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# NOTES

## SANCTUARY FOR THE WHALES: WILL THIS BE THE DEMISE OF THE INTERNATIONAL WHALING COMMISSION OR A VIABLE STRATEGY FOR THE TWENTY-FIRST CENTURY?

### I. INTRODUCTION

On May 26, 1994 the International Whaling Commission<sup>1</sup> voted to create an Antarctic sanctuary for the whales.<sup>2</sup> This new policy essentially completed the transformation of the IWC from an international organization established to set quotas for commercial whaling, to an environmental watchdog group.<sup>3</sup> Initially, the IWC regulated the active whaling nations by divid-

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<sup>1</sup> The International Whaling Commission [hereinafter IWC] was created by the International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716 [hereinafter ICRW]. The IWC was originally established as a voluntary union of the whaling nations to empower an international agency to set quotas and catch limitations of the number of whales to be hunted. The International Convention for the Regulation of Whaling addressed virtually all mammals which fall under the classification of Cetacea, but in implementation the IWC historically has addressed the whales hunted for their commercial value, which are greatly depleted in numbers and in need of conservation. Melinda K. Blatt, *Woe for the Whales: Japan Whaling Association*, 55 U. CIN. L. REV. 1285 at 1287 (1986).

<sup>2</sup> The sanctuary proposal does not specifically seek to protect specific species of whales. The IWC has the internal mechanisms to place limitations on individual species of whales. As of 1986, the IWC had instituted a worldwide moratorium on whaling on all species of whales. The sanctuary proposal will protect approximately 90% of the feeding grounds of the global whale population. Sean MacConnell, *Albert Praised For Whale of a Victory*, THE IRISH TIMES, June 28, 1994.

<sup>3</sup> According to the ICRW, *supra* note 1, art. V, 62 Stat. 1716, the IWC was empowered to distribute whaling quotas among the whaling nations. Until the 1982 decision to place a global moratorium on whaling, the IWC continued to allow for thousands of whales to be caught annually. See Pat A. Birnie, *International Legal Issues in the Management and Protection of the Whale: A Review of Four Decades of Experience*, 29 NAT. RESOURCES J. 903 at 916 (1989). It was only after considerable international pressure that the IWC began to act in a manner indicating genuine concern for the preservation of whales. Previous to the moratorium,

ing the existing whale stocks among members.<sup>4</sup> In 1982, the IWC voted to ban all commercial whaling by 1986, reversing its previous policy of distributing whale quotas.<sup>5</sup> The proposed ban was met with harsh criticism from the whaling nations.<sup>6</sup> Several whaling nations filed formal objections to the IWC's ban on whaling.<sup>7</sup> According to the IWC's charter, a nation may avoid compliance with any IWC policy by simply filing a formal objection with the IWC.<sup>8</sup> In 1992, Norway announced plans to resume limited commercial whaling.<sup>9</sup> Norway had long been considered a leader in environmental issues.<sup>10</sup> Norway's decision to resume commercial whaling presented the IWC with its single greatest challenge to date. The IWC was essentially powerless to respond to the Norwegian challenge to its authority.<sup>11</sup>

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the IWC would regularly set quotas on whales stocks in excess of what it was possible to catch. *Id.*

<sup>4</sup> The signatory nations to the ICRW include: Argentina, Australia, Brazil, Chile, Denmark, France, the Netherlands, New Zealand, Norway, Peru, the USSR, The United Kingdom, The United States and South Africa. ICRW, *supra* note 1, 62 Stat. 1716.

<sup>5</sup> Birnie, *supra* note 3, at 919.

<sup>6</sup> At the time of the proposed worldwide moratorium, the nations that continued to be major whaling forces were Japan, Iceland, Norway and the U.S.S.R. Other nations such as Peru, Chile, Brazil and South Korea also supported the continuation of whaling. Additionally, the Philippines, the Solomon Islands and St. Vincent expressed interest in whaling. Birnie, *supra* note 3, at 912.

<sup>7</sup> Specifically, Norway, Japan, Peru and the U.S.S.R. all filed timely objections to the 1982 worldwide whaling moratorium. For a more complete discussion see *infra* note 139.

<sup>8</sup> ICRW, *supra* note 1, 62 Stat. 1716. Article five states that a member nation need only file a timely objection, within thirty days, to any amendment to the schedule to be exempted from the relevant change. *Id.* Under the IWC protocol, the proposed ban on whaling was actually entered into the IWC as the 1982 amendment to the IWC schedule. The amendments of the thirty fourth annual meeting of the IWC replaced the schedules contained in International Whaling Commission Schedule, ICRW, *supra* note 1, 62 Stat. 1716 at 1723.

<sup>9</sup> As previously stated, Norway raised an objection to the IWC's 1982 moratorium. In a compromise with the IWC and the anti-whaling nations, Norway maintained its objection but did not resume commercial whaling. Instead, it was allocated a quota of less than 200 Minke whales for scientific purposes. A discussion of the IWC's use of scientific whaling as a bargaining tool with whaling nations will follow *infra*, note 139. Thus, Norway's 1992 decision to resume commercial whaling was in direct defiance of the IWC.

<sup>10</sup> Johan Jorgen Holst, Untitled, NATIONAL PRESS CLUB MORNING NEWSPAPER, Oct. 4, 1993.

<sup>11</sup> The IWC had a relatively quiet early history, including some minor disputes by individual member states, requesting increases in their whaling quotas. See Birnie, *supra* note 3, at 920. The 1982 moratorium was the manifestation of a

The challenge that the IWC presently faces is whether it will be sufficiently empowered to respond to nations which violate its policies. If the IWC remains effectively powerless to react to offending nations, then its future becomes unstable.

This comment will explore the current crises facing the IWC. Section two will present a general orientation of the whale controversy, a biological synopsis of whales, including an analysis of the character and capacity of the whales and a brief history of whaling. The third section of this comment will discuss the development of the international environmental movement and how it effected the IWC. Section four will introduce the governing international body, the IWC. It will include a synopsis of the history of the IWC, its internal operations, and the most significant milestones that it has faced since its inception. The fifth section will explore the response to the recent transition in IWC policy, which shifted the IWC's focus to that of an environmentally concerned international organization. This will be followed by analysis of the IWC's transition in policy as best exemplified by the recent decision to establish the Antarctic whale sanctuary. It will include the response by both the pro-whaling and anti-whaling forces. Section five will also contain an analysis of the current issues the IWC faces. This will include a presentation of some internal causes of the crises that the IWC must address. The comment will conclude with some possible solutions to the challenges facing the IWC as it enters the twenty-first century.

## II. BACKGROUND

The IWC is unable to curtail the actions of member nations based on a controversial opt out clause in its own charter.<sup>12</sup> Article V of the ICRW stipulates that a member of the IWC need only file a timely objection to a whale quota, and any actions taken will not be considered in violation of the IWC.<sup>13</sup> The Norwegian decision to resume commercial whaling was not the only

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philosophical transformation by the IWC into a conservationist organization. When Norway decided to challenge this decision, it cut to the core of the IWC's inability to enforce its own policies.

<sup>12</sup> Birnie, *supra* note 3, at 913.

<sup>13</sup> ICRW, *supra* note 1, art. V, 62 Stat. 1716.

challenge to the IWC moratorium.<sup>14</sup> The sanctuary proposal creates a greater restriction on the whaling nations, as it is scheduled to last for fifty years and protect the feeding grounds of the majority of the world's whale populations.<sup>15</sup> Subsequently, the response to the 1994 whale sanctuary presents a greater challenge to the IWC's survival than the global response to the 1982 whaling moratorium.

The proposed sanctuary will cover some thirty million square kilometers of water around the Antarctic continent.<sup>16</sup> This enormous sanctuary will be a critical addition to the existing whale sanctuaries off the Mexican coast and in the Indian Ocean.<sup>17</sup> The decision to establish an Antarctic sanctuary was met with tremendous praise by the anti-whaling nations as well as environmental groups.<sup>18</sup> However, the major whaling nations were infuriated by the IWC's decision. Japan immediately filed an objection and threatened to withdraw from the IWC.<sup>19</sup>

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<sup>14</sup> See *infra* section V.B.3. for a discussion of the response by the whaling forces to the whaling moratorium.

<sup>15</sup> MacConnell, *supra* note 2.

<sup>16</sup> The sanctuary will protect some 8 million square miles, or a quarter of the world's oceans, and has been estimated to have the potential to protect 80% of the world's remaining whales from commercial whaling. Paul Brown, *Sanctuary Doooms Japanese Whaling*, THE GUARDIAN, May 28, 1994 at 6.

<sup>17</sup> Sri Lanka and the Seychelles won international praise for the establishment of a marine mammals sanctuary off of the coasts of Sri Lanka in the Indian Ocean. See Hal Whitehead, *The Unknown Giants*, 66 NAT'L GEOGRAPHIC 775, 776 (1984) for a discussion of the importance of the Indian Ocean sanctuary. The Mexican government led the international community in preservation of the whales, creating the first whale sanctuaries in its territorial waters. Mexican whale sanctuaries were first created in 1972 around La Laguna Ojo de Liebre and La Laguna Guerrero Negro along Mexico's north-western Coast. These two areas were not only along the extremely rare Gray whales annual migration route, but also serve as prime mating and calving areas. In 1979, Mexico augmented its coastal sanctuaries to include La Laguna San Ignacio, also a mating and calving area. Steven L. Swartz & Mary Lou Jones, *Gray Whales*, 171 NAT'L GEOGRAPHIC 755, 759, 770 (1987).

<sup>18</sup> See *supra* note 6, for a discussion of the nations identified as leaders in the anti-whaling movement. Several non governmental organizations [hereinafter NGO's] are also extremely significant in the fight against whaling. Among the NGO's that have had a major effect on the anti-whaling movement are Greenpeace, Earth Island Institute, World Wildlife Fund. Greenpeace ran an emotionally charged and highly successful campaign in the late 1980's against the tuna industry. Edward J. Linehan, *The Trouble with Dolphins*, 155 NAT'L GEOGRAPHIC 506, 528 (1979), for a complete discussion of the tuna/dolphin debate.

<sup>19</sup> *Japan to Protest IWC Vote to Form an Antarctic Sanctuary*, KYOTO NEWS INT'L, Aug. 15, 1994. See also *Whaling: Japan to Consider a Withdrawal From The*

Russia also filed an objection to the sanctuary plan, despite having voted for the plan at the IWC meeting in May, 1994.<sup>20</sup> Norway failed to vote on the sanctuary, but continues limited whaling in its coastal waters.<sup>21</sup>

Japan argues that the decision to establish an Antarctic whale sanctuary was an *ultra vires*<sup>22</sup> act by the IWC and not in compliance with its mission statement.<sup>23</sup> The Japanese contention is that the IWC charter provided for the regulation, rather than the cessation of whaling.<sup>24</sup> The IWC is in a precarious situation because of the Japanese threat to withdraw from the

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IWC, American Political Network, Greenwire, May 31, 1994, available in LEXIS, News Library, CUR File.

<sup>20</sup> Of the 32 countries that were eligible to vote at the May 1994 meeting of the IWC, 23 voted for the sanctuary plan. Japan was the only nation that voted against the plan. Russia voted in the place of the former U.S.S.R., and voted in favor of the proposal. In an unexpected move, Norway failed to attend the vote and several Caribbean nations abstained. Nicholas Read, *Whale of a Decision is a Fluke, but Fleets are Harpooned*, VANCOUVER SUN, June 4, 1994 at A20.

<sup>21</sup> See Ray Mosely, *Defying a Global Ban, Norway Still Hunts Whales*, CHI. TRIB., Feb. 22, 1994 at N1.

<sup>22</sup> Ultra Vires is defined as an "act performed without any authority to act on subject." BLACK'S LAW DICTIONARY 791 (6th ed. 1990).

<sup>23</sup> The IWC mission statement is found in the ICRW charter; the ICRW established the IWC to implement its goals and to safeguard "for future generations the great natural resource represented by whale stocks." ICRW *supra* note 1, 62 Stat. 1716.

<sup>24</sup> The IWC provided the Japanese with additional support for their argument that the IWC was acting in a manner outside of its jurisdiction. When the Scientific Committee recommended to the IWC that the Minke whale could sustain limited commercial whaling. See Yomiuri Shimbuni, *IWC Leader Quits in Protest*, THE DAILY YOMIURI, June 6, 1993. The IWC rejected the theory that the whales could withstand limited whaling, leaving the Japanese infuriated by the influence that nations that say whales are "worthy of sparing by virtue of its high level of intelligence," were able to have over the IWC as a whole. Yoshio Shioya, *Sanctuary For the Whales Defies Logic*, THE NIKKEI WEEKLY, June 13, 1994 at 6. The Japanese argue that the Convention for the Regulation of Whaling, had rejected the *res communis* approach, akin to the global commons Sept. 24, 1931, 49 Stat. 3079. Instead, the IWC implemented policy based on the free seas principle that use of the free seas could only be compromised by international agreement. Birnie *supra* note 3, at 906 (explaining the international legal conceptual difference between a *res communis* and free seas approach in formation of the IWC). The Japanese contend that they only contracted to a schedule system from which they can opt out at any time. ICRW, *supra* note 1, art. V, 62 Stat. 1716. Rather than agree to a moratorium or sanctuary system that they contend the IWC has no basis in establishing, the Japanese have threatened to withdraw from the IWC altogether. See *supra* note 22.

