.

V. THE UNITED STATES: DOMESTIC RESPONSES TO THE ANTI-WHALING MOVEMENT

Although the United States was once considered a leading whaling force,¹³² it enthusiastically responded to the anti-whaling movement and has finally emerged at the forefront of the controversy as a supporter of IWC policy. National concern for marine mammals induced the U.S. to enact laws designed to protect these creatures and increase states' compliance with IWC regulations. More specifically, the U.S. has unilaterally enacted two pieces of legislation intended to augment the enforcement power of the IWC through import and fishing sanctions against countries who violate the regulations set forth by the Commission.

A. *The Pelly Amendment (1971)*

In 1971, Congress passed the Pelly Amendment¹³³ in support of the ban by the International Commission for the Northwest Atlantic Fisheries' on salmon fishing on the high seas.¹³⁴ The scope of the amendment has since expanded to include all species of fish along with endangered or threatened species such as whales.¹³⁵ Pursuant to the Pelly Amendment, if the U.S. Secretary of Commerce determines that nationals of a foreign country are engaged in fishing operations or harvesting endangered or threatened species in a manner that "diminishes the effectiveness" of an international conservation program, he or she "shall certify such fact to the President."¹³⁶ Upon receipt of the certification, the President has the discretion to direct the Secretary of the Treasury to prohibit the importation of fish or wildlife products from the offending country.¹³⁷ The President may choose to forgo the actual implementation of sanctions

132. See Berger-Eforo, *supra* note 6, at 451.

133. 22 U.S.C. § 1978 (2000).

134. Ted L. McDorman, *The GATT Consistency of U.S. Fish Import Embargoes to Stop Driftnet Fishing and Save the Whales, Dolphins and Turtles*, 24 GEO. WASH. J. INT'L L. & ECON. 477, 482 (1991).

135. *Id.* at 483.

136. 22 U.S.C. § 1978.

137. *Id.*

against another country in the hope that the threat will be sufficient to encourage compliance. Within sixty days of receiving the certification, the President is required to report the action taken or provide reasons for failure to take action.¹³⁸ Any import sanctions imposed under this amendment must be consistent with the General Agreement on Tariffs and Trade ("GATT").¹³⁹

In 1974, the first certification instituted under the Pelly Amendment was directed at the whaling activities of Japan and the Soviet Union.¹⁴⁰ Since the countries lodged timely objections to an IWC regulation decreasing the quota for minke whales, their harvests in excess of the quota were not technically violations of the regulation. Outraged at the apparent abuse, the U.S. certified both countries. Since both countries had announced their intention to strengthen their conservation efforts and abide by IWC quotas, President Ford declined to take action and notified Congress that trade sanctions would not be imposed.¹⁴¹

In 1978, the United States again certified Chile, Peru and the Republic of Korea under the Pelly Amendment for their whaling practices in violation of IWC quotas.¹⁴² Crucial to note is that these countries were not members of the IWC at the time of certification. Like Japan and the Soviet Union, they too were not technically in violation of the ICRW. Again, the President refused to impose sanctions on these countries.¹⁴³

Dissatisfied with the failure of the President to impose sanctions in the situations mentioned above, Congress was forced to reevaluate the effectiveness of the Pelly Amendment in regard to international whaling operations. Legislators pointed to the level of presidential discretion as the major deficiency of the

138. *Id.*

139. *Id.*

140. McDorman, *supra* note 134, at 484.

141. President's Message to Congress Reporting on International Whaling Operations and Conservation Programs, PUB. PAPERS 47, 47-48 (Jan. 16, 1975).

