

INTERNATIONAL WHALING COMMISSION: THE PAST, PRESENT AND FUTURE OF THE IWC

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The International Whaling Commission (IWC) has been a staple in the media for years due to its many controversies. The first part of this article reviews the history of both the whaling industry and the IWC. The second part introduces the organizational structure of the IWC. The third part examines the whaling moratorium and scientific research permit exception in more detail. The final conclusion addresses two issues the whaling moratorium and scientific research exception have created and introduces possible solutions.

1. INTRODUCTION

Towards thee I roll, thou all-destroying but unconquering whale; to the last I grapple with thee; from hell's heart I stab at thee; for hate's sake I spit my last breath at thee. Sink all coffins and all hearses to one common pool! and since neither can be mine, let me then tow to pieces, while still chasing thee, though tied to thee, thou damned whale! Thus, I give up the spear!¹

And God created great whales, and every living creature that moveth, which the waters brought forth abundantly, after their kind, and every winged fowl after his kind: and God saw that it was good.²

The enchantment of whales has lead humans to both fear and revere them. Whales represented the earliest form of substance for aboriginal tribes. Whaling was one of the first fishing industries to sustain entire countries. Ignorance and greed led humans to drive whale populations to the brink of extinction. It was through reevaluation and cooperation that nations were able to implement protections for whales.

When conservation of whales became a hot topic, there were layers of politics and cultural norms to dig through before tackling the problem. Often with the sensationalism of whaling by the main stream media, it's hard to understand that some cultures find nothing

¹ HERMAN MELVILLE, *MOBY DICK* 755 (Collector's Library 2004) (1851).

² GENESIS 1:21 (King James Version).

damaging about whaling. Some countries would equate hunting whales to western countries slaughtering of cows or hunting deer. To some countries, the realization of the declining population is nothing more than a myth propagated by countries with a conservation agenda. The first step in “saving the whales” isn’t outright prohibition of whaling, but rather understanding of whaling and why it’s so popular.

The International Whaling Commission is a recent collaboration of nations to protect whale species. However, whaling is older than many of these nations. To understand the issues surrounding the IWC, the history and culture of whaling must first be examined.

2. HISTORY

A. Whaling Industry

The whaling industry dates back thousands of years ago.³ Initially, most hunting was limited to Alaskan and Scandinavian hunters.⁴ They used the whales for both food and oil.⁵ These hunters used small boats close to shore.⁶ Using handheld harpoons and nets, the hunters would try to drive the whales ashore and effectively beach them.⁷ Since the hunters used small boats and were attempting to beach whales, the whales affected by hunting were generally small

³ GEORGE A. FELDHAMER, LEE C. DRICKAMER, STEPHEN H. VESSEY, JOSEPH F. MERRITT & CAREY KRAJEWSKI, MAMMALOGY: ADAPTION, DIVERSITY, ECOLOGY 339 (The John Hopkins University Press 2007).

⁴ *Id.*

⁵ *Id.*

⁶ Gerry J. Nagtzaam, *The International Whaling Commission and the Exusive Great White Whale of Preservationism*, 33 WM. & MARY ENVTL. L. & POL’Y REV. 375, 389 (2009).

⁷ GEORGE A. FELDHAMER ET AL., *supra* note 3.

slower species located in coastal waters.⁸ This type of subsistence hunting more than likely had little effect on whale populations.⁹

Whaling changed significantly in the fifteenth century.¹⁰ Basques joined the hunt.¹¹ Basques used larger boats and ventured further out into the water.¹² Basques also ventured further into the eastern coasts of Canada.¹³ In the 1500's and 1600's, European countries joined the industry.¹⁴ European countries brought larger boats capable of traveling further.¹⁵ In the 1600's, New England joined the Industry. By the seventeenth century, boats journeyed as far north as the Arctic in pursuit of whales.¹⁶

Whaling had moved from subsistence hunting to a highly profitable commercial endeavor.¹⁷ From 1750 to 1870, whales were extremely valuable.¹⁸ Whales were considered valuable for their meat, oil and whalebone (baleen).¹⁹ Whale by-products were used in both perfume and clothing.²⁰ In the late 19th century, a whale would sell for approximately USD \$2,000.²¹ Whale populations started to significantly decline.²²

⁸ GEORGE A. FELDHAMER ET AL., *supra* note 3.