IWC.<sup>25</sup> Previously, several nations have withdrawn from the IWC, some of which have returned.<sup>26</sup> Other nations which left the IWC formed a breakaway organization which will potentially challenge the IWC's role as the international organization empowered to address whaling on an international level.<sup>27</sup> The decision to create a whale sanctuary will either be the begin-

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<sup>25</sup> This is not to suggest that the IWC is at risk because Japan, as a single nation, poses a tremendous threat to the IWC. Rather, Japan is in a unique position to challenge the IWC at this time. Japan wields tremendous economic influence over smaller, less independent nations. Additionally, Japan has the potential to continue to use its economic leverage to affect policy in the IWC, including influencing other nations to withdraw from the IWC. Finally, the IWC is currently facing more challenges now than in its prior history, from both internal and external forces. See Shimbuni, *supra* note 25.

<sup>26</sup> For example, the Seychelles withdrew from the IWC early in 1994 citing economic constraints. See *Seychelles Withdraws From Whaling Commission*, REUTERS WORLD SERVICE, Mar. 29, 1994. After making an internal policy decision to cease domestic whaling, Canada withdrew from the IWC in 1981. Andrew P. Hutton, *Regional News: Dateline Ottawa*, United Press International, June 30, 1981, available in LEXIS, News Library, ARC File. Iceland left the IWC in June 1992, stating the IWC was "functioning completely against its original purpose." Keiko Tatsuta, *French Whale Sanctuary May Need Political Concessions*, Japan Economic Newswire, May 10, 1993, available in LEXIS, News Library, Cur File. Three months prior to the Puerto Vallarta meeting of the IWC, Russia, who assumed the seat of the former U.S.S.R., admitted that during previous administrations, the U.S.S.R. had been whaling illegally on an extensive basis. Russian authorities promised to present the IWC with more accurate data on whaling in the U.S.S.R. at the upcoming IWC meeting. See Paul Brown, *Foreign Focus: Whaling Scandal: Soviet Union Illegally Killed Great Whales*, THE GUARDIAN, Feb. 12, 1994, at 12.

<sup>27</sup> Iceland threatened to leave the IWC unless the organization was reformed. Thorir Gudmundsson, *Iceland May Leave Whaling Commission*, The Reuters Library Report, Jan. 23, 1988, available in LEXIS, News Library, Arc file. Additionally, Norway has repeatedly threatened to leave the IWC. Norway remains a member nation but continues to whale commercially on a limited basis. Norway's decision to whale commercially is in direct defiance of IWC policy. See Tony Samstag and David Young, *Norway to Resume Whale Hunt as Iceland Quits IWC*, THE TIMES, June 30, 1992. Of further significance, Norway joined with Iceland to form the North Atlantic Marine Mammals Commission [hereinafter NAMMAC], a direct challenge to the viability of the IWC as the governing international organization on whaling. Most of the major whaling nations have considered joining this breakaway organization, rather than continue membership in the IWC which appears increasingly indifferent to their whaling policies. As far back as 1992, Japan threatened to join NAMMAC if the IWC persisted in failing to recognize the pro-whaling nations' position. Alexander MacLeod, *World Body Shaken By Attempts to Resume Hunt*, CHRISTIAN SCI. MONITOR, July 6, 1992 at 3. Should Japan actually decide to join the NAMMAC, then it would be in a position to challenge the IWC as the legitimate whaling organization, as three of the four largest whaling forces, Japan, Iceland and Norway, would be members of it, rather than the IWC.

ning of the IWC's demise, the reduction of a once viable international force into a functionally valueless agency or the transformation of the IWC into a leader in international environmental conservation.<sup>28</sup>

### III. AN INTRODUCTION TO THE WHALING CONTROVERSY

In order to fully analyze the IWC's recent decision to establish a whale sanctuary around Antarctica, it is necessary to first consider background information on whaling. Whales provide highly desirable natural resources<sup>29</sup> which resulted in their depletion, and continue to present a special problem in international environmental law.<sup>30</sup> Additionally, there is recent information indicating that whales are highly intelligent sentient animals, which further complicates their standing in international law.<sup>31</sup> The possibility that whales have the capacity to think, communicate and analyze raises ethical questions regarding their killing.<sup>32</sup> In fact, the intellectual capacity of whales has become the central point of the whaling controversy. The anti-whaling forces argue that whales are intelligent animals with a right to life.<sup>33</sup> The pro-whaling nations consider whales as a resource for food, oil, leather and medicine to be used for the benefit of mankind.<sup>34</sup> The pro-whaling nations dismiss any inference that whales are worthy of any additional protection and consider any efforts to change their use of whales

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<sup>28</sup> In the most recent IWC conference the IWC indicated that it had no intention of moderating its limitations on whaling. At the 1995 meeting, held in Dublin Ireland, the IWC continued its assault on whaling by voting to ban all scientific whaling in the Antarctic sanctuary. The IWC further demonstrated a concern for global environmental issues in its most recent meeting when the IWC began an evaluation of the impact of global warming and ocean dumping on the ecosystem inhabited by the whales. *See Outcome of International Whaling Commission Conference*, IAC NEWSLETTER DATABASE, June 7, 1995.

<sup>29</sup> For a discussion of the many products extracted from whales *see infra* text accompanying notes 74.

<sup>30</sup> For a discussion on the gross depletion of whale stocks *see infra* note 89.

<sup>31</sup> For information pertaining to the sentient nature of whales *see infra* text accompanying notes 54, 56-58.

<sup>32</sup> Anthony D'Amato & Sudhir K.Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L L. 21 (1991).

<sup>33</sup> *Id.* at 49.

<sup>34</sup> Suvendrini Kakuchi, *Japan Bid to End Whaling Suffers Setback*, THE INTER PRESS SERVICE, May 12, 1993, available in LEXIS, News Library, CUR File.



as cultural discrimination.<sup>35</sup> Yet, there is a host of scientific data that is difficult to ignore and that raises several complicated questions. If the whales are as intelligent as science now believes, should they not have some form of standing or right to protection on an international basis?<sup>36</sup>

#### A. *Biological Data on Cetaceans*

Whales are sea dwelling mammals which surface to breathe air via a blowhole.<sup>37</sup> The various species of whales surface with differing frequency, but rely on the same biological characteristics to allow them to dive deeply and remain under water for extended amounts of time.<sup>38</sup> Many of the typical characteristics common to most land mammals have been adapted and changed in whales. Besides greatly increased lung capacity, their front limbs evolved into flippers and their hind limbs disappeared, leaving behind hip joints in the skeletal structure.<sup>39</sup>

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<sup>35</sup> Eriko Sugita, *Japanese Continue to Eat Whales Despite World Condemnation*, Reuters, Aug. 27, 1987, available in LEXIS, News Library, ARC File.

<sup>36</sup> For a discussion of the cumulative nature of scientific data, indicating the potential for intelligence, comparable to human intelligence see D'Amato and Chopra, *supra* note 33. Additionally, if whales are arguably as intelligent as humans, then an evaluation of whether whales are entitled to some form of standing in international law might be in order, given existing theories evaluating standing of inanimate objects. See generally, Christopher D. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects* (1968).

<sup>37</sup> Some whales actually have two blowholes or nostrils through which they breathe. The presence of a second blowhole is an identifying characteristic of various whales. Additionally, whales do not actually spout water during exhalation. Rather, the appearance of water that may appear when whales surface to breathe, is superfluous water that is being discharged from the lungs. Roger Payne, *AMONG WHALES*, 93 (1995).

<sup>38</sup> Whales have remarkable lung and blood oxygen level capacity, which essentially enables them to store tremendous amounts of oxygen and utilize it with remarkable efficiency. Whales do not produce extensive amounts of carbon dioxide, thus enabling them to remain under water for prolonged amounts of time. Sperm whales submerge "for an average of 40 minutes between breaths," but can remain under water for up to one and a half hours. Hal Whitehead, *The Realm of the Elusive Sperm Whale*, 188 NAT'L GEOGRAPHIC 57, 61-62 (1995). The baleen whales, in general, can remain under water for almost an hour. Stefani I. Hewlett, *Whales*, Funk & Wagnall's, 1993, available in MicroSoft Encarta, B475.

<sup>39</sup> Another example of the evolutionary adaptations in whales is that whales have lost the external ear common to land mammals, as their "hearing" is accomplished via echolocation, discussed *supra* note 25. See Payne, *supra* note 38 at 206-208.

There are some seventy-six different species of whales, dolphins and porpoises, all of which constitute the order Cetacea.<sup>40</sup> Whales are mammals that are believed to have descended from land dwellers.<sup>41</sup> The earliest whale fossils date back 40 million years.<sup>42</sup> There are two major categories of whales: the Odontoceti,<sup>43</sup> the toothed whales and the Mysticeti,<sup>44</sup> otherwise known as Baleen whales. The Odontoceti generally include dolphins, porpoises and the smaller whales, with the identifying characteristic being the existence of teeth.<sup>45</sup> Mysticeti, or the Baleen whale, are so named for the baleen or a filter like elastic structure which hangs from their upper jaws which allows them to feed and filter their food.<sup>46</sup> The Mysticeti are generally referred to as the great whales, all of which have been hunted to the brink of extinction.<sup>47</sup>

Whales are able to navigate underwater via the employment of echolocation.<sup>48</sup> Echolocation is essentially an internal sonar capacity that most whales possess. The whales emanate a series of clicks, whistles and vocalizations via the nasal sacs. These sounds bounce off of a targeted object sending sound waves back to the whale. The whale receives the sound waves

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<sup>40</sup> See Hewlett, *supra* note 39.

<sup>41</sup> For a discussion on whether the whale may have emerged from a common ancestor as present day hoofed mammals, see Hewlett, *supra* note 39.

<sup>42</sup> See Hewlett, *supra* note 39.

<sup>43</sup> SUSAN J. WERNERT ed., NORTH AMERICAN WILDLIFE 72 (1984).

<sup>44</sup> *Id.* at 73.

<sup>45</sup> The largest of the Odontoceti is the Right Whale which may grow to 60 feet in length and reach 40 tons in weight. See Hewlett, *supra* note 39. The Right Whale was subject to aggressive whale hunting once whalers realized that the characteristic square head contained massive amounts of oil. Thus, they were one of the most severely depleted species of whales, because they were the right whale to catch in order to get the most oil. As a result the right whale was hunted to the brink of extinction prior to the twentieth century. Roger Payne, *Swimming With Patagonia's Right Whales*, 142 NAT'L GEOGRAPHIC 576, 578-579 (1972). Roger Payne, President of the Whales Conservation Institute, is considered to be the pre-eminent authority on whales. His research includes the original work involving the "songs" of the humpback whale. Payne has specialized in whale research since the late 1960's and his long awaited book "Among Whales" is considered to be the definitive authority on whales. *Roger Payne Talks About Whales*, The Charlie Rose Show, June 14, 1995, WNET Educational Broadcasting Company, Journal Graphics Transcripts, available in LEXIS. (transcribed.)

<sup>46</sup> See Hewlett, *supra* note 39.

<sup>47</sup> The whales that were extensively hunted include: the Fin, the Gray, the Humpback and the Right. See Hewlett, *supra* note 39.

<sup>48</sup> Wernert, *supra* note 44, at 75.

after they have resounded and navigate in response.<sup>49</sup> It should be noted that a whale's ability to navigate via echolocation is extremely sophisticated and efficient. Whales have been described as "swimming in an ocean of symphony of sound"<sup>50</sup> and having the "visual acuity of a cat on land."<sup>51</sup>

The exact capacity that whales have remains a contested scientific issue. Their unique sensory abilities "have given rise to speculation as to their intelligence. Cetaceans are the only animals (other than the elephant) to possess a brain larger than a human."<sup>52</sup> While a whale's brain is small in comparison to its body size, the part of the brain responsible for higher functioning is much larger than that of a human.<sup>53</sup>

### B. *Character and Capacity of the Whales*

The incredible public support for the anti-whaling movement began to emerge as our awareness of the potential capacity of the whales began to expand. Cetaceantology was virtually an unexplored field until the 1970's. Previously, any scientific data gathered on the feeding patterns, migrational habits and calving ground was used by the whaling industry to better locate their prey.<sup>54</sup>

There have been a series of studies done on the various species of whales pertaining to their abilities to communicate with one another, their complex actions and interactions with one another, and more recently with man. Several studies have demonstrated that whales have the capacity to play,<sup>55</sup> nur-

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<sup>49</sup> Hewlett, *supra* note 39. For a complete exploration of echolocation and communication among various whales, including among various species, see Roger Payne, *New Light on the Singing Whales*, 161 NAT'L GEOGRAPHIC 463 (1982).

<sup>50</sup> See generally, Payne, *New Light on the Singing Whales*, 161 NAT'L GEOGRAPHIC 463 (1982).

<sup>51</sup> Hewlett, *supra* note 39.

<sup>52</sup> Hewlett, *supra* note 39.

<sup>53</sup> See D'Amato & Chopra, *supra* note 33. In note 2, the authors cite the work of Dr. John Lilly saying "to think the way that we do he (the whale) would have to use about one sixth of his brain . . . the cerebral cortex is the part of the brain referred to as responsible for higher functioning, meaning memory or conceptual thought." *Id.*

<sup>54</sup> See generally, Clay Eric Hawes, *Note: Norwegian Whaling and the Pelly Amendment A Misguided Attempt at Conservation*, 3 MINN. J. GLOBAL TRADE 97 (1994).