142. Letter from Secretary of Commerce Juanita Kreps to President Jimmy Carter (Dec. 12, 1977) (on file with author).

143. President's Message to Congress Transmitting a Report, PUB. PAPERS 265, 265-266 (Feb. 13, 1979).

Pelly Amendment and proposed to rectify this deficiency by allowing some form of sanction upon certification.¹⁴⁴

B. The Packwood-Magnuson Amendment (1979)

The Packwood-Magnuson Amendment to the Fishery Conservation and Management Act of 1976¹⁴⁵ was enacted to correct the deficiencies of the Pelly Amendment and impose automatic economic sanctions against countries not abiding by IWC regulations.¹⁴⁶ Under the Packwood-Magnuson Amendment, the Secretary of Commerce is authorized to determine whether nationals of a foreign country are engaged in operations that diminish the effectiveness of the IWC by direct or indirect means.¹⁴⁷ A positive finding by the Secretary of Commerce is deemed a certification under the Pelly Amendment. However, in addition to the President's receipt of notice of certification, the Packwood-Magnuson Amendment directs the Secretary of State to reduce by 50% the certified country's fishery allocation in U.S. waters.¹⁴⁸

The United States Supreme Court had an opportunity to interpret the Packwood-Magnuson Amendment in *Japan Whaling Ass'n v. American Cetacean Society*.¹⁴⁹ In a highly criticized opinion, the Supreme Court concluded that the decision to implement sanctions was voluntary and that the Secretary of Commerce was not required to certify countries who captured whales in excess of IWC quotas under the Packwood-Magnuson Amendment.¹⁵⁰ The decision afforded the U.S. time to negotiate with Japan. In a series of secret negotiations, Japan agreed to comply with the moratorium and avoid trade sanctions that might have cost the country hundreds of millions of dollars in damages.¹⁵¹ Subsequently, the decision in *Japan Whaling Ass'n* has been openly criticized by conservationists and legislators

144. See 125 Cong. Rec. H22, 083-84 (daily ed. Aug. 2, 1979) (statements of Reps. Murphy and Obestar).

145. The Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801-1882 (2000) [hereinafter FCMA].

146. 16 U.S.C. § 1821.

147. *Id.*

148. *Id.*

149. *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986).

150. *Id.* at 222.

151. See Berger-Eforo, *supra* note 6, at 451.

for contradicting legislative intent and undermining international efforts to regulate whaling.¹⁵²

C. The Failure of Unilateral Action to Protect the Whales

Difficulty arises when an individual state attempts to enforce an international regulatory regime through domestic measures. In a few cases, threat of unilateral sanctions may result in a token effort toward correcting the offense.¹⁵³ Threatened nations often respond with counter-threats that prevent countries such as the U.S. from imposing sanctions, especially where the trading relationship between the two nations is important for both economies.

The executive branch has indicated a concern that an embargo on fish would inevitably result in a retaliatory embargo on American fish exports.¹⁵⁴ Not surprisingly, Japan has threatened to take such action as a leverage to forestall U.S. sanctions.¹⁵⁵ Japan maintains even more leverage due to investments in joint venture fishing operations with American companies in the North Pacific.¹⁵⁶ This is extremely significant since the U.S. alone has provided an enforcement mechanism for the IWC. Pro-whaling nations are prone to base their decisions on whether or not to observe IWC regulations on their assessment of U.S. intentions.¹⁵⁷

More importantly, utilization of fishery import prohibitions under the Pelly and Packwood-Magnuson Amendments raises serious questions about the consistency of such action with United States obligations under GATT.¹⁵⁸ The question of whether the amendments will interfere with provisions of GATT is not entirely clear. The vagueness of these provisions and the lack of authoritative rulings make it nearly impossible

152. See McDorman, *supra* note 134, at 485.

153. Wilkinson, *supra* note 72, at 286.

154. *Id.* at 286.

155. *Id.*

156. *Id.*

157. *Id.*

158. See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT].

to predict the outcome of future conflict.¹⁵⁹ Still, "a comprehensive treaty such as GATT that lowers trade barriers signals a move toward multilateralism that implies a disdain for unilateral measures to further environmental goals."¹⁶⁰

In response to Japan's decision to expand its whaling operations to include protected Bryde's and sperm whales, the U.S. Secretary of Commerce, Norman Mineta, formally certified Japan pursuant to the Pelly Amendment on September 13, 2000.¹⁶¹ Secretary Mineta chided Japan for its activities and noted that the U.S. government is "deeply concerned that the real aim of this large hunt is to pave the way for an outright resumption of commercial whaling."¹⁶² He added that "[b]y killing whales in defiance of the scientific advice of the [IWC] and the clear expression of the majority of the [IWC] members, Japan is undermining the ability of the body to achieve its mission."¹⁶³ After receiving notice of certification from Secretary Mineta, President Clinton directed that Japan be denied access to allotments for fishing in U.S. waters.¹⁶⁴ Since no foreign fishing allotments currently exist in waters under U.S. jurisdiction, whether certification and subsequent sanctions will affect Japanese whaling is unclear.¹⁶⁵