⁹ *Id.*

¹⁰ NAGTZAAM, *supra* note 6.

¹¹ *Id.* The Basques are attributed with inventing the concept of industrial whaling in the eleventh century in the Bay of Biscay. *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ GEORGE A. FELDHAMER ET AL., *supra* note 3. During the seventeenth century, the Dutch and English had vessels in the hundreds. These vessels hunted right whales, Greenland whales and nordcapers. *Id.*

¹⁵ *Id.*

¹⁶ NAGTZAAM, *supra* note 6.

¹⁷ GEORGE A. FELDHAMER ET AL., *supra* note 3.

¹⁸ NAGTZAAM, *supra* note 6.

¹⁹ GEORGE A. FELDHAMER ET AL., *supra* note 3.

²⁰ NAGTZAAM, *supra* note 6.

²¹ NAGTZAAM, *supra* note 6, at 390.

²² GEORGE A. FELDHAMER ET AL., *supra* note 3.

“Modern whaling” is considered to have started in 1864 with the invention of the explosive grenade harpoon.²³ The explosive grenade harpoon was created by Svend Foyn of Norway and was shot from a canon.²⁴ In addition to the new harpoon, steam-driven boats replaced sailing boats.²⁵ These innovations allowed whalers to hunt for the first time faster species of whales located far away from coastal waters.²⁶ The 1900’s also brought around the creation of floating factory ships.²⁷

It was soon evident that these new practices had a negative impact on whale populations.²⁸ Whalers hunted assuming limitless resources existed.²⁹ Whales, unlike fish stocks, are slow to mature.³⁰ Whaling led to the extinction of coastal whale stocks.³¹ Whalers were pushed further out from land every year.³²

Nations were slow to recognize the devastating effects whaling had on whale populations. In 1902, Norway passed a law limited whaling companies’ activities.³³ The law limited one catcher to each station and mandated that stations must be at least fifty miles apart.³⁴ Iceland was the first country to implement a complete whaling moratorium.³⁵ The twenty-year

²³ NAGTZAAM, *supra* note 6, at 390.

²⁴ *Id.*

²⁵ GEORGE A. FELDHAMER ET AL., *supra* note 3. These new small fast steam boats were called “catchers.” NAGTZAAM, *supra* note 6, at 390.

²⁶ NAGTZAAM, *supra* note 6, at 390. Species that had avoided whalers were now up for grabs. These species included the blue, fin, sei and minke whales. *Id.*

²⁷ GEORGE A. FELDHAMER ET AL., *supra* note 3. Further, the whaling industry created permanent whale oil factories built close to whaling grounds. This allowed whalers to efficiently hunt and process whales. This also allowed whalers to catch a large fin-whale and pull the carcass on board without trying to haul to land and risk losing the carcass. NAGTZAAM, *supra* note 6, at 390-391.

²⁸ NAGTZAAM, *supra* note 6, at 390.

²⁹ *Id.* at 391.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* By the 1904-1905 season, new factory whaling ships had reached the Antarctic waters of South Georgia. This was the last frontier of whaling, and every place with whales had been hunted. *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 392.

moratorium started in 1915.³⁶ However, for the most part the whaling industry was self-regulated leading to the disastrous depletion of whale populations.³⁷

B. International Whaling Commission

Prior to the creation of the International Whaling Commission, there were several attempts at regulating the whaling industry. In 1931, the first Convention for the Regulation of Whaling was held in Geneva, Switzerland.³⁸ All states attached to the League of Nations were involved in the four-year negotiation process.³⁹

The Convention addressed whaling in all waters including those within a state's territory.⁴⁰ The Convention also required whaling vessels to be licensed and created an exception for coastal aboriginal people.⁴¹ The Convention allowed whaling to continue; however, the "killing of calves, immature whales and female whales accompanied by calves" was outlawed.⁴²

Japan, Germany and the U.S.S.R. did not sign on to the Convention.⁴³ Each state was prolific in whaling and didn't find the economic incentives compelling enough to sign on to the

³⁶ NAGTZAAM, *supra* note 6, at 392.