<sup>55</sup> In Dr. Payne's 1972 study on Right Whales he wrote of a right whale interacting with his staff:

ture,<sup>56</sup> control their own actions and interact with humans in a positive and safe manner.<sup>57</sup> A series of these studies were done during the heart of the save the whales campaign, which helped capture the sophisticated and interactive nature of whales. However, scientists today continue to capture the hearts of readers with the details of ongoing whale studies, which further illuminate the capacity of whales.<sup>58</sup>

Perhaps no single publication dealing with the environment reaches and educates as many people as does the National

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A whale approached and circled the boat closely, almost touching it several times with its head. But then it turned its flukes to the skiff, swished them strongly from side to side, backed up and placed them under the stern and raised the whole boat, passengers and all, six inches in the air. Payne, *supra* note 46, at 578.

The Whale let the captive craft hang there for a long minute, then lowered its flukes slowly, without tipping the boat . . . whales lifted and set [the skiff] two more times with the utmost control and deliberation.

Payne, *supra* note 46, at 581.

<sup>56</sup> In the same study another exceptional example of the interactive and playful nature of the whales was provided:

Newborn calves liked to play with their mothers' tails. They would slide off first one fluke then the other. Usually the mothers patiently absorbed all the jostling. Once, though we saw a big female deftly roll onto her back just as her mischievous calf was about to ram her.

She grabbed the youngster by clamping the small of his tail to her side flipper. He wriggled and struggled and sputtered. When he had calmed down, she slowly let him go. Payne, *supra* note 46, at 586.

<sup>57</sup> In 1987, National Geographic ran a story about the comeback of the Gray whales. This article provided one of the most descriptive and moving synopsis of their character:

From our very first encounter with Amazing Grace, she readily adopted us along with our 14-foot inflatable outboard as her personal toys. She would roll under the boat, turn belly up with her flippers sticking three to four feet out of the water on either side of the craft, then lift us clear off the surface of the lagoon, perched high and dry on her chest between her massive flippers.

When she tired of this bench pressing technique, Grace would do the same thing with her head, lifting us out of the water and letting us slide off to swirl around her in circles, like a big rubber duck in the bathtub with a ten ton playmate. At other times Grace would submerge beneath us and release a tremendous blast of air that boiled to the surface like a giant Jacuzzi that engulfed us and the boat. After such gymnastics Grace would turn lie quietly along side of the boat to be rubbed. We would oblige her with a vigorous massage along her back, head and ribs, while she opened her mouth to display huge fringed curtains of creamy white Baleen plates.

Swartz and Jones, *supra* note 17, at 758.

<sup>58</sup> See generally Whitehead, *supra* note 48.

Geographic.<sup>59</sup> During the 1970's, National Geographic published dozens of studies and photo essays on whaling. One of the preeminent scientists dealing with whales is Dr. Roger Payne. He and a team of biologists studied the Right Whales in Patagonia for three months. His work was published in National Geographic, which then became an international forum where scientists could reach the public with their new findings on whale behavior and capacity. The capacity of human beings to demonstrate playfulness "is generally attributed to higher intelligence."<sup>60</sup> The same level of playfulness is evident in whales. In addition, some scientist argue that not only are whales capable of communication and expression, but that they may be as intelligent as humans.<sup>61</sup> For example, the humpback whale is known to produce a song-like noise, used in communication with other humpback whales, and possibly other species of whales.<sup>62</sup> However, the extent of the intellectual capacity of whales has yet to be determined, and is fiercely contested by the pro-whaling nations.

The historical perception of whales was that they were vicious and predatory in nature and a menace to whalers.<sup>63</sup> The whaling nations contend that whales are no different than any

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<sup>59</sup> Education has always been one of the major objectives of the National Geographic, according to the National Geographic Society's annual report for 1993-1994. Almost \$ 400,000 were spent on education and another \$ 7,000 on scientific research. National Geographic has a circulation that has grown to almost forty five million readers per issue. NATIONAL GEOGRAPHIC SOC'Y REPORT OF PROGRAMS (1994).

<sup>60</sup> For a complete discussion regarding the intellectual capacity of the whales see D'Amato & Chopra, *supra* note 33, at 22. Their study is an emotionally moving and graphic demonstration of the whales capacity to suffer and experience pain. In contrast, selections of Dr. Payne's work, see *supra* notes 56 and 57, is presented to demonstrate with equal clarity, the capacity of whales to play and interact and clearly control their interaction with humans and each other. Prior to the work of marine biologists in the 1970's whales had been considered as ferocious animals, which instinctively attacked man. See generally Erich Hoyt, *The Whales Called Killer*, 166 NAT'L GEOGRAPHIC 220 (1984).

<sup>61</sup> See generally D'Amato & Chopra, *supra* note 33, for a synopsis of scientific theory on whale capacity and brain size.

<sup>62</sup> See Roger Payne, *supra* note 50, for a complete discussion on the songs of the humpback whale as a means of communications among other whales.

<sup>63</sup> Hoyt, *supra* note 61, at 222-23. This article cites official U.S. Navy publications as recent as the early 1980's warned that Orcas (killer whales) were a distinct threat to man. Hoyt, *supra* note 61, at 222-23.

other animal harvested for the benefit of mankind.<sup>64</sup> Japan contends that the anti-whaling forces are perpetuating a cultural bias against Eastern views and philosophy regarding whaling.<sup>65</sup> Japan takes offense to efforts led by the United States, England and France to halt whaling, as they infringe on what it considers to be an inherent national and cultural right.<sup>66</sup> Japan views these efforts to halt whaling as an infringement on its national sovereignty and the implementation of cultural imperialism.<sup>67</sup>

### C. *History of Whaling*

The history of whaling can be broken into three main stages: ancient whaling,<sup>68</sup> the free resource stage,<sup>69</sup> and modern whaling.<sup>70</sup> There are accounts that man has been whaling as far back as one thousand years, and arguably longer.<sup>71</sup> Whales were hunted as a valuable source of food and fuel.<sup>72</sup> Other essential items were made from whale byproducts such as tools,

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<sup>64</sup> Tim Pearce, *Whaling Ban May End 1,000 Year Old Japanese Tradition*, REUTERS NORTH EUROPEAN SERVICE, July 13, 1984.

<sup>65</sup> Kakuchi, *supra* note 35.

<sup>66</sup> Many Japanese find the anti-whaling forces efforts to halt whaling as an obsession unfair to Japanese culture. Kakuchi, *supra* note 35.

<sup>67</sup> Pearce, *supra* note 65. Essentially, Japan advances an argument that questions how an international organization or a foreign nation can attempt to effectuate or regulate what another nation considers its cultural identity. Pearce, *supra* note 65. International law functions only when a given nation compromises a part of its national sovereignty. Japan has made it clear that it considers whaling to be part of its cultural identity and not subject to international regulation. Andre Darby, *Japan: Calls for the Right to Kill Whales for Food*, THE AGE, May 10, 1993, available in LEXIS, World Library, Allwld File. In fact, Japan has gone so far as to advance that its small remaining whaling industry should qualify as aboriginal and granted the right to whale free from international scrutiny. Pearce, *supra* note 65.

<sup>68</sup> Pearce, *supra* note 65. The Japanese claim to have a thousand year old history of whaling. Pearce, *supra* note 65.

<sup>69</sup> The free resource period is defined as the period in whaling excluding ancient whaling, prior to World War I. D'Amato & Chopra, *supra* note 33, at 28.

<sup>70</sup> The modern whaling period, post-World War I, does not so much refer to advancement in whaling technology. In fact most significant advancements occurred during the free resources stage. See generally D'Amato & Chopra, *supra* note 33. The modern whaling period refers to the whaling that continued after the establishment of the IWC. D'Amato & Chopra, *supra* note 33.

<sup>71</sup> See Cliff M. Stein, *Whales Swim for Their Lives as Captain Ahab Returns in a Norwegian Uniform: An Analysis of Norway's Decision to Resume Commercial Whaling*, 8 TEMP. INT'L & COMP. L.J. 155, 159 (1994).

<sup>72</sup> Birnie, *supra* note 3, at 903.

weapons, clothing and shelter.<sup>73</sup> The whaling industry has contributed "substantially to the wealth of numerous countries and has been dominated successively by the Norse, Basque, English, Dutch, Norwegian, American, Japanese and Russian whalers."<sup>74</sup> Whaling originally existed to meet subsistence needs. As advancements were made in technology, whaling became an industry. The Basques "began the first organized whaling operation approximately 800 years ago" in the area around the Bay of Biscay.<sup>75</sup> Other accounts trace Basque whaling back to 875 A.D.<sup>76</sup> In either case, the Basques were the first civilization to transform whaling into a viable organized business.<sup>77</sup> The Basques brought their operations to the new world and essentially began the free resources period of whaling.<sup>78</sup> This is, at least in part, attributed to the exhaustion of whale populations in the original hunting areas.<sup>79</sup>

The free resources period refers to the period when whaling spread across the Atlantic to the new world and eventually out to island outposts.<sup>80</sup> This period incorporates all commercial whaling done until the whaling powers recognized that the stocks of whales were so grossly depleted that they voluntarily signed multilateral agreements to ration and preserve the whale stock.<sup>81</sup> During the free resource period, whales were

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<sup>73</sup> Birnie, *supra* note 3 at 903.

<sup>74</sup> Charles R. Schultz, *Whaling*, Funk & Wagnall's, 1993, available in MicroSoft Encarta, B477.

<sup>75</sup> Hawes, *supra* note 55 at 100.

<sup>76</sup> Schultz, *supra* note 75.

<sup>77</sup> Schultz, *supra* note 75.

<sup>78</sup> See generally Bill Curtsinger, *Discovery in Labrador: A 16th-Century Basque Whaling Port and Its Sunken Fleet*, 168 NAT'L GEOGRAPHIC 40, 43-45 (1985).

<sup>79</sup> Schultz, *supra* note 75.

<sup>80</sup> Birnie, *supra* note 3, at 906.

<sup>81</sup> Birnie, *supra* note 3, at 910. The first such multilateral agreement was the decision to establish a unit to measure of whale oil taken. Birnie, *supra* note 3, at 910. The Blue Whale Unit [hereinafter BWU] was applied to the three main whales hunted, the Blue, the Sei and the Humpback. Birnie, *supra* note 3, at 910. The BWU measured the amount of oil taken from each whale and placed a quota of oil the contracting parties were allocated. Birnie, *supra* note 3, at 910. The BWU served as a voluntary commercial union, but was limited because not every whaling nation or party was represented. Birnie, *supra* note 3, at 910. The non members continued to whale freely, thus critically undermining the BWU system. Birnie, *supra* note 3, at 910.

hunted for their oil, meat and baleen.<sup>82</sup> The whaling industry essentially hunted the most economically viable species to the point of extinction.<sup>83</sup> When a given species was so severely depleted that it became economically disadvantageous to hunt, the industry would then exploit a different species.<sup>84</sup> Whaling expanded to the new world essentially at the same time as the colonies were developed. The American whaling industry reached its pinnacle of productivity in the mid-nineteenth century, producing some five million gallons of whale oil, over five million pounds of whalebone and employing over 70,000 people.<sup>85</sup> As the U.S whaling industry began to decline, Norway assumed dominance in the whaling industry. Norwegian success was greatly influenced by advancements in modern technology, such as better boating and navigational skills, and improvements in weaponry.<sup>86</sup>

The modern era of whaling benefitted greatly from a series of technological advancements in the industry.<sup>87</sup> The whaling nations used the exploding harpoon gun and other advancements in technology to exploit the whale populations, some to the brink of extinction.<sup>88</sup> Perhaps the most significant change in the modern whaling period was the use of factory ships in the

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<sup>82</sup> Birnie, *supra* note 3, at 910.

<sup>83</sup> Stein, *supra* note 72, at 159.

<sup>84</sup> See Stein, *supra* note 72, at 159.

<sup>85</sup> Schultze, *supra* note 75.

<sup>86</sup> Stein, *supra* note 72 at 160. The exploding harpoon gun was an extremely significant development because it enabled the whalers to much more efficiently kill the whale and move on to additional quarry. Stein, *supra* note 72 at 160. The harpoon gun was invented by Sven Foyn in 1868 and ushered in a new age in whaling. Stein, *supra* note 72 at 160.

<sup>87</sup> Stein, *supra* note 72, at 160. As coastal stocks of whaling became depleted, the Norwegian whaling industry countered with advancements in the whaling ships, equipping them with steam engines, which allowed for deep ocean hunting. Stein, *supra* note 72, at 160.

<sup>88</sup> D'Amato & Chopra, *supra* note 33 at 29. In 1910 over 10,000 baleen whales were taken in the Antarctic region, five years later, Norway alone killed an additional 15,000. D'Amato & Chopra, *supra* note 33 at 29. Between 1918-1919 less than 10,000 whales were killed annually, a decline perhaps attributable to World War I. D'Amato & Chopra, *supra* note 33 at 29. Then in 1919-1920 43,129 total whales were killed. D'Amato & Chopra, *supra* note 33 at 29. The killing increased exponentially thereafter, surpassing 43,000 in 1931 alone, the year the Convention for the Regulation of Whaling was signed. D'Amato & Chopra, *supra* note 33, at 34.



industry.<sup>89</sup> This form of whaling essentially allowed for the processing of whales while at sea. Whalers were able to harvest the economically viable parts of the whale and discard the rest.<sup>90</sup> This allowed individual whaling ships to hunt, kill and process several times the number of whales previously taken. When it became economically disastrous<sup>91</sup> to hunt the valuable whale species, the whaling nations then formed alliances which founded the IWC.