VI. PROPOSED SOLUTION

Increased concern for the global environment creates the necessity for effective international agreements focused on the preservation of common resources that transcend territorial

159. Steve Charnovitz, *Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices*, 9 AM. U. J. INT'L L. & POL. 751, 775-90 (1994).

160. Schiffman, *supra* note 33, at 335-36.

161. Press Release, The White House, Office of the Press Secretary, Press Briefing by Chief of Staff John Podesta, Secretary of Commerce Norman Y. Mineta, NOAA Administrator D. James Baker, and NOAA Deputy Assistant Secretary for International Affairs, Rolland Schmitt on U.S. Actions on Japanese Whaling (Sept. 13, 2000), *available at* <http://www.noaa.gov/whales> (last visited Mar. 21, 2002).

162. *Id.*

163. *Id.*

164. Press Release, The White House, Office of the Press Secretary, President Clinton Directs U.S. Actions in Response to Japanese Whaling (Sept. 13, 2000), *available at* <http://www.noaa.gov/whales> (last visited Mar. 21, 2002).

165. *Id.*

boundaries. Accordingly, consenting nations have engaged in multilateral treaties establishing cooperative legal obligations to achieve an environmentally conscious result. Implicit in these treaties is the notion of national sovereignty – a concept that often leads directly to the ineffectiveness of the treaty. While allowing states to bind themselves to international agreements that preserve their national sovereignty tends to increase the likelihood that a state will agree to the norm, it will also increase the possibility of seriously undermining the norm's enforcement.

National sovereignty is carefully guarded by individual states and is rarely compromised. Historically, customary international law stipulated that a sovereign state has jurisdiction to prescribe and enforce laws only within its territorial boundaries.¹⁶⁶ Subsequently, this custom was incorporated into international environmental treaties like the ICRW.¹⁶⁷ As demonstrated, this compromise precipitated the failure of the IWC to protect the great whales from continued exploitation.

Recent progress in the field of international environmental law may shed some light on the current whaling controversy by providing alternatives to strengthen conservation efforts. One commentator has argued that nearly nine hundred multilateral legal instruments addressing environmental concerns have played an integral role in "setting the pace for cooperation in the international community in the development of international law."¹⁶⁸ First, it is crucial to highlight a significant change in the focus of international agreements since the implementation of the ICRW in 1946. Accordingly, early treaties like the ICRW were almost entirely concerned with limiting the excessive killing of animals in danger of becoming seriously depleted through human exploitation.¹⁶⁹ Recently, the emphasis of international environmental treaties has shifted to address concerns regarding the disruption of wildlife habitat and also the preservation of delicate ecosystems.¹⁷⁰ Instead of simply focusing on the management of a particular species, the

166. Ardia, *supra* note 19, at 497.

167. ICRW, *supra* note 10, pmbl.

168. Brown-Weiss, *supra* note 11, at 675.

169. Lyster, *supra* note 25, at 299.

170. *Id.*

IWC should be encouraged to incorporate this comprehensive approach into its framework. Closely related to this issue is the necessity for improved scientific research conducted by an international body. Second, a system designed to increase compliance among member nations at the international and domestic level must be introduced. Third, improved monitoring with the assistance of non-governmental organizations ("NGOs") is also required. Finally, an effective dispute resolution system should be implemented.