³⁷ *Id.* at 393.

³⁸ NAGTZAAM, *supra* note 6, at 393. While the regulation of the whaling industry was beneficial to the whaling population, the motivation behind the Convention was not conservation. The slaughter of whales had reached an all time high, and the over abundance of whale oil caused prices to lower. The regulation of the whaling industry was seen as an economic endeavor. *Id.*

³⁹ *Id.*

⁴⁰ CONVENTION FOR THE REGULATION OF WHALING, arts. 1, 8, 9, Sept. 24, 1931, 155 L.N.T.S. 349.

⁴¹ *Id.* The exception applied to aboriginal people only if "canoes, pirogues and other exclusively native craft propelled by oars or sails" were used. Aboriginal people were also prevented from using firearms and could not hire non-aboriginals to assist in whaling activities.

⁴² Anthoany D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L L. 21, 31 (1991).

⁴³ NAGTZAAM, *supra* note 6, at 394.

Convention.⁴⁴ These countries accounted for 30 percent of whaling making the Convention significantly less effective.⁴⁵

The collapse of the Geneva Convention led the whaling industry to attempt to stabilize the situation themselves through several agreements in 1933 through 1938.⁴⁶ As with the Geneva Convention, companies refused to sign on making the agreement ineffective. In the 1937-38 season, 54,664 whales were killed internationally.⁴⁷ Whales were well on their way to worldwide extinction until World War II started.

Navel restrictions confined most floating factory ships to port.⁴⁸ Ships that weren't confined to port were either helping with the war effort or destroyed in battle.⁴⁹ The war allowed whale populations to slightly recover.⁵⁰ During the 1943-1944 season, only 6,197 whales were killed.⁵¹

⁴⁴ ELIZABETH DESOMBRE, *THE GLOBAL ENVIRONMENT AND WORLD POLITICS* 151 (2d ed. 2007).

⁴⁵ *Id.*

⁴⁶ NAGTZAAM, *supra* note 6, at 394-395. After the failure of the Convention, several whaling companies created the International Association of Whaling Companies. Like the motives of the Convention, the whaling companies did not seek to conserve the whaling population, but rather control the prices of whale oil by limiting production. Most Antarctic whaling companies agreed to limit their hunting, but two British companies and one Norwegian company refused to join and continued to harvest whales.

In 1937, another agreement was forged between nations to restrict the whaling industry. Argentina, Australia, Germany, the Irish Free State, New Zealand, South Africa, the United Kingdom, and the United States of America all agreed to implement the 1937 International Agreement for the Regulation of Whaling. NAGTZAAM, *supra* note 6, at 395 (*citing* INT'L COMM'N ON WHALING, EIGHTH REPORT OF THE COMMISSION 3 (1957)). Once again proponents of the whaling industry, Japan, Germany, Chile, U.S.S.R., refused to follow the provisions of the agreement. The agreement outlawed the taking of grey and right whales and imposed a two year ban on humpback whales. The agreement also regulated the time and location of whaling season in order to protect young and immature whales. Despite these protections, the whaling industry continued to exploit whales. NAGTZAAM, *supra* note 6, at 395.

⁴⁷ NAGTZAAM, *supra* note 6, at 396 (*citing* PATRICIA BIRNIE, *INTERNATIONAL REGULATION OF WHALING: FROM CONSERVATION OF WHALING TO CONSERVATION OF WHALES AND REGULATION OF WHALE-WATCHING* 129 (1985)).

⁴⁸ NAGTZAAM, *supra* note 6, at 394.

⁴⁹ *Id.* at 395.

⁵⁰ *Id.* at 396.

⁵¹ *Id.* (*citing* THE COMM. FOR WHALING STATISTICS, *INTERNATIONAL WHALING STATISTICS XXXI* 8 (1954)).