#### IV. DEVELOPMENT OF INTERNATIONAL ENVIRONMENTAL LEGAL MOVEMENT

Before discussing the history and evolution of the IWC, it is necessary to discuss the international environmental movement in general. The twentieth century brought many sweeping changes, and this is most evident in the international environmental arena. The success of the industrial revolution caused a severe depletion of the world's natural resources.<sup>92</sup> Eventually, an awareness began to develop that there may be negative consequences of the unending exploitation of nature. The IWC is an example of a greater global concern to contract to protect the global commons.<sup>93</sup>

##### A. *International Law Employed By Individual Nations*

The advancements of the twentieth century brought a growing awareness that developed on a domestic level as well

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<sup>89</sup> Stein, *supra* note 72, at 161. In 1922 the whaling industry received another tremendous boost when the stern slip-way was developed, Peter Sorlie. Stein, *supra* note 72, at 161. This invention was essentially a drop slide system which would allow whales to be pulled onto a conveyor belt, after which they could be processed. Stein, *supra* note 72, at 162. This eliminated the need to return to land or sea based processing centers, and allowed a vast increase in the number of whales that could be handled. Stein, *supra* note 72, at 162.

<sup>90</sup> Stein, *supra* note 72, at 162.

<sup>91</sup> See generally Stein, *supra* note 72. The whaling industry was killing whales at a rate at which all whaling nations realized could not be sustained. Stein, *supra* note 72, at 158. Various species were nearly impossible to find, and other stocks were so depleted it was not advantageous to pursue them any longer. Blatt, *supra* note 1, at 1287.

<sup>92</sup> See Blatt, *supra* note 1, at 1287.

<sup>93</sup> The global commons refers to the parts of the earth that are beyond national jurisdictions; areas held in common by the world such as the atmosphere, the open ocean and the resources found there. IRENE FRANK & DAVID BROWN-STONE, *THE GREEN ENCYCLOPEDIA* 141 (1992).

as part of a larger international movement. Individual nation states began to enter into treaties with other states in an effort to address specific regional problems.<sup>94</sup> However, the focus during the earliest stages of international environmental law was on economic interests, rather than conservation of resources.<sup>95</sup> Initial efforts of conservation were designed to ensure recovery of a given species so that it might later be harvested, ensuring future economic prosperity.<sup>96</sup> Driven by the need to protect their future economic interests, nations began to enter into bilateral and multilateral agreements, which often resulted in some form of environmental protection.<sup>97</sup> While intentions behind these treaties may have been primarily motivated by economic factors,<sup>98</sup> they still provided a basis for multilateral action on environmental issues.

International law also began to evolve rapidly in the twentieth century.<sup>99</sup> A war weary world established the United Nations as an international forum where member nations would be subjected to a greater authority.<sup>100</sup> The formation of the United Nations is the single largest international effort and rec-

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<sup>94</sup> Edith Brown Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 GEO. L.J. 675, 681 (1993).

<sup>95</sup> *Id.*

<sup>96</sup> A series of treaties were passed protecting various economically desirous species, including the Convention for the Protection of Birds Useful to Agriculture, Mar. 19, 1902, 30 Martens 2d 686, the Convention for the Protection of Fur Seals, Feb. 1911, 37 Stat. 1538, and the Convention for the Regulation of Whaling, Sept. 24, 1931, T.I.A.S. 1849, 155 L.N.T.S. 349.

<sup>97</sup> For example the Convention for the Protection of Birds Useful to Agriculture, Mar. 19, 1902, 30 Martens 2d 686, the Convention for the Protection of Fur Seals, Feb. 1911, 37 Stat. 1538, and the Convention for the Regulation of Whaling, Sept. 24, 1931, T.I.A.S. 1849, 155 L.N.T.S. 349.

<sup>98</sup> In addition to the treaties mentioned above, the ICRW is a clear example of an international agreement that, though motivated by economic interests, had beneficial environmental results (the preservation of whale stocks). Blatt, *supra* note 1, at 1288.

<sup>99</sup> In 1911 the United States and Canada agreed to international litigation to resolve a transborder dispute, which dealt with the effects that pollution originating in Canada had on United States citizens. This was the first international case in which one nation was held responsible for the effects of its actions on the citizens of another nation. Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1911, 1935. This philosophy was expanded in two subsequent environmental cases; Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9), and Lake Lanoux (Fr. v. Spain), 12 R.I.A.A. 281, 1957. Each of these cases represented a tremendous expansion and reaffirmation of the jurisdiction of international law.

<sup>100</sup> FRANK & BROWNSTONE, *supra* note 94, at 318.

ognition of the need for an international body with some form of international authority.<sup>101</sup> The United Nations was empowered with a series of enforcement provisions including sanctions, the ability to condemn a nation's action, and the ability to utilize force.<sup>102</sup> The enforcement authority of the United Nations exemplifies international cooperation built on compromises of each member's national sovereignty. National sovereignty is a carefully guarded possession, and not one that is given up or compromised easily. Therefore, it is of little surprise that while the IWC was established at roughly the same time as the United Nations, it was not provided with any mechanism to enforce its policies. This failure to provide implementation authority to the only international body empowered to act continues to be the critical limitation of the IWC.

*B. Concern for the Environment Becomes a Driving Force in International Law*

The 1960's have often been described as a period of revolution, turmoil, and philosophical development.<sup>103</sup> Both international and environmental law evolved tremendously during this decade.<sup>104</sup> Rachel Carson<sup>105</sup> made an entire generation aware of the potential effects of continued exploitation of the natural resource base, with particular emphasis placed on the effect poisoning environmental pollutants would have. The response to this work and the growing influence of the environmental movement in the United States led to the first sweeping piece of domestic legislation protecting the environment.<sup>106</sup>

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<sup>101</sup> FRANK & BROWNSTONE, *supra* note 94, at 317.

<sup>102</sup> The ability to use force to apply a UN policy, as in the Korean conflict, is rarely used. Instead, the U.N. is much more likely to use the doctrine of humanitarian aid, where forces will be sent in to a trouble area for humanitarian reasons. FRANK & BROWNSTONE, *supra* note 94, at 317.

<sup>103</sup> See generally Weiss, *supra* note 95.

<sup>104</sup> ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW at xiii-xxv (1991). From 1902 until 1905, 29 treaties of major international significance were passed on international environmental issues. *Id.* From 1960-1969, 25 treaties were passed, almost doubling the body of international environmental law. *Id.*

<sup>105</sup> RACHAEL CARSON, SILENT SPRING (1963).

<sup>106</sup> The National Environmental Policy Act, 42 U.S.C.A. § 4321 (1988), was representative of other domestic policies in individual nation states. See generally Weiss, *supra* note 95.

The 1970's saw a vast proliferation of environmental legislation, on both a domestic and international level. More environmental legislation was passed during the 1970's than had collectively been passed before.<sup>107</sup> In 1972, the United Nations passed the Stockholm Declaration on the Human Environment, a sweeping piece of legislation.<sup>108</sup> The Stockholm Declaration set forth dozens of fundamental statements discussing man, the environment, and the ideal interaction between the two.<sup>109</sup> The Stockholm Declaration specifically addressed the need to ensure the preservation of whales. The United Nations Convention on the Environment specifically stated that "governments agree to strengthen the International Whaling Commission . . . [and called for] a ten year moratorium on commercial whaling" which would provide the IWC with the ability to regroup, evaluate its performance and anticipate its future.<sup>110</sup> While this proposal was never adopted by the IWC, it did draw international attention to the IWC and the increasing depleted whale

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<sup>107</sup> KISS & SHELTON, *supra* note 105, at 205-08.

<sup>108</sup> Stockholm Declaration on the Human Environment, U.N. Doc. A/CONF. 49/14/Rev.1, reprinted in 11 I.L.M. 1416 (1972) [hereinafter Stockholm Declaration]. The United Nations Stockholm Conference included not only representatives from the individual nations, but an additional 700 non-governmental observers as well as 1500 journalists. The Declaration proclaimed that "both aspects of man's environment, natural and man made, are essential to his well being and to enjoyment of basic human rights- the right to life itself" and "the protection and improvement of the human environment is a major issue which affects the well being of peoples and economic development throughout the world" and labeled as a basic goal "to defend and improve the human environment for the present and future generations." *Id.* section I, art[s]. 1, 2 and 6 respectively.

<sup>109</sup> Stockholm Declaration, *supra* note 109. While this convention was of international importance, it too contained a recognition of the conflict between issues of state sovereignty and the need for global cooperation. Principle 21 proclaims:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies and the obligation to ensure that the activities within their jurisdiction do not cause damage to the environment of other States. Stockholm Declaration, *supra* note 109, at sec. I, art. 6, prin. 21.

Specifically, pertaining to whaling, the United Nations Conference on the Human Environment called for international cooperation in supporting and strengthening the IWC. See generally James Michael Zimmerman, *Baldrige Murazumi Agreement: The Supreme Court Gives Credence To An Aberration in American Cetacean Society III*, 14 B.C. ENVTL. AFF. L. REV. 257 (1987).

<sup>110</sup> Valaria Neale Spencer, *Domestic Enforcement of International Law: The International Convention for the Regulation of Whaling*, 2 COLO. J. INT'L. ENVTL L. & POL'Y 109, 113 (1991).

stocks.<sup>111</sup> The IWC eventually began to limit the quotas of those whales in greatest danger of extinction. Additionally, the Stockholm Declaration established precedent in the arena of international cooperation on the environment. As a result, the IWC passed a series of significant treaties and conventions which were increasingly protective of the international environment.

The single most significant recent treaty is the 1992 Rio Conference on the Environment and Development.<sup>112</sup> This international meeting was of tremendous significance because it placed the preservation of environment at the forefront of the international community's agenda. This conference included representatives from one hundred and seventy-five countries, and one hundred heads of state.<sup>113</sup> The conference was noteworthy because the developing nations advanced a plan including the doctrine of sustainable development. Sustainable development is the theory that a given generation can use natural resources available to it provided that the resources can recover from that use.<sup>114</sup> Sustainable development is a policy that allows any nation to elect the level of development acceptable to them and future generations.<sup>115</sup> This policy is based on the desire to achieve "optimal sustainable yield, allowing for the continued exploitation of a renewable natural resource . . . in a framework of perpetual renewal."<sup>116</sup> Additionally, the size and composition of the Earth Summit essentially represented a shift in the balance of power in international environmental circles. The lesser developed nations were vocal in their opposition to the traditional superpowers presiding over the convention, and were vocal in asserting their rights to control their own environmental futures.<sup>117</sup>

## V. THE GOVERNING INTERNATIONAL ORGANIZATION

The international focus on whaling exemplifies one of the first unified efforts to regulate damage to the environment. The

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<sup>111</sup> *Id.* at 113.

<sup>112</sup> U.N. Conference on Environment and Development, 31 I.L.M. 814 (1992).

<sup>113</sup> FRANK & BROWNSTONE, *supra* note 93, at 315-16.

<sup>114</sup> Vidal, *Weeping and Whaling*, THE GUARDIAN, May 7, 1993.

<sup>115</sup> *Id.*

<sup>116</sup> KISS & SHELTON, *supra* note 105, at 146.

<sup>117</sup> See generally Vidal, *supra* note 115.

International Convention for the Regulation of Whaling proposed several restrictions on whaling, but ultimately several participants refused to be restricted by the accord.<sup>118</sup> The whaling nations entered into a voluntary agreement in 1931 known as the Convention for the Regulation of Whaling.<sup>119</sup> This convention had minimal effect in that the member nations agreed to cease hunting the severely depleted Right Whales or lactating or undersized whales.<sup>120</sup> While the 1931 convention was limited in its effectiveness, it did serve as a precedent and foundation for the ICRW.<sup>121</sup>

A. *Establishment of the International Whaling Commission*

In 1946, the International Convention for the Regulation of Whaling<sup>122</sup> created the IWC as a voluntary agreement among the whaling nations. The IWC was established to serve as the governing body regarding whaling, and to implement its economic and environmental goals.<sup>123</sup> The convention recognized "the interests of nations of the world in safeguarding for future generations the great natural resources represented by whale stocks."<sup>124</sup>

The whaling nations created the IWC to address the universal need to conserve whale stocks<sup>125</sup> on an international ba-

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<sup>118</sup> See generally Blatt, *supra* note 1.

<sup>119</sup> Convention for the Regulation of Whaling, Sept. 24, 1931, 155 U.N.T.S. 349, 1935 L.N.T.S. 351 [hereinafter CRW].

<sup>120</sup> *Id.* at art. IV (a), (b).

<sup>121</sup> KISS & SHELTON, *supra* note 105, at 284.

<sup>122</sup> IWC, *supra* note 1.

<sup>123</sup> KISS & SHELTON, *supra* note 105, at 285. The whaling nations set forth in the ICRW that this was a voluntary affiliation among nations engaged in whaling, operating under the recognition that the whale stocks of the world were so depleted that they required immediate conservation. The convention specifically recognized "the interests of the nations of the whole world in safeguarding for future generations the great natural resource represented by whale stocks." IWC, *supra* note 1, preamble.

<sup>124</sup> Blatt, *supra* note 1, at 1287.