A. Improved Scientific Research With An Ecological Approach

The signatories of the ICRW entered into the treaty to ensure the sustainable development of whale species that would provide for economically prosperous future harvests. As the environmental climate of the world changed in the mid-1970's, the IWC demonstrated a shift toward conservation of whales that culminated in the establishment of an indefinite moratorium on commercial whaling. Japan, a country intent on exploiting the popularity of whale in the marketplace, has continued the practice of commercial whaling utilizing the scientific research exception.¹⁷¹ One of Japan's more notorious arguments in support of its controversial whaling activity is that the IWC has acted on irrational emotions and inaccurate scientific data that seriously underestimates whale populations.¹⁷² Japan's argument fails to take into account the position of whales in the ocean's food chain. Whales play a crucial part in maintaining the equilibrium of the ecosystem. Thus, "the killing of one whale amounts to harvesting from three hundred to five hundred square kilometers of ocean area."¹⁷³

Scientific uncertainty is deeply imbedded in international environmental law.¹⁷⁴ This is especially true in the instant case, given the migration patterns of whales throughout the world's oceans, low rates of reproduction, late onset of sexual

171. Berger-Eforo, *supra* note 6, at 450.

172. *Id.*

173. Dr. W. M. von Zharen, *Ocean Ecosystem Stewardship*, 23 WM. & MARY ENVTL. L. & POL. REV. 1, 20 (1998).

174. Brown Weiss, *supra* note 11, at 688.

maturity and small populations.¹⁷⁵ Accordingly, current methods for ascertaining whale populations have proven dangerously inaccurate because the data is subject to individual biases and methodological flaws.¹⁷⁶ Relying solely on information from member nations utilizing these potentially erroneous methods, the IWC has been unable to compile reliable records of whale stocks and catch statistics. Whaling nations have often capitalized on this dependence by refusing to supply the IWC with crucial data or by severely under-reporting catch statistics over the years.¹⁷⁷

The need for an independent organization to supply the IWC with accurate and current information is apparent. Proponents of whale preservation tend to base their arguments on scientific knowledge of whales indicating that the animals are intelligent, sentient beings capable of communication.¹⁷⁸ For example, studies suggest that the large brain size of whales coupled with systematic and cooperative hunting techniques exhibit the superior mental abilities of marine mammals.¹⁷⁹ Further evidence of whales' intelligence is found in their ability to communicate with one another.¹⁸⁰ Much remains unknown about the species. This deficiency in knowledge can be remedied through use of non-lethal scientific research.

To serve both the consumer and conservation interests, the proposed scientific organization must be deemed legitimate in the eyes of pro-whaling and anti-whaling nations. To ensure legitimacy, this supranational organization should be established outside the framework of the IWC and should be empowered, by amendment, to issue binding decisions regarding

175. See Burns, *supra* note 23, at 64. The life cycle of the whale is extraordinarily fragile. Usually only one calf is born at a time and the gestation period may last upwards of one year depending on the species. Schiffman, *supra* note 33, at 322. In the majority of large whale species, the females do not become pregnant again until their young are weaned. *Id.* As a result, whales rarely reproduce more than once every two years. *Id.*

176. For a detailed explanation of current whale counting methods, see Burns, *supra* note 23, at 58. Present considerations regarding the viability of whales also fail to take into account the potentially disastrous effect of marine pollution, depletion of the ozone layer and climate change. *Id.*

177. Caron, *supra* note 126, at 171.

178. Schiffman, *supra* note 33, at 320.

179. *Id.* at 321.

180. *Id.*

the efficacy of proposed scientific research catches by member nations. The agency should be instructed to certify only non-lethal research programs focused on the comprehensive study of marine mammals and their ecosystem and food supply. The organization should also encourage research aimed at uncovering the relationship between whale populations and environmental degradation such as marine pollution and depletion of the ozone layer. Member countries would be required to make defined contributions to the agency, which should be comprised of scientists nominated by the nations subject to approval by the Commission. Inevitably, recommendations by the agency would rarely be the result of unanimity. Nevertheless, the agency should be allowed to issue determinations based on a majority vote.

B. Independent Monitoring as a Means to Strengthen Compliance

The history of the IWC has been marked by a series of infractions committed by whaling nations in the interest of profit.¹⁸¹ These infractions, along with numerous other acts intended to undermine the spirit of the Convention, are a direct result of poor monitoring and ineffective enforcement mechanisms. Given the large jurisdictional area under the IWC's control, independent monitoring is critical to identify and prevent violations that no state can easily uncover. Abundance of these violations also seems to indicate that states are cognizant of the inability of the IWC to punish infractions.