The climate of environmental conservation changed post World War II.⁵² Environmentalists took heed of the effect over-fishing had on whale populations.⁵³ A new understanding arose that viewed whales as a global resource rather than a resource of an individual state.⁵⁴ The U.S. Secretary of State at the time, Dean Acheson, embodied the new vision of whaling by stating, “The world’s whale stocks are a truly international resource in that they belong to no one single nation, nor to a group of nations, but rather they are wards of the entire world.”⁵⁵

With the momentum of preservation, most nations recognized the importance of a new convention focusing on conservation. The United States was leading most of the post-World War II efforts and took it upon themselves to call for an international conference to address whaling.⁵⁶ On December 2nd, 1946, the International Convention for the Regulation of Whaling (ICRW) was created in Washington, DC.⁵⁷ This convention superseded all previous agreements and would be effective on November 10, 1948.⁵⁸

Whereas previous agreements focused on the economic benefits of regulating the industry, the preamble of the Convention highlighted the importance of protecting whales from overfishing.⁵⁹ In order to continue the mission of the Convention, the International Whaling Commission (IWC) was created.⁶⁰

⁵² NAGTZAAM, *supra* note 6, at 397.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ NAGTZAAM, *supra* note 6, at 397 (citing PETER J. STOETT, THE INTERNATIONAL POLITICS OF WHALING 30 (1997)).

⁵⁶ NAGTZAAM, *supra* note 6, at 397.

⁵⁷ INTERNATIONAL WHALING COMMISSION, IWC INFORMATION (2008), <http://www.iwcoffice.org/commission/iwcmain.htm> (*hereinafter* IWC Website).

⁵⁸ D’ AMATO, *supra* note 42, at 33.

⁵⁹ NAGTZAAM, *supra* note 6, at 397.

⁶⁰ *Id.* at 399.

3. ORGANIZATION STRUCTURE

The International Whaling Commission is comprised of individual member states. States can join the IWC regardless if their state engages in whaling practices.⁶¹ Each member country is represented by an individual called a Commissioner.⁶² The Commissioner is usually assisted by experts and advisors.⁶³ The Chair and Vice Chair are elected from the Commissioners and usually serve for three years.⁶⁴ In addition to the Commissioners, the IWC has a full-time Secretariat. The IWC Secretariat is located in Cambridge, England and includes seventeen staff members.⁶⁵

The IWC holds an annual meeting usually in May or June at varying locations.⁶⁶ There are three main committees within the convention: Scientific, Technical, and Finance and Administration.⁶⁷ The most important of these committees is the Scientific Committee. The Convention requires that all amendments to the Schedule be based on scientific findings.⁶⁸

⁶¹ NAGTZAAM, *supra* note 6, at 399. (citing Tora Skodvin & Steinar Andresen, *Nonstate Influence in the International Whaling Commission, 1970-1990*, GLOBAL ENVTL POL., Nov. 2003, at 70-71). The decision to allow non-whaling states to join the IWC proved to be critical in moving changes to the schedule through the IWC. In order to effectuate change, member states can recruit like-minded allies to vote. The decision to allow non-whaling states was made on the premise that whales were a global resource and not a state resource.

⁶² IWC WEBSITE, *supra* note 57.

⁶³ *Id.*

⁶⁴ *Id.* The current Chair is Dr. William Hogarth from the United States. The current Vice-Chair is Mr. Minoru Morimoto from Japan. *Id.*

⁶⁵ *Id.* The seventeen staff members include the Secretary, Head of Finance and Administration, Head of Science, Computing Manager and support staff. The current IWC Secretary is Dr. Nicola Grandy. *Id.*

⁶⁶ *Id.* The IWC chooses the location of the meeting either by invitation by a member country or the Secretariat's home nation, the United Kingdom. The last four locations have been Madeira, Portugal; Santiago, Chile; Anchorage, United States; and Frigate Bay, St. Kitts and Nevis. *Id.*

⁶⁷ *Id.* In 2004, a new committee, Conservation, first met. There are several sub-committees including the popular aboriginal subsistence whaling and Infractions. A Commissioner can decide if their state would like to be involved in these sub-committees and most states choose to do so. *Id.*

⁶⁸ *Id.* In the initial years, the scientists on the Scientific Committee were anything but independent. The scientists were often a vehicle of their nation and gave recommendations based on the policy the nation sought to put forth. In 1960, the United Kingdom proposed that a committee of three independent

The Scientific Committee currently consists of over 200 of the world's leading whale biologists.⁶⁹ Scientists are either nominated by member governments or invited to join by the committee itself.⁷⁰ The Scientific Committee meets two weeks immediately preceding the annual meeting of Commissioners to consider particular subjects.⁷¹ The subject matter the committee deals with varies greatly depending on the IWC's needs.⁷²

The Scientific Committee can make recommendations based on scientific information collected.⁷³ In order for any changes to the Schedule to be passed, the Commissioners must vote

scientists be established. The motion was passed. The committee created later grew to the present day Scientific Committee. NAGTZAAM, *supra* note 6, at 403.