<sup>125</sup> ICRW *supra* note 1, articles III and IV sections a and b state:

The Contracting Governments Agree to establish an Whaling Commission, to be composed of one member from each contracting government. Each member shall have one vote and may be accompanied by one or more experts and advisors. Additionally the whaling commission was empowered to encourage, recommend or if necessary to organize studies related to whales and whaling . . . [and] collect and analyze statistical information concerning the current condition and trend of the whale stocks and the effects of whaling activities.

sis. The whaling nations exploited the whales to the point that entire species were on the brink of extinction, and others species so severely depleted that their recovery remains uncertain.<sup>126</sup> The IWC represents a united international conservation effort by both the victors and the vanquished nations of World War II. At that time, little was known about whales, other than their value as a natural resource.<sup>127</sup> Yet, the commercial whaling nations had the foresight to realize, that without global conservation of the whales, they would soon be extinct.<sup>128</sup> Thus, conservation of the whale commenced on a global basis. While the field of international environmental law grew throughout the twentieth century, the IWC represented one of the first significant international cooperative conservation efforts.

## B. *IWC Milestones*

There have been two major phases in the history of the IWC since its inception. The first significant period in IWC administration is from its foundation until a 1981 decision to implement a moratorium on whaling. During this time, the IWC functioned as a supervisory agency overseeing the equitable distribution of the whale stocks.<sup>129</sup> The second significant period in IWC history includes the 1982 moratorium on all commercial whaling.<sup>130</sup> This period actually represents the transformation of the IWC into an environmentally conscious organization.

### 1. *The IWC: The Quota Years*

The foundation of the IWC is important to emphasize because it represented a cooperative effort by the signatory nations to agree to the quotas set by the IWC. The IWC established quotas in an effort to allow individual whale stocks time to replenish.<sup>131</sup> Based on recommendations from its scien-

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ICRW *supra* note 1, articles III and IV sections a and b.

<sup>126</sup> See *supra* note 89.

<sup>127</sup> D'Amato & Chopra, *supra* note 33, at 33-34.

<sup>128</sup> See *supra* note 126.

<sup>129</sup> Birnie, *supra* note 3, at 909.

<sup>130</sup> Stein, *supra* note 72, at 167.

<sup>131</sup> KISS & SHELTON, *supra* note 106, at 284. This is a basic power granted to the IWC in its inception and has not been contested by member nations. See *generally supra* note 1.

tific committee, the IWC issued quotas at the annual meetings of the IWC.<sup>132</sup> The IWC was also empowered to study and investigate information relating to the amount of current whale stocks, and based on those findings, establish schedules designating acceptable numbers of individual species of whales to be hunted.<sup>133</sup> The IWC meetings were basically uneventful and comprise a relatively inactive period in IWC history.<sup>134</sup> Member nations would advocate for increases in individual allocations in whales stocks.<sup>135</sup> Other nations which had been major whaling forces, such as the United States, became non-whaling nations.<sup>136</sup>

Some of the new non whaling nations began to advocate greater restrictions on whaling, advancing scientific data showing that whales had much greater intellectual capacity than previously suspected. During this time, the scientific community was extensively studying whale populations, transforming a lethargic world into willing participants in the enormous "save the whales"<sup>137</sup> movement. The non whaling nations called on the IWC to reform its policies so that the growing body of scientific knowledge regarding whales would be incorporated. The nations which continued to whale were quickly becoming outraged, leading to the inevitable conflict that would follow the IWC's response to the anti-whaling nations.

## 2. *The Moratorium*

In 1981, the IWC approved a zero quota on all whale species. This decision caused considerable dissent among IWC members.<sup>138</sup> The ban on commercial whaling was to take effect

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<sup>132</sup> Birnie, *supra* note 3, at 910.

<sup>133</sup> Blatt, *supra* note 1, at 1289.

<sup>134</sup> See generally Birnie, *supra* note 3.

<sup>135</sup> See generally Birnie, *supra* note 3.

<sup>136</sup> See generally Birnie *supra* note 3.

<sup>137</sup> For a synopsis of some of the most successful campaigns, see *supra* note 18.

<sup>138</sup> The zero quota in 1986 was on commercial whaling, with few exceptions for scientific reasons. Robert Whyman, *Slaughter in the Name of Science*, THE DAILY TELEGRAPH, Nov. 28, 1988, at 21. As stated, several nations filed immediate objections, making the moratorium inapplicable to them. One tactic employed by the IWC to bring offending nations into compliance was to allocate quotas of whales to individual nations, thus making limited whaling acceptable to the IWC. *Id.* However, at the June 1995 meeting, the IWC halted this informal policy of using scientific whaling allocations as bargaining chips to appease the whaling nations. In



in 1986, and was faced by immediate objections filed by member nations, Japan, Norway and the USSR.<sup>139</sup> The IWC has little recourse to a member nation filing an objection to any of its policies.<sup>140</sup> The IWC is a voluntary union of nation states which contracted to interact on whaling via the IWC. When a nation joins an international agency and agrees to abide by its policies, individual national sovereignty is compromised. When the IWC was founded, the member states provided that a member nation is required only to file a timely objection and cannot be held to the disputed policy.<sup>141</sup>

The controversial ban on whaling went into effect along with a series of compromise clauses in 1986. The compromise clauses can be placed into two broad categories: whaling for subsistence reasons and whaling for scientific reasons. Subsistence whaling refers to whaling done by traditional societies which hunt whales as part of a long standing cultural norm.<sup>142</sup> The comprehensive use of the whale by aboriginal tribes is typical of subsistence whaling.<sup>143</sup> This is atypical for all other whaling nations. The vast majority of a whale is normally discarded,

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the June 1995 meeting, the IWC voted to ban all scientific whaling in the Antarctic sanctuary and to ban all lethal forms of scientific whaling. *See supra* note 29.

<sup>139</sup> *See generally* Stein, *supra* note 72.

<sup>140</sup> Birnie, *supra* note 3, at 927-28.

<sup>141</sup> This extremely controversial "opt out" clause, as set forth in Article 5 of the ICRW, *supra* note 1, is one of the critical weakness in the IWC. For a full exploration of how this clause alone makes enforcement a virtual impossibility, *see generally* Birnie, *supra* note 3.

<sup>142</sup> Ken Murphy, *Makah Tribe Seeks to Take to the Seas on the Trail of the Whales*, LOS ANGELES TIMES, Aug. 2, 1995, at A5.

<sup>143</sup> *Id.* The Inupiat people, native American Eskimos, indigenous to Alaska, continue to hunt endangered whales as it is considered to be an essential part of their survival. Emory Kristof & Lael Morgan, *The Last U.S. Whale Hunters*, 143 NAT'L GEOGRAPHIC 346 (1973). The Inupiat utilize every part of the whale to meet specific needs; all the whale meat is either eaten immediately, or frozen for later use, the blubber is used for fuel, the skin for bait in traps. *Id.* The issue of the right of subsistence level societies to pursue traditional whaling has once again been raised to the IWC when the Makah tribe announced plans for the resumption of whaling. Murphy, *supra* note 143. The Makah is the only Native American tribe which reserved the right to whale in its treaty with the United States. Murphy, *supra* note 143. This is particularly complicated because the Makah has agreed to act in compliance with the IWC, yet the Makah have placed the United States, a leading anti-whaling nation, in the position in which it must request a whaling quota from the IWC. Murphy, *supra* note 143. This weakens the United States' position as a leader among the anti whaling nations and inadvertently strengthens the position of the whaling nations. Murphy, *supra* note 143.

even today.<sup>144</sup> The major use of the whale is as a source of meat.<sup>145</sup> Advancements in technology have rendered the items once prized in the whale of little practical use today.<sup>146</sup> For example, blubber was an essential ingredient in many perfumes, but can now be replaced with synthetics. With the invention of kerosene, the whale is no longer coveted for oil as it had been during the whaling heyday in the nineteenth century.<sup>147</sup>

Scientific whaling quotas distributed by the IWC represent compromise with the whaling nations. In an effort to appease member nations that continued to whale, the IWC allocated each of these nations a certain number of scientific catches. In theory, these nations were to catch and study the whales regarding gender, breeding and feeding patterns.<sup>148</sup> There are no restrictions on the use of by-products of the scientific whaling.<sup>149</sup> Thus, the general consensus of the non-whaling nations and environmentalists is that scientific whaling is little more than slaughter thinly veiled as science.<sup>150</sup> The IWC responded to extensive, continued Japanese whaling, categorized by Japan as scientific whaling in a two fold attack. At the June 1995 meeting, the IWC voted to ban all scientific whaling within the parameters of the Antarctic sanctuary. At the same meeting the IWC moved to recommend the suspension of all lethal forms of whale research.<sup>151</sup>

### 3. *The Pro-Whaling Nations*

The International ban on whaling generated a series of complex responses. The reactions of the most vocal proponents

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<sup>144</sup> Kristof and Morgan, *supra* note 144, at 348.

<sup>145</sup> Kristof and Morgan, *supra* note 144, at 348.

<sup>146</sup> D'Amato & Chopra, *supra* note 33, at 29.

<sup>147</sup> D'Amato & Chopra, *supra* note 33, at 29.

<sup>148</sup> D'Amato & Chopra, *supra* note 33, at 54-60.

<sup>149</sup> The Convention on International Trade in Endangered Species of Fauna and Flora, Mar. 6, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243, [hereinafter CITES]. There are no specific regulations set on what may be done with the whales after the studies for scientific reasons are completed, set down by the IWC. However, the CITES convention completely regulates trade in endangered species, once a species has been listed as endangered. *Id.* CITES regulates the trade of any by-products extracted from wildlife listed as endangered. *Id.* The Minke whale remains on CITES' list of endangered species, thus prohibiting the sale of whale meat on an international basis. *Id.* app. at sched. 3.

<sup>150</sup> See generally D'Amato & Chopra, *supra* note 33.

<sup>151</sup> See *supra* note 139.

of whaling repeatedly challenged the viability of the IWC. Among the larger whaling nations, Norway and the Soviet Union voted against the moratorium, while Japan abstained.<sup>152</sup> Japan, the Soviet Union and Iceland immediately filed formal objections with the IWC regarding the whaling moratorium.<sup>153</sup> Additionally, Japan issued a statement that it planned to continue its commercial whaling despite the global moratorium.<sup>154</sup> Japan advanced the position that the IWC was established to create quotas on whaling, not an indefinite moratorium.<sup>155</sup> Japan openly continued to whale commercially and had no intention to come into compliance until the United States threatened economic sanctions.<sup>156</sup>

#### a. Norway

Norway's decision to resume limited commercial whaling directly challenged the IWC's ban on whaling.<sup>157</sup> Norway had filed an objection to the IWC moratorium and continued to whale, keeping within the quotas set forth by the IWC.<sup>158</sup> As recently as this past summer whaling season, Norwegian whalers set out to hunt the Minke whale commercially.<sup>159</sup> There is a

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<sup>152</sup> See D'Amato & Chopra, *supra* note 33, at 39-48.

<sup>153</sup> D'Amato & Chopra, *supra* note 33, at 46-48.

<sup>154</sup> D'Amato & Chopra, *supra* note 33, at 46-48.

<sup>155</sup> Darby, *supra* note 68, at 21.

<sup>156</sup> Darby, *supra* note 68, at 21.

<sup>157</sup> Martha Howton, *International Regulation of Commercial Whaling: The Consequences of Norway's Decision to Hunt the Minke Whale*, 18 HASTINGS INT'L & COMP. L. REV. 175 (1994).

<sup>158</sup> Julian Isherwood, *Oslo Ignores Threats and Returns to Whale Hunt*, THE DAILY TELEGRAPH, May 19, 1993, at 21.

<sup>159</sup> Ray Moseley, *Defying Global Ban, Norway Still Hunts Whales*, CHICAGO TRIBUNE, Feb. 22, 1994. In fact, continued Norwegian and Japanese whaling has proven so difficult to stop that the militant environmentalist group, Sea Shepherd Conservation Society, has escalated its tactics to halt whaling. Greg Neale, *War Against Whaling Goes Underwater, Hunt Saboteurs use Mini-submarine*, THE SUNDAY TELEGRAPH, June 26, 1994, at 13. Previously, members of Sea Shepherd would attempt to stop whaling ships from leaving for sea by sinking the vessels. *Id.* Currently, Sea Shepherd has obtained a miniature submarine and has threatened to use further violence to stop Japanese and Norwegian whaling. *Id.* The Sea Shepherd group is considered a radical environmental group that does not receive support from mainstream environmental groups, such as Greenpeace, which was the group from which Sea Shepherd broke away. *Id.* Indications are that other more radical environmental organizations are rising into the international limelight fighting on behalf of the whales. Paul Brown, *Norway: Whales Protest Chains*, THE GUARDIAN, July 1, 1995, at 10.

dispute as to the exact number of Minke whales in existence today, conservative estimates place the number of Minke whales at 600,000.<sup>160</sup> In 1992, Norway announced the number of Minke whales, particularly those indigenous to the waters off of Norway, was sufficient to withstand limited commercial whaling.<sup>161</sup> As a result, the Norwegian government allocated a quota of an additional 160 Minke whales to be hunted. This was in addition to the IWC's allocation of 136 Minke, for scientific purposes.<sup>162</sup> Norway's argument was that the Minke whale was capable of surviving limited harvesting without detriment to the herd as a whole. Norway calculated that an expanded quota would not have an adverse effect on the Minke whale population because it would be able to reproduce at least that number of whales by the next hunting season.<sup>163</sup> Norway advanced its position as the embodiment of the theory of sustainable development, and argued it to be an inherent national right.<sup>164</sup>

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<sup>160</sup> The pro-whaling forces have asserted that there are as many as a million Minke whales globally and over 90,000 off of the Norwegian coast. See Isherwood, *supra* note 159, at 22. The anti-whaling forces argue that the numbers are as low as half the numbers advanced by the whaling nations, and cite difficulties in accurately accounting for all the whales, given their migrational patterns and tendency to remain submerged at length. Graham Barret, *Norway Fights to Preserve a Way of Life*, THE AGE, May 25, 1993, at 31. The available objective data, calculated by the IWC's Science Committee, places the number of Minke whales at approximately 850,000 globally. The largest single population is located in the waters around the Antarctic, numbering 760,000. Isherwood, *supra* note 159, at 22.