Under the current scheme, whaling nations are required to maintain at least two inspectors on each ship "for the purpose of maintaining twenty-four hour inspection" and adequate inspection at each land station.¹⁸² Not surprisingly, these national inspector schemes have proven ineffective since a strong tendency exists for inspectors appointed and financed by their own governments to overlook infractions.¹⁸³ In place of the national observer scheme, the IWC should require member nations to appoint individuals who would serve as inspectors on factory ships and in land stations as determined by the Com-

181. See generally Berger-Eforo, *supra* note 6.

182. Schedule, *supra* note 125, art V.

183. Burns, *supra* note 23, at 75.

mission. The Commission would then assign inspectors to various locations on a six-month rotation. Inspectors would be responsible to ensure the application of IWC mandates and to report any abuses directly to the Commission. Nations determined to be in violation of IWC regulations would be required to respond to the allegations in a hearing held by the Commission. The information would be disseminated among the member states, and if egregious enough, to non-member states and NGOs as well.

NGOs may also be effectively utilized in the monitoring scheme. Unlike member states who may be concerned with retaliation, NGOs are politically independent and, as a result, more aggressive enforcers of international norms.¹⁸⁴ For example, NGOs have the ability to put direct public pressure on a state, organize a boycott or take direct action against violators since they are not subject to political pressure from the non-compliant state.¹⁸⁵ This is significant given the fact that NGOs are credited with initiating the first worldwide campaign to stop the slaughter of whales.¹⁸⁶ Graphic videos and public news stories brought the plight of whales to the attention of the international community and played an important role in transforming the composition of the IWC.¹⁸⁷ With this in mind, the IWC should grant NGOs the ability to present evidence of infractions to the Commission.

C. Effective Dispute Resolution

At present, the ICRW provides no mechanism by which states may effectively resolve disputes regarding whaling activities. The United States has attempted to respond to this deficiency by enacting domestic legislation to impose trade sanctions on nations who undermine IWC's authority.¹⁸⁸ Unilateral sanctions may be viewed as contrary to the spirit of multilateralism embodied in the GATT and may be deemed illegal by a future GATT panel.¹⁸⁹ Thus, a possible remedy for

184. Ardia, *supra* note 19, at 560.

185. *Id.*

186. *Id.*

187. *Id.*

188. 22 U.S.C. § 1978 (2000); 16 U.S.C. § 1821 (2000).

189. Schiffman, *supra* note 33, at 339.

violations of IWC regulations may be found in comprehensive dispute settlement provisions of UNCLOS. Where state parties are unable to resolve a dispute "concerning the interpretation or application of an international agreement related to the purposes of [UNCLOS],"¹⁹⁰ the Convention provides that a state party may bring a claim against another state in any of the following fora: (1) the International Tribunal for the Law of the Sea in accordance with Annex VI; (2) the International Court of Justice; (3) an arbitral tribunal in accordance with Annex VII; or (4) a special arbitral tribunal in accordance with Annex VIII.¹⁹¹ It appears fairly reasonable to conclude that state actions which diminish the effectiveness of an IWC regulation will be subject to the UNCLOS dispute settlement procedure, especially since Article 65 indicates that marine mammals deserve special protection in the EEZ. Specifically, Article 65 states:

Nothing in this Part restricts the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study.¹⁹²

VII. CONCLUSION

Despite historic overexploitation, whales are now afforded protection from all but a few states. Activities of these states, most notably Japan, have prevented the protection of whales from achieving the status of customary law binding on all nations. If pro-whaling states determine that continuous international objection to their whaling activities outweighs the potential economic benefit of harvesting the animals, they may likely abandon their current practices.

190. UNCLOS, *supra* note 70, art. 288(2).

191. *Id.* art. 287.

192. *Id.* art. 65.

In the meantime, the IWC will have to reform its policies to ensure greater monitoring and reliable scientific data while maintaining its legitimacy in the eyes of pro-whaling and anti-whaling nations alike. Individual states should be encouraged to continue the protest against Japan's whaling activities without incurring GATT-related liability. Further, the efforts of non-governmental organizations to publicize Japanese whaling hunts should be applauded. The pressure of public opinion may eventually devastate the already controversial whaling industry.

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