The IWC was not only influenced by members nations that supported whaling, but starting the 1970's, the anti-whaling nations started to use their own power to create anti-whaling decisions. At the 1972 United Nations Conference on the Human Environment in Stockholm, Sweden, the United States called for a ten-year moratorium on whaling to enable stocks to replenish. The IWC scientific committee argued the action wasn't scientifically valid. Regardless, the motion was passed 52-0. *Id.* at 405.

⁶⁹ IWC WEBSITE, *supra* note 57. The size of the Scientific Committee has grown considerably since the IWC was created. In 1954, the committee had only eleven scientists from seven member nations. In 2003, the committee had over 170 scientists from thirty member nations. Of the 170 scientists, over thirty-nine were invited participants. *Id.*

⁷⁰ IWC WEBSITE, *supra* note 57.

⁷¹ *Id.* The committee publishes an annual review of important issues effecting whales. The issues are often the highlight of the meeting conduct prior to the annual meeting. *Id.*

⁷² *Id.* The committee has a broad field of material to study as indicated by the Convention text. The Convention indicates the Scientific Committee is to organize studies and investigations regarding whales, collect statistical information of the whale stocks and study, appraise and disseminate information involving the populations of whale stocks. *Id.*

⁷³ *Id.* The first scientific committee was formed to give independent opinions on the proper catch restrictions. However, the scientists were barely heard over the roar of member nations and weren't initially very effective in their recommendations. This fact was startlingly clear when the current whale stock numbers were announced at the 1967 meeting in London. In 1937, there were approximately 100,000 blue whales. NAGTZAAM, *supra* note 6, at 404 (citing INT'L COMM'N ON WHALING, NINETEENTH REPOT OF THE COMMISSION 15 (1969)). By 1967, there were approximately 1000. *Id.* This scientific information proved sobering to the United States who decided to put eight types of whales on its own Endangered Species List, therefore prohibited hunting of these types of whales. NAGT 404 This change from the whalers' faction to the anti-whaling movement would prove imperative to the IWC efforts. The economic power the United States brought to the table would be instrumental in passing a whale moratorium. NAGTZAAM, *supra* note 6, at 404.

with a three-quarters majority.⁷⁴ If passed, a change becomes effective within ninety days unless a member nation files an objection.⁷⁵

In Article Five of the Convention, the objection procedure is outlined.⁷⁶ Any member nation can object to a decision if they feel it seriously affects its national interest.⁷⁷ The member nation must file this objection within ninety days of notification of the decision.⁷⁸ If a member nation properly objects to a change to the schedule, then that government is not bound by the change.⁷⁹

This is a controversial element of the ICRW since it presumably leaves the IWC with no powers of enforcement.⁸⁰ However, the objection procedure is a large reason the ICRW was agreed upon in the first place.⁸¹ If the objection procedure isn't available to member nations, there is nothing keeping a nation from withdrawing from the IWC completely.⁸²

4. MORATORIUM

The whaling moratorium was a controversial issue at the time it was passed and continues to be a hot button issue today. The first indication a moratorium may be an option was at the 1972 IWC meeting in London.⁸³

⁷⁴ IWC WEBSITE, *supra* note 57.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ IWC WEBSITE, *supra* note 57.

⁸⁰ *Id.*

⁸¹ *Id.* The Article Five “loophole” was greatly abused in the first few decades of the ICW. Objections were so prevalent that the ICRW was almost completely ineffective against pro-whaling nations. NAGTZAAM, *supra* note 6, at 400.

⁸² IWC WEBSITE, *supra* note 57.

⁸³ NAGTZAAM, *supra* note 6, at 408.