<sup>161</sup> The pro-whaling forces estimate that the Minke whale population off of Norway is sustaining growth at 2% annually. Vidal, *supra* note 115, at 18. The number of whales Norway hunted constituted .02% of the North Atlantic Minke population. Vidal, *supra* note 115, at 18. Norway basis its position on these numbers, asserting that the North Atlantic herd will be able to withstand this type of limited hunting. Vidal, *supra* note 115, at 18. The anti-whaling nations figures sharply differ and maintain that the number of whales in the North Atlantic can not be accurately calculated. Vidal, *supra* note 115, at 18. The IWC addressed this discrepancy at the June 1995 meeting of the IWC, when the IWC held that the methods of calculation were inaccurate and therefore, not able to be considered as part of an argument advancing sustainable development. See generally Howton, *supra* note 158.

<sup>162</sup> Isherwood, *supra* note 159, at 21.

<sup>163</sup> Isherwood, *supra* note 159, at 21.

<sup>164</sup> Henshu Techo, *Jottings*, THE DAILY YOMIURI, June 1, 1994.

The Norwegian government has long been internationally acknowledged for its sterling environmental policies.<sup>165</sup> Norway whaled commercially in each year since 1993 and has not indicated any intention of ceasing this activity. This is a flagrant challenge to the IWC because the decision to whale commercially is diametrically opposed to current IWC policy. Norway has also threatened to withdraw from the IWC on several occasions since the 1982.<sup>166</sup>

Norway is not alone in its defiance. Iceland has withdrawn from the IWC in complete frustration regarding the IWC's present anti-whaling stance.<sup>167</sup> The U.S.S.R. objected to the ban and continued to whale commercially, never complying with IWC reporting protocol.<sup>168</sup> The Japanese consider the IWC as an intergovernmental agency created to establish quotas on commercial whaling nations and to conserve the whale stocks as necessary.<sup>169</sup> Japan advanced the same argument that Norway did in 1992, stating that the specific species of whales it intends to continue to harvest has recovered sufficiently and could sustain limited commercial hunting.<sup>170</sup> Japan has not specifically stipulated what it would consider to be limited harvesting. The argument that once a species has reached a sufficient number to withstand limited hunting is difficult to argue against on an empirical level. The Minke whale in particular

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<sup>165</sup> In fact, Norwegian Prime Minister Gro Harlem Brundtland had long held a reputation as a pioneer in the environmental arena. Vidal, *supra* note 115, at 19. Her work included a leadership role at the 1992 Earth Summit, pioneering the principal of sustainable development. Vidal, *supra* note 115, at 19. Additionally, Prime Minister Brundtland had campaigned for the international moratorium on whaling in the early 1980's. See Vidal, *supra* note 115, at 19.

<sup>166</sup> While Norway had initially supported the global moratorium on whaling, but filed an official objection when the IWC rejected a Japanese plan which would include revised management schedules, leading to the resumption of whaling. Vidal *supra*, note 115, at 18. Norway remains an active participant in the IWC to date. See note 28 *supra*.

<sup>167</sup> Gudmundsson, *supra* note 28.

<sup>168</sup> Brown, *supra* note 27, at A18.

<sup>169</sup> Darby, *supra* note 68, at 22.

<sup>170</sup> There are at least 760,000 Minke whales that inhabit the waters around the Antarctic, which is where the Japanese hunt whales, Norway opted to hunt an additional 160 Minke whales, bringing the total to approximately 300 out of at least 60,000 North Atlantic Minke whales. By extrapolation, the Japanese could argue, under the doctrine of sustainable development, the right to hunt a number of whales, provided that number remains lower than the growth rate of the herd. See *supra* notes 166-70 and accompanying text.

appears to now have reached the point at which it could survive very regulated whaling.<sup>171</sup> Norway's harvesting proposal appears to be an application of the doctrine of sustainable development, as advanced at the Earth Summit.<sup>172</sup> However, if one accepts the argument that whales are sentient creatures, capable of higher thought and feeling, then the argument that whales are entitled to standing and a right to life becomes increasingly compelling.

b. Japan

In addition to Norwegian opposition to the whaling moratorium, Japan became extremely vocal in its opposition to IWC policy. Japan immediately objected to the ban on whaling and continued to whale commercially. Japan based its refusal to halt whaling on a history of coastal whaling.<sup>173</sup> The Japanese do not accept the vast amount of scientific research on the sentient nature of whales, and instead, consider whales a vital food source.<sup>174</sup> The Japanese resent the imposition of western values on their culture, particularly in regard to whaling.<sup>175</sup> Japan claims to have a whaling history that dates back over one thousand years.<sup>176</sup> Japan is currently the most vocal proponent for the continuation of whaling and the single largest consumer of whale meat.<sup>177</sup> While several thousand tons of whale are consumed annually, in various stages of preparation,<sup>178</sup> whale cannot be considered a staple in the Japanese diet.<sup>179</sup> The Jap-

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<sup>171</sup> The Minke whale is the most plentiful whale of its size. See Hawes, *supra* note 55, at n. 98 (citing WHALE POPULATION ASSESSMENTS (IWC, Cambridge, U.K.) (1992)).

<sup>172</sup> Techo, *supra* note 165, at 3.

<sup>173</sup> Pearce, *supra* note 65.

<sup>174</sup> The Japanese contend they have consumed whale for thousands of years. Whaling was particularly useful due to the prohibition against consuming four legged animals from the 7th to the 19th century. Osamu Nakashima, *Why the West Should Let Japanese Eat Whale*, THE CHRISTIAN SCI. MONITOR, April 26, 1983, at 23.

<sup>175</sup> *Id.* at 24.

<sup>176</sup> Pearce, *supra* note 69.

<sup>177</sup> Hugo Kelly, *One Man's Meat, Another's Murder*, THE AGE, Feb. 26, 1994.

<sup>178</sup> Nakashimi, *supra* note 175, at 23.

<sup>179</sup> Whale is not considered to be an essential part of the Japanese diet, rather it has become a delicacy that is infrequently found and expensive. Whyment, *supra* note 139, at 21. Even the whaling lobby concede that whale is no longer a staple in the Japanese diet. Whyment, *supra* note 139, at 21.

anese whaling industry employs some 1,300 people annually.<sup>180</sup> The significance of whaling to Japan embodies a much greater issue than simply the desire to continue the consumption of a minor part of the Japanese diet. Whaling to Japan is of critical importance because it is exemplary of many of the Japanese international policies. Japan exists as an island nation with a tremendous lack of natural resources.<sup>181</sup> In order to supply its thriving economy, Japan must turn externally for resources.<sup>182</sup> As stipulated, the Japanese economy has a tremendous influence on Japanese policy.<sup>183</sup> Japan has been one of the two dominant economic superpowers over the past fifteen years.<sup>184</sup> Yet, all that Japan has accomplished has been achieved with a limited natural resource base.<sup>185</sup> Japanese international policy has often been imperialistic, in an effort to obtain needed resources.<sup>186</sup> In the modern world, with neo-colonization often rejected by the international community, Japanese policy has come under incredible scrutiny.<sup>187</sup> Whaling is of tremendous importance to Japan, to the extent that Japan is willing to risk international scrutiny. For Japan, maintaining the right to extract resources from other nations or the global commons is crucial. For Japan to concede on the whaling issue would be to compromise one of its major natural resource bases, the right to explore and exploit the seas.<sup>188</sup>

It is noteworthy that Japan has an exceptionally poor international environmental record.<sup>189</sup> Japan has a long and well documented history of violating international environmental law.<sup>190</sup> To date, Japan does not use "dolphin safe" netting in

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<sup>180</sup> The whaling industry is not as prevalent as it was, currently processing 20,000 tons annually, one tenth the size it was at its peak in 1962. *See generally*, Pearce *supra* note 65.

<sup>181</sup> Suvendrini Kakuchi, *Japan-Trade: Keeping an Eye on Resource Rich Central Asia*, INTER PRESS SERVICES, Oct. 10, 1994, at 12.

<sup>182</sup> *Id.*

<sup>183</sup> Pehr Gyllenhammar, *The Global Economy: Who Will Lead Next?* 175 J. ACCT. 61, Jan. 1993, at 63.

<sup>184</sup> *Id.*

<sup>185</sup> *See generally* Zimmerman, *supra* note 110.

<sup>186</sup> *See generally* Zimmerman, *supra* note 110.

<sup>187</sup> *See generally* Zimmerman, *supra* note 110.

<sup>188</sup> Nathaniel C. Nash, *Vast Area of Rain Forest are Being Destroyed in Chile*, THE N.Y. TIMES, May 31, 1994, at C3.

<sup>189</sup> *See generally* Zimmerman, *supra* note 110.

<sup>190</sup> *See generally* Zimmerman, *supra* note 110.

fishing for tuna.<sup>191</sup> Instead, it uses drift nets, which are notorious for killing marine mammals. Further, Japan continues to whale in excess of its scientific quotas allocated.<sup>192</sup> Another example of Japan's poor international environmental record is seen in its continued importation of ivory.<sup>193</sup> Japan is also one of the world's largest importers of natural resources, such as wood, often severely depleting the resource nation.<sup>194</sup> Japan's position on whaling is typical of its international environmental policy. Japan has long needed to turn externally to fuel its rapid economic growth due to its compromised natural resource base. As long as Japan continues to function as an isolated superpower, amendments to its international environmental policy cannot reasonably be anticipated. Thus, Japan continues to aggressively pursue environmentally unfriendly policies, and continues whaling to date.

#### 4. The Anti-Whaling Forces

The whaling nations face considerable criticism and pressure by both the international environmental organizations and several former whaling nations to alter their policies. The United States has elevated itself into the forefront of the whaling controversy, by passing a series of domestic policies which were designed to bring the whaling nations into compliance with the IWC.<sup>195</sup> United States' policy was greatly influenced by increased awareness of the potential capacity of whales, which was bolstered by the international environmental agencies.<sup>196</sup>

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<sup>191</sup> Amanda Brown, *Report Warns of "Wall of Death" Fishing Nets Threat*, PRESS ASS'N NEWSFILE, May 28, 1991, available in LEXIS, News Library, ARCNWS File.

<sup>192</sup> See generally Zimmerman, *supra* note 110.

<sup>193</sup> See generally Zimmerman, *supra* note 110. Ivory is obtained from elephant tusks, elephants are increasingly rare and are listed as endangered species according to CITES. KISS & SHELTON, *supra* note 105, at 262.

<sup>194</sup> RESS W. GORTE, *Alternate Sources of Wood for Japan*, CONGRESSIONAL RESEARCH REPORT, Nov. 1994, available in LEXIS, News Library, CURNWS File.

<sup>195</sup> Spencer, *supra* note, at 115.

<sup>196</sup> See *supra*, notes 55-58 and accompanying text.



a. The United States

The United States, once a leading whaling force,<sup>197</sup> transformed itself into a nation committed to the preservation of whales.<sup>198</sup> The United States Congress responded to the growing pro-whaling sentiment, on both a domestic and international front, by passing a series of legislation. The three most significant pieces of legislation regarding the United States' position on whaling are: The Marine Mammal Protection Act,<sup>199</sup> The Packwood Magnuson Amendment to the Magnuson Fishery Conservation and Management Act<sup>200</sup> and The Pelly Amendment to the Fishermen's Protective Act.<sup>201</sup> The United States enacted the 1971 Pelly Amendment and the 1979 Packwood Amendment to promote the policies of the IWC.<sup>202</sup> These amendments empowered the Secretary of Commerce to certify that an offending nation was acting in a manner that would "diminish the effectiveness" of IWC policy.<sup>203</sup> At that point, the President would decide whether to recommend sanctions against the offending nation.<sup>204</sup> Once sanctions were recommended, the offending nation would no longer be able to fish within United States territorial waters, nor would it be allowed to export fish products to the United States.<sup>205</sup> In response to the Japanese defiance of the IWC's moratorium on whaling, the Secretary of Commerce certified that Japan was acting in a manner that was undermining the effectiveness of the IWC.<sup>206</sup> The United States assumes its role as an environmental leader, and would eventually bring the objecting nations into some

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<sup>197</sup> See generally Blatt, *supra* note 1.

<sup>198</sup> Blatt, *supra* note 1, at 1292.

<sup>199</sup> Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, at 107, 86 Stat. 1027 (1977), [hereinafter MMPA]. The MMPA was passed to address the massive slaughter of dolphins and porpoises by the tuna industry. Zimmerman, *supra* note 110, at 298.

<sup>200</sup> 16 U.S.C. § 1821 (1993) [hereinafter The Packwood Amendment]. The Packwood Amendment was passed to give the United States the authority to revoke fishing privileges of any nation which diminished the effectiveness of the IWC. Blatt, *supra* note 1, at 1304.

<sup>201</sup> 16 U.S.C. § 1371 (1990) [hereinafter The Pelly Amendment].

<sup>202</sup> Spencer, *supra* note 111, at 116.

<sup>203</sup> Spencer, *supra* note 111, at 116.

<sup>204</sup> Spencer, *supra* note 111, at 118.

<sup>205</sup> Blatt, *supra* note 1, at 1295.