The United States and United Kingdom delegations moved for a global moratorium to allow whale stocks to recover.⁸⁴ The Scientific Committee argued against a blanket ban since the moratorium would prevent the biologists from looking at whales on a species level. If there was absolutely no taking of whales, there would be no way to monitor the stocks and study species.⁸⁵ The IWC voted on the moratorium proposal and it was defeated; four countries voted for the proposal, seven against and three abstained.⁸⁶

The IWC voted on a moratorium at both the 1973 and 1974 meetings.⁸⁷ Both proposals were defeated. Whaling nations such as Mexico, Japan and the U.S.S.R. all argued that fin, sei and sperm whales were still plentiful full enough to hunt.⁸⁸ The following years were fraught with internal fights in the Scientific Committee and a greater presence of Environmental Non-Governmental Organizations (ENGO).⁸⁹

⁸⁴ NAGTZAAM, *supra* note 6, at 408 (citing INT'L COMM'N ON WHALING, TWENTY-FOURTH REPORT OF THE COMMISSION 24 (1974)).

⁸⁵ NAGTZAAM, *supra* note 6, at 408. The Scientific Committee provided an alternative plan. They suggested that rather than a blanket ban, the IWC should spend a decade intensely researching whales. After gathering this data, the IWC should act accordingly. The Scientific Committee solution was more in line with stricter whaling restrictions based on the whale stock number rather than discontinuing all commercial whaling. *Id.*

⁸⁶ *Id.*

⁸⁷ NAGTZAAM, *supra* note 6, at 408.

⁸⁸ *Id.*

⁸⁹ *Id.* at 409-410. In 1977, cetologists were able to attend meetings as observers, but the Scientific Committee itself was so fractured, there wasn't a clear voice. The committee was split between conservationists and preservationists. This fracture was so deep the committee was unable to even decide on the content of any paper submitted for its approval. There is some indication this internal war was the reason ENGO's were able to become so involved in the IWC. *Id.*

ENGO's were successful in changing policies of member nations individually. Australia, Argentina, Uruguay and the Netherlands all altered their domestic policies regarding whaling with the influence of ENGO's. By 1979, ENGO's were attending IWC meetings as observers and in some instances as commissioners. Jean-Paul Forton-Gouin was able to become a commissioner by funding a Panamanian delegation. Jean-Paul supported the ENGO position and was able to advocate for them from his Commissioner position. ENGO's were also present at the annual meetings in the form of protests. *Id.*

Pro-whaling countries don't take the ENGO position lightly. Japan attempted to remove Greenpeace from the IWC in 1999 due to their aggressive protests of Japanese whaling vessels. These protests included trespassing on to Japanese ships. The Sea Shepherd Conservation Society has attempted a similar tactic. Natalie Klein, *Whales and Tuna: The Past and Future of Litigation between Australia and Japan*, 21 GEO. INT'L ENVTL. L. REV. 143, 170 (2009).

The division of member nations within the IWC started to shift with the United States's passage of the Pelly Act.⁹⁰ The 1971 Pelly Act gave the Secretary of Commerce the ability to determine if nationals of a foreign country are diminishing the effectiveness of an international fishery conservation program.⁹¹ The IWC was considered "an international fishery conservation program" under the Pelly Act.⁹² If the Secretary of Commerce certifies this fact to the President, the President is authorized to ban importation of fishing products from the offending nation.⁹³

The 1971 Pelly Amendment was followed by the more powerful 1979 Packwood-Magnuson Amendment.⁹⁴ If certified by the Secretary of Commerce, this amendment requires the Secretary of State to reduce the offending country's fishing allocation in U.S. waters by at least fifty percent.⁹⁵

Through the Pelly Amendments, the United States was able to impact the decisions of whaling countries.⁹⁶ Facing possible certification and trade alienation, Taiwan decided to ban whaling within its waters.⁹⁷ These amendments not only encouraged countries to quit their whaling practices, they also encouraged non-whaling countries to join the IWC.⁹⁸ By the 1981

⁹⁰ NAGTZAAM, *supra* note 6, at 411.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ NAGTZAAM, *supra* note 6, at 411.

⁹⁵ *Id.*

⁹⁶ *Id.* In 1978, the United States certified Chile, Peru and South Korea for continued whaling. Despite these efforts, the United States wasn't completely successful. Commercial whaling continued and whalers hunted more immature whales in the 1970's. *Id.* at 412.

⁹⁷ *Id.* at 411.

⁹⁸ *Id.* at 412. By the 1979 annual meeting, the IWC member nations had grown to twenty-three. ENGO's also played an important role in non-whaling countries decisions to join the IWC. The ENGO's had a plan to tip the member nations in favor of a moratorium. *Id.* Greenpeace indicates there was plan to add:

At least six new anti-whaling members from 1978 to 1982 through the paying of annual dues, drafting of membership documents, naming of a commissioner to represent these countries, at an annual cost of more than USD 150,000. *Id.* (citing Tora Skodvin & Steinar Andresen, *Nonstate Influence in the International Whaling Commission, 1970-1990*, GLOBAL ENVTL. POL., Nov. 2003, at 81).

meeting, the number of member nations within the IWC had grown by thirty-three percent.⁹⁹ Despite this new larger pro-preservation IWC, the proposed moratorium did not pass.¹⁰⁰

The 1982 meeting in Brighton, United Kingdom proved to be the turning point.¹⁰¹ A whaling moratorium amendment was passed on July 23, 1982.¹⁰² The moratorium passed twenty-five to seven with five countries abstentions. There was a three year grace period for member nations to phase out commercial whaling.¹⁰³ The ban did contain two exceptions: a scientific research exception and an aboriginal subsistence whaling exception.¹⁰⁴

Four countries filed formal objections to the moratorium: Japan, Norway, Peru and the U.S.S.R.¹⁰⁵ Peru withdrew its objection, leaving three countries with formal objections.¹⁰⁶ The United States then decided to flex its muscle, and informed Norway and Japan that under the

⁹⁹ D' AMATO, *supra* note 42, at 44.

¹⁰⁰ NAGTZAAM, *supra* note 6, at 416. At the 1981 meeting, the proposal was defeated by a vote of sixteen in favor, eight against and three abstentions. *Id.* (citing INT'L COMM'N ON WHALING, THIRTY-SECOND REPORT OF THE COMMISSION 18 (1982)). In addition to a global ban proposal, several other bans of various types were defeated including a ban on minke whaling, ban on whaling in the North Atlantic, and a global phase-out of commercial whaling over the next five years. NAGTZAAM, *supra* note 6, at 416.

¹⁰¹ At the 1982 meeting, thirty-seven member nations were present. Eight of these nations had never engaged in whaling practices. Fifty-one ENGO's were present. There were a total of five moratorium proposals. NAGTZAAM, *supra* note 6, at 416.

¹⁰² *Id.* at 417.

¹⁰³ D' AMATO, *supra* note 42, at 46.

¹⁰⁴ *Id.* Both exceptions are commonly criticized for diminishing the effectiveness of the worldwide ban. The scientific permit exception is criticized for allowing commercial whaling under the guise of scientific research. If a whale is hunted under the scientific exception, there a requirement the whale meat not be wasted. Therefore, Japan can still package and sell the meat as long as there is some scientific data obtained from whales.

The aboriginal exception is much different. There are more restrictions. If an aboriginal coastal community is given a permit to hunt whales, they must do so without using modern technology including high-powered harpoons and fast ships. The meat isn't commercially package and sold, but rather used within the community as it traditionally was at the start of whaling.

The countries that support each of these exceptions also differ. While the United States does not participate in the scientific exception, the U.S. is a strong proponent of the aboriginal exception. The U.S. has obtained permits for Alaskan coastal communities. The U.S. agreed to the aboriginal exception after the threat of legal action against the government by these communities under the United States Constitution First Amendment's Free Exercise clause. *Id.*

¹⁰⁵ NAGTZAAM, *supra* note 6, at 420.

¹⁰⁶ D' AMATO, *supra* note 42, at 46.