<sup>206</sup> Stein, *supra* note 72, at 189.

semblance of compliance.<sup>207</sup> In the case of Japan, the Japanese ultimately withdrew their objection to the moratorium rather than to face sanctions under the Pelly and Packwood Amendments. The Pelly and Packwood Amendments have been used to certify that nations were violating IWC policy, but to date sanctions have never been imposed.<sup>208</sup>

In *Japan Whaling Association v. American Cetacean Society*,<sup>209</sup> the Supreme Court held that the decision to implement sanctions was wholly voluntary and not incumbent on the executive branch.<sup>210</sup> This decision provided the executive branch with time to negotiate with Japan. The trading relationship between Japan and the United States was an essential part of the economies of both nations.<sup>211</sup> The Reagan administration was reluctant to offend such a major trading partner. Instead, a series of secret negotiations were held between Japanese and United States officials. Japan agreed to comply with the moratorium, after a series of secret negotiations.<sup>212</sup> Thus, Japan was able to avert trade sanctions that would have caused hundreds of millions of dollars in damages to Japan.<sup>213</sup> The United States is currently the leading anti-whaling nation member in the IWC, and it is probably the only viable economic entity that can challenge Japan.<sup>214</sup> The United States has a strong anti-whaling policy, as seen by the existence of the MAP and the Pelly and Packwood Amendments. The United States policy has the potential to bring violating nations into compliance with the IWC.

#### b. The Environmental Organizations

When the IWC first announced the international ban on commercial whaling, the environmentally aware NGO's were optimistic and supportive. However, this jubilation rapidly

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<sup>207</sup> Stein, *supra* note 72, at 189.

<sup>208</sup> Stein, *supra* note 72, at 189.

<sup>209</sup> *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986). This case contains a complete analysis of the Pelly Amendment and the decision to certify a nation which acts in a manner that diminishes the effectiveness of the IWC.

<sup>210</sup> *Id.*

<sup>211</sup> See generally Gyllenhammer, *supra* note 184.

<sup>212</sup> Zimmerman, *supra* note 110, at 263.

<sup>213</sup> See Zimmerman, *supra* note 110, at 263.

<sup>214</sup> See generally Gyllenhammer, *supra* note 184.

turned to despair when Japan, Norway, Iceland and Peru raised objections. The United States was able to force Peru and Iceland into compliance.<sup>215</sup> Norway was stronger in its defiance to the IWC policy and the United States' attempts to enforce it. Norway's strong international environmental record made it much more difficult for the anti-whaling forces to rally international condemnation of Norwegian commercial whaling.<sup>216</sup> Norway maintained that their limited Minke whales was not in violation of international law, as it was in compliance with the theory of sustainable development.<sup>217</sup> Greenpeace led a worldwide campaign to impose sanctions against Norway, and was joined by a host of other international environmental organizations.<sup>218</sup> In fact, non-governmental organizations,<sup>219</sup> such as Greenpeace, World Wildlife Fund, and the World Conservation Union, have vigorously condemned pro-whaling nations.<sup>220</sup> The Japanese policy has long been abhorred by the environmental movement.<sup>221</sup> The environmental NGO's were further supportive of United States attempts to bring Japan into compliance with international whaling policy throughout the late 1980's.<sup>222</sup> Additionally, when the United States and Japan reached a compromise agreement to phase out Japanese commercial whaling by 1988, the international environmental NGO's were quick to

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<sup>215</sup> Peru and Iceland were easier to bring into compliance with the IWC, though under protest, due to their weaker economic positions. Norway and Japan are less dependent on the United States for the success of their economies. See generally Gyllenhammer, *supra* note 184. Norway sought to avoid sanctions from the United States, by launching a multimedia campaign advancing their position and their environmental record in general. Yet, had sanctions been implemented, it is unclear whether that would have brought Norway into compliance with IWC policy. Even Iceland resisted demands from the United States of coming into compliance with the IWC, and as a result eventually withdrew from the IWC altogether. *Greenpeace Prawn Boycott Wins Support*, F.M.J. INTERNATIONAL PUBLICATIONS, July 3, 1993 at 3.

<sup>216</sup> See generally Vidal, *supra* note 115.

<sup>217</sup> Vidal, *supra* note 115, at 18.

<sup>218</sup> Vidal, *supra* note 115, at 18.

<sup>219</sup> There are dozens of international NGO's involved in the preservation of the environment. Greenpeace, the World Wildlife Fund, the World Conservation Union, and the American Cetacean Society have been among the most active involved with the anti-whaling campaign. Kiss & SHELTON, *supra* note 105, at 72-73.

<sup>220</sup> Hawes, *supra* note 55, at 111.

<sup>221</sup> Hawes, *supra* note 55, at 106.

<sup>222</sup> Hawes, *supra* note 55, at 106.

issue praise.<sup>223</sup> While voicing dissent at the Norwegian decision to resume limited commercial whaling, the international environmental NGO's launched an assault on Japanese whaling policies. The NGO's focused their energy against Japan due to their history of poor compliance with international environmental law and their insistence of continued whaling.<sup>224</sup>

## VI. ANALYSIS OF THE CURRENT CHALLENGES FACING THE IWC

The IWC saw a formally united membership divide into two diametrically opposed groups over the whaling controversy. Each side of the whaling controversy has become more entrenched in its position. The few remaining whaling nations base their position on their individual cultural whaling traditions and as a national right of sovereignty. The anti-whaling nations have forged an alliance with the international environmental agencies. The anti-whaling forces are equally committed to the preservation of the whale, empowered by increased scientific data pertaining to the capacity of whales. Thus, the IWC is faced with its greatest challenge to date.

### A. *The Sanctuary Proposal*

The IWC's decision to implement a whaling moratorium signaled the beginning of a major transformation in its internal policies. While the IWC was created by nations with the intent to regulate whaling, it is now advancing a policy which halts whaling for an extended period of time.<sup>225</sup> The IWC once again

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<sup>223</sup> Gyllenhammar, *supra* note 184, at 64.

<sup>224</sup> Gyllenhammar, *supra* note 184, at 64.

<sup>225</sup> As discussed above, in the first stage of IWC history, the IWC allocated quotas of whales to be caught, often exceeding what was physically possible to be caught. The IWC came under intense scrutiny during the early 1970's, as a result of the Stockholm Declaration. *See supra* notes 110-12. The next legal phase the IWC underwent was the 1982 decision to implement a global moratorium on whaling. During this phase the IWC allowed for continued limited aboriginal and scientific whaling. *See supra* notes 145-54.

While the whaling nations disagreed with the 1982 moratorium, it was only a temporary reaction, based on the need to give the whale stocks time to replenish. The sanctuary proposal is meant to be permanent, not to last less than 50 years and will protect the overwhelming majority of the whales, representing a tremendous philosophical transformation in IWC internal operations. Japan is particularly affected by the sanctuary proposal because it does the majority of its whaling in the Antarctic. Russia, Iceland and Norway whale primarily in Northern Atlantic or in their coastal waters. *See* Charles Webb, *Antarctica Project Reports Russia*

shifted its internal philosophy on May 26, 1994 when the it voted to establish a sanctuary for whales in the waters around Antarctica.<sup>226</sup> The whale sanctuary would incorporate 90% of the whale's feeding grounds, at least on a seasonal basis. Essentially, the whale sanctuary would ban all whaling, including scientific whaling, in any of the waters south of 40° latitude.<sup>227</sup> This would form a haven for whales in the waters around Antarctica.<sup>228</sup> Antarctica itself represents an area of tremendous international cooperation, as exemplified by the stringent requirements to access the Antarctic continent.<sup>229</sup> In theory, the whale sanctuary could be implemented as a viable international legal strategy, similar to the conservation effort to protect Antarctica.<sup>230</sup> By doing this, the IWC has essentially changed gears, transforming itself from a union of commercial whaling nations to an international watchdog group.

The sanctuary proposal<sup>231</sup> did not receive universal acceptance when proposed to the full membership of the IWC at the 1993 Kyoto meeting.<sup>232</sup> In fact, Japan simultaneously peti-

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*objects to Southern Ocean Whale Sanctuary*, U.S. NEWSWIRE, Sept. 14, 1994, available in LEXIS, News Library, Cur file.

<sup>226</sup> Brown, *supra* note 16, at 7.

<sup>227</sup> Brown, *supra* note 16, at 7.

<sup>228</sup> Brown, *supra* note 16, at 7. They would include the already existing sanctuaries around Mexico and in the Indian Ocean. MacConnel, *supra* note 2, at A1.

<sup>229</sup> For a discussion of the international environmental successes in the Antarctic, see Jennifer Angelini & Andrew Mansfield, *A Call for U.S. Ratification of the Protocol on Antarctic Environmental Protection*, 21 *ECOLOGY L.Q.* 163 (1994). The authors trace the evolution of international law in the Antarctic, including the most significant legal milestones and developments. *Id.*

The Convention on the Conservation of Antarctic Marine Living Resources, Mar. 20, 1980. 33 U.S.T. 3476, (hereinafter CCAMLR) contains many of the same principles as does the proposed Antarctic sanctuary agreement. The CCAMLR establishes precedent for the protection of all living marine resources at a level of reasonable use. *Id.* Therefore, the CCAMLR could only be used to effectuate an Antarctic whale sanctuary, provided a fifty year prohibition was considered to be rational. It is incumbent that the IWC establish the reasonableness of the sanctuary proposal, but the IWC is faced with the conflicting information provided by its own Scientific Committee. See generally Shimbuni, *supra* note 25.

<sup>230</sup> Angelini & Mansfield, *supra* note 230, at 187-89.

<sup>231</sup> The sanctuary proposal was advanced by the French representative to the IWC at the 1992 annual meeting. However, the plan was still unfinished and the IWC decided to continue discussion on this proposal until further study could be done on the topic. See Tatsuta, *supra* note 27.

<sup>232</sup> Nicholas Read, *Whale of a Decision is a Fluke, but Fleets are Harpooned*, THE VANCOUVER SUN, June 4, 1994, at A20.

tioned the IWC to categorize its depleted whaling industry as aboriginal, thus qualifying it as an exception to prohibitions on whaling.<sup>233</sup> The IWC was faced with two contradicting proposals, essentially splitting the convention. Japan made its request to be categorized as aboriginal,<sup>234</sup> and when that failed, it requested a larger quota of scientific catches. Japan based its request on the recommendations made by the IWC's scientific committee providing for limited commercial whaling of the Minke whale.<sup>235</sup> The scientific committee recommended that the IWC return to a schedule based quota system called a revised management procedure. These revised management procedures were "based on the conclusion that some whale species can endure hunting."<sup>236</sup> The scientific committee made recommendations for limited commercial whaling of specific species at two consecutive IWC meetings. The IWC membership rejected the recommendations on both occasions, resulting in the resignation of the chairman of the scientific committee.<sup>237</sup>

In addition to the split among IWC members into pro-whaling and anti-whaling factions, there was additional concern that the coastal member states would vote against the sanctuary proposal.<sup>238</sup> Nonetheless, the sanctuary proposal was officially presented to the IWC at the May 26, 1994,<sup>239</sup> Puerto Vallarta meeting. The IWC passed the proposal by a margin of 23 votes to 1, with several nations abstaining, or not arriving for the vote.<sup>240</sup> Japan cast the lone dissenting vote, as several

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<sup>233</sup> *Id.*

<sup>234</sup> *Joint Whale Sanctuary Plan Gets 19 Nation's Backing*, JAPAN TRANSPORTATION SCAN, May 30, 1994, available in LEXIS, News Library, Cur file.

<sup>235</sup> Shimbuni, *supra* note 25, at 5.

<sup>236</sup> Shimbuni, *supra* note 25, at 5.

<sup>237</sup> Shimbuni, *supra* note 25, at 4.

<sup>238</sup> There was particular concern regarding coastal nations south of the 40th parallel because the sanctuary was seen as an infringement of the 200 mile exclusive economic zone assumed by these nations. See generally Tatsuta, *supra* note 27.

<sup>239</sup> St. Vincent, Grenada and Dominique all abstained from the vote, while St. Lucia did not attend the meeting. Read, *supra* note 233, at A20. All four island nations, which had received large loans from Japan, were the subject of a threatened tourist boycott by the environmental NGO's. See *Int'l Conservationists to Boycott Region's Tourism*, INTER PRESS SERVICE, Mar. 2, 1994, available in LEXIS, News Library, Cur File.

<sup>240</sup> Read, *supra* note 233, at A20.

small Caribbean nations, which had been expected to vote against the sanctuary abstained from the vote.<sup>241</sup>

### B. *The Pro-Whaling Response*

The current pro-whaling nations opposed this enormous policy change. Iceland voiced its disgust at the sanctuary to the press.<sup>242</sup> Japan is threatening to leave the IWC as well, and join the breakaway organization formed by Iceland.<sup>243</sup> Norway failed to vote on the sanctuary issue, possibly due to its narrow escape from sanctions imposed by the United States.<sup>244</sup> Additionally, Norway whales in the northern hemisphere and is therefore not directly effected by the sanctuary proposal.<sup>245</sup> Russia abstained from the sanctuary vote, but later filed an objection to the decision.<sup>246</sup> However, Russia has since withdrawn its objection and has accused Japan of economic blackmail in order to achieve its whaling policy goals.<sup>247</sup> This leaves Japan as the only current member of the IWC who has filed formal objections to both the 1982 whaling moratorium and the sanctuary proposal. As the international law presently stands, Japan can not be forced into compliance by the IWC.

The continued controversy and the possibility that the remaining whaling nations may leave the IWC raises questions about the IWC's future. The IWC's viability is called into question because the pro-whaling nations could leave the IWC in support of NAMMAC, the IWC's rival. In order to accomplish the universal cooperation that Antarctic protection has received, member states will need to understand that such cooperation is actually in their best interests. The question then

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<sup>241</sup> Read, *supra* note 233, at A20.

<sup>242</sup> See generally Tatsuta, *supra* note 27.

<sup>243</sup> See generally Tatsuta, *supra* note 27.

<sup>244</sup> Andrea Shalal Esa, *Clinton Delays Sanctions Against Norway on Whaling*, REUTERS, Oct. 4, 1993, available in LEXIS, News Library, Cur File. In addition, Norway maintains that there is no plausible legal basis for the whale sanctuary, because they dispute the existence of scientific support for its establishment. *Russia Back Tracks to Support Sanctuary*, JAPAN TRANSPORTATION SCAN, Nov. 7, 1994, available in LEXIS, News Library, Cur File.

<sup>245</sup> Betsy Carpenter & Jennifer Setter, *Harpoon Rattling in the Atlantic*, U.S. NEWS & WORLD REPORT, May 7, 1993 at 72.

<sup>246</sup> See generally Webb, *supra* note 226.

<sup>247</sup> Andrew Darby, *Russians in Threat to Whale Sanctuary*, SYDNEY MORNING HERALD, Sept. 7, 1994 at 7.

becomes, whether it is in the whaling nations interest to go along with the whale sanctuary. The global moratorium on whaling, however objectionable to the whaling nations, was in part attributable to the need to give the whale stocks time to replenish. Once whales stocks had sufficiently recovered, the whaling nations could resume hunting without damaging future whale stocks. The whale sanctuary is a slightly different issue because it is unclear whether the IWC chose to implement a whale sanctuary to indefinitely protect the whales to give them time to recover, or to protect the whales due to increased information regarding their capacity. If it is the latter, as the Japanese argue, then it could never be in the whaling nations' best interests to support the whale sanctuary. While the anti-whaling nations celebrate the sanctuary decision, the pro-whaling nations are threatening to withdraw completely from the IWC.

### C. *The Anti-Whaling Response*

Regarding the sanctuary proposal, the United States is being assisted by other member nations such as France, Mexico, Denmark and Chile. The IWC passed the sanctuary proposal by a nearly unanimous vote.<sup>248</sup> This presents a remarkably united front for such a controversial move, which actually represents a major shift in IWC policy. Additionally, Norway's failure to vote gives the anti-whaling nations an advantage when campaigning for international support. Japan has always had a poor environmental record, while the Norwegian record has been sterling.<sup>249</sup> Japan's poor environmental history will make it easy for the anti-whaling nations to crystallize an international opinion against the few remaining whaling nations. While the non-whaling nations are jubilant at the formation of the sanctuary, their greatest challenge lies in the future, in its implementation.

The environmental response to the sanctuary proposal has been limited to date. The individual environmental organizations have issued statements of condemnation against Japan,

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<sup>248</sup> Read, *supra* note 233, at A21.

<sup>249</sup> Zimmerman, *supra* note 110, at 287; *see also* Vidal, *supra* note 115, at 1A.



and wide praise for the sanctuary proposal itself.<sup>250</sup> Perhaps their most effective support regarding the sanctuary proposal came well before the vote occurred. The environmental NGO's were extremely vocal in their criticism of the Norwegian decision to resume whaling.<sup>251</sup> When President Clinton decided not to certify Norway for its violations of IWC policy, the NGO's were even more vocal in their condemnation.<sup>252</sup> Realizing the significance of the sanctuary proposal, the environmental NGO's began to rally support against the Caribbean nations that had aligned with Japan. Once the smaller island nations realized that they risked greater economic loss, they quickly chose to amend their policy decision.<sup>253</sup> The international environmental organizations can be expected to continue to battle Japanese whaling policy, as Japan stands alone in its potential to damage the IWC.

#### D. *The IWC as it Faces the Twenty-first Century*

The Norwegian decision to resume commercial whaling, however limited, was in direct contradiction to a specific policy espoused by the IWC. This brazen defiance presented the single most significant challenge to the IWC as a serious international governing body. The IWC was essentially powerless to prevent Norway from the resumption of commercial whaling because the IWC has no enforcement powers. The IWC is, at its essence, a voluntary union. Once a member state has filed a timely objection to an IWC policy, there is little more that the IWC can do to effectuate compliance. Other than officially requesting that a member state review its objection, the IWC can only rely on other governments to try and force the offending nation into adaptation of its policies.<sup>254</sup>

The Norwegian defiance of a worldwide ban is diminished in significance when compared to the Japanese objection to the

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<sup>250</sup> Eduardo Garcia Aguilar, *Environmentalists Laud Creation of Whale Sanctuary*, AGENCE FRANCE PRESSE, May 27, 1994, available in LEXIS, News Library, Cur File.

<sup>251</sup> *Greenpeace Prawn Boycott Wins Support*, F.M.J. INTERNATIONAL PUBLICATIONS, July 3, 1993 at 3, and *WWF Condemns Norway's Move to Kill Whales*, REUTERS, May 10, 1993, available in LEXIS, News Library, Cur File.

<sup>252</sup> See generally Esa, *supra* note 245.

<sup>253</sup> See generally Esa, *supra* note 245.

<sup>254</sup> Spencer, *supra* note 111, at 120.

creation of a whale sanctuary. Japan considers its whaling policy to be of critical importance.<sup>255</sup> Given its limited natural resource base, it is unlikely that Japan can afford to permanently abdicate its right to whale.<sup>256</sup> Whale is no longer a substantial part of the Japanese diet, but Japan is unwilling to compromise future rights to use or extract natural resources indigenous to the global common.<sup>257</sup> Additionally, the Japanese policy regarding whaling is consistent with its international environmental record.<sup>258</sup> The IWC's decision to establish a whale sanctuary was ardently opposed by Japan.<sup>259</sup> Furthermore, Japan has threatened to withdraw from the IWC because of the whale sanctuary. The IWC is left in a situation where among the major whaling nations, one has withdrawn, another continuously flaunts its defiance of the 1986 moratorium, another has secretly continued whaling throughout the 1980's and yet another is threatening to withdraw altogether. The IWC will have tremendous difficulty in maintaining its position as the legitimate international whaling agency if none of its remaining members whale, and its rival group is composed of all of the major whaling nations.

The evolution of the international environmental movement has brought an increasing awareness of the need to protect the global commons. The leaders of nearly every nation reaffirmed the growing awareness of the global nature of environmental protection when they met at the 1992 Rio Earth Summit.<sup>260</sup> Such an international cooperative effort on the environment would have been inconceivable even thirty years ago. Today, virtually every nation, regardless of the level of industrialization, is cognizant of the need to restore and assure our common international resources.<sup>261</sup> Yet, with as many advancements as have been made in the global awareness of environmental issues, the international organizations which effectuate international conservation have not been empowered

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<sup>255</sup> For a discussion of the Japanese position on the importance of whaling, see Whymant, *supra* note 139, at 21.

<sup>256</sup> See generally Gyllenhammer, *supra* note 184.

<sup>257</sup> See generally Gyllenhammer, *supra* note 184.

<sup>258</sup> See generally Zimmerman, *supra* note 110.

<sup>259</sup> See generally Gyllenhammar, *supra* note 184.

<sup>260</sup> See generally Vidal, *supra* note 115.

<sup>261</sup> See generally Vidal, *supra* note 115.

with the means to enforce their policies. This is based in an inherent conflict in international law which balances an individual nation's sovereignty against the empowerment of an international organization.<sup>262</sup> The more empowered an international organization becomes, the more the member nations must compromise self sovereignty. As long as participation in an international body remains voluntary, member nations can simply opt out rather than face unpleasant consequences. History provides few examples of an international legislative body empowered to bring violating member states into compliance. While the United Nations may embody some communitarian principles, it is often criticized as being ineffective, powerless, and under the control of its greatest economic contributors.

The increased concern for the protection of the global environment creates the need to be able to respond to environmental challenges on a transboundary level. The increased spirit of cooperation captured by the increasing movement towards regionalization<sup>263</sup> may help resolve the dichotomy that remains in international environmental law. Once the focus of individual national benefit is tied in with the success of a greater region, then individual nations will be less able to function within that cooperative unit and still pursue self interested policies. For example, if Japan's economic well being were to be tied to the greater success of a Pan-Asian community, Japan would be increasingly less likely to pursue self serving policies that might harm the larger region. Given that Japan has a natural resource base that is insufficient to support its growing population, Japan has advocated the resumption of whaling as an inherent right, and must do so because of its need to preserve all venues of extrapolation of global resources.<sup>264</sup> Japan's limited natural resource base places it in the position of pursuing policies that pay little regard to the global consequences of their neocolonial environmental procedures.<sup>265</sup> The resumption of whaling would no longer be necessary because Japan would be

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<sup>262</sup> KISS & SHELTON *supra* note 105, at 16-18.

<sup>263</sup> There has been an increasing number of nations organizing regionally; such as the European Community and The North American Free Trade Agreement. KISS & SHELTON, *supra* note 105, at 19-21.

<sup>264</sup> See generally Gyllenhammer, *supra* note 184.

<sup>265</sup> KISS & SHELTON, *supra* note 105, 74-75.

able to rely on the vast resource bases of the region, rather than continue to exploit every viable resource to satisfy short term needs.

In the immediate future, the existing international organizations must be empowered to regulate and take punitive action against violating nations.<sup>266</sup> In time, the preservation of a regional or global common may well dictate international policy. In the interim, it is incumbent on the member nations of governing international bodies to empower these organizations to enforce their own policies.<sup>267</sup> In the example of the IWC, the IWC should have the ability to evaluate the imposition of commercial sanctions by member nations against a violating nation to bring about compliance. Should the offending nation choose to leave the IWC, the IWC should be able to address the issue to the international community. This form of redress could include commercial sanctions by the remaining IWC nations, or the ability to sanction the offending nation(s) via the United Nations or a more recently empowered International Court of Justice.<sup>268</sup> The International Whaling Commission should be applauded for its effort to transform itself from an agency regulating the whaling industry to an environmental watchdog group. The member nations of the IWC must empower the IWC to enforce its own policies. Failure to adequately provide the IWC with enforcement capacity will risk reducing the IWC to an antiquated, faltering agency. The IWC was designed to address whaling on an international level. However, the policy changes transforming the IWC into an environmental watchdog group have alienated every remaining whaling nation. If the integrity of the sanctuary proposal is to remain intact, the member nations must develop or amend the IWC's charter to provide some way to deal with offending nations. The IWC must have some capacity to sanction violators of its policies, whether or not those nations elect to maintain their member

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<sup>266</sup> KISS & SHELTON, *supra* note 105, at 11.

<sup>267</sup> As long as participation in international organizations remains free of consequence, individual nations will continue to violate international policies that do not advance their own interests. KISS & SHELTON, *supra* note 105, at 11.

<sup>268</sup> In order for a nation to be held accountable to the ICJ, that nation must first agree to submit to ICJ's jurisdiction. Perhaps a membership to an organization such as the IWC could automatically entail submission to ICJ jurisdiction. KISS & SHELTON, *supra* note 105, at 126-27.

status. An amendment to the IWC's charter establishing enforcement capacity would simply complete the metamorphose that the IWC has undergone.<sup>269</sup> The IWC has the opportunity to once again become a pioneer in the international community. As discussed earlier, the IWC was one of the premier international environmental organizations showing the global community could unite successfully when motivated. The international community has evolved tremendously since the establishment of the IWC, as has the international environmental movement.

## VII. CONCLUSION

Nowhere is the success of the global green movement been better embodied than in the save the whales campaign.<sup>270</sup> Scientific evidence has contributed to our awareness that whales are extremely advanced, communicative, sentient mammals. We are yet to fully comprehend the full capacity of the whale species. This is not meant to slight the cultural norms of those nations which hold whaling to be an ingrained tradition. In discussing traditional whaling nations, one must allow that not only are they an extreme statistical minority, but that there are certain moral and ethical dilemmas that scientific advancement brings into focus. Here, science has shown that the whales are capable of much greater intellectual capacity than ever believed, indicating that it is wrong to kill the whales.<sup>271</sup> Morality must keep in stride with increases in scientific knowledge.<sup>272</sup> The save the whales campaign has been so successful because the international community has recognized the validity of scientific evidence regarding the whales. With such near universal support for the whales, the IWC has the unique opportunity to become one of the first international organizations that would have some muscle in implementing its policies. Essen-

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<sup>269</sup> Such an amendment might only need stipulate that should the IWC vote, by a three quarter majority, that if a nation has acted in a manner that undermines the IWC, the violating nation will either suffer economic sanctions, lose its voting privileges, or the violation will be submitted to the I.C.J. or U.N. for discipline.

<sup>270</sup> This is part due to the sentient nature of the whales, and in part due to effective lobbying by the international environmental NGO's.

<sup>271</sup> D'Amato & Chopra, *supra* note 33, at 29.

<sup>272</sup> D'Amato & Chopra, *supra* note 33, at 29.

tially, the sanctuary proposal has set the stage for a showdown on whaling. The anti-whaling campaign has the momentum and the justification to make a stand. The question that remains to be determined is whether the international community represented by the member states of the IWC is ready to gamble and establish the IWC as an agency that can do more than recommend policy. The author believes that the IWC has nothing to lose and that failure to empower the IWC will only bring about the demise of this organization.

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