Pelly Amendment, the US would seek to impose an embargo and ban the importation of their fish products.¹⁰⁷ As a result, Japan agreed to stop commercial whaling practices by 1987.¹⁰⁸

5. SCIENTIFIC PERMITS

Under the ICRW, states have the authority to issue scientific permits to hunt whales. The IWC has little power to control these scientific permits even if the activities are questionably scientific.¹⁰⁹ Japan, Iceland, Russia and Norway have all previously utilized the scientific permit system.¹¹⁰ Japan is the only country currently using the permit system.¹¹¹ In 1995, the United Kingdom proposed a resolution in regards to the permit system.¹¹² This proposal advocated that research should be done through non-lethal methods unless an “exceptional” circumstance requires lethal methods.¹¹³ This proposal was accepted.

Despite this resolution, Japan continues to hunt under the scientific permit system. Japan’s scientific permit practice have been addressed in several IWC meetings and have subjected Japan to global censure.¹¹⁴ However, according to the ICW, Japan is within their rights as a member nation, and isn’t violating the ICRW.

¹⁰⁷ NAGTZAAM, *supra* note 6, at 421. The United States was unable to threaten U.S.S.R. in the same regard, since the United States didn’t import fish products. The threat to use sanctions proved to be an empty threat. Sanctions were illegal under GATT. *Id.*

¹⁰⁸ NAGTZAAM, *supra* note 6, at 421.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ A. W. Harris, *Article: The Best Scientific Evidence Available: The Whaling Moratorium and Divergent Interpretations of Science*, 29 WM. & MARY ENVTL. L. & POL’Y REV. 375, 382 (2005).

¹¹² NAGTZAAM, *supra* note 6, at 431.

¹¹³ NAGTZAAM, *supra* note 6, at 431.

¹¹⁴ *Id.* at 432. At the fifty-fifth meeting, the IWC as an entity it “expressed deep concern that the provision permitting special permit whaling enables countries to conduct whaling for commercial purposes despite the moratorium on commercial whaling...[and that doing so was] contrary to the spirit of the moratorium on commercial whaling and to the will of the Commission.” *Id.* (citing INT’L WHALING COMM’N, 54 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION (2003)).

The Japanese research program was created in direct response to the moratorium. In effect, it was intended to provide the scientific basis for the IWC to make precisely the decisions contemplated by the treaty parties when they adopted the moratorium. That it may have been intended to generate data and information that might support the resumption of commercial whaling should scarcely be remarkable or a matter for criticism or concern. Japan was simply going about obtaining what the Commission said it wanted: research results that would permit future management decisions to be made.¹¹⁵

However, the scientific data collected through scientific permits is questionable at best.¹¹⁶

The IWC depends on member nations for the data the Scientific Committee utilizes.¹¹⁷ The member state's position within the IWC can greatly affect what data is reported.¹¹⁸ It's publicly known that the former Soviet Union has deliberately submitted incorrect data to the IWC for years.¹¹⁹ States are also free to determine what data will be collected with scientific permits.¹²⁰

While conducting scientific research, Japan maintains that whaling no longer poses a threat of extinction on whaling populations.¹²¹ The data Japan chooses to collect logically supports this position. However, the public outcry about Japan's scientific research comes two fold. First, Japan uses lethal means to collect their data. Second, Japan uses the whale meat collected through their scientific research for commercial enterprises. Under the IWC, the meat cannot go to waste. As the rules are written today, Japan is not violating the ICRW.

Australia and Japan have a close relationship. Japan is Australia's largest trade partner. However, Australia and Japan are on quite opposite ends of the whaling controversy. Australia consistently challenges Japan's position in regards to scientific permit whaling. KLEIN, *supra* note 89, at 143-144.

¹¹⁵ Eldon V. C. Greenberg et al., *Japan's Whale Research Program and International Law*, 32 CAL. W. INT'L L.J. 151, 161 (2002).

¹¹⁶ KLEIN, *supra* note 89, at 173.

¹¹⁷ *Id.* at 174.

¹¹⁸ KLEIN, *supra* note 89, at 173.

¹¹⁹ *Id.*

¹²⁰ KLEIN, *supra* note 89, at 175. The Scientific Committee can review the permits and resulting data and give recommendations to member states on how to better collect data; however, these recommendations are just that and aren't binding on the member nations. *Id.*

¹²¹ Donald K. Anton, *20-Ton Canaries: The Great Whales of the North Atlantic: Symposium Article: Antarctic Whaling: Australia's Attempt to Protect Whales in the Southern Ocean*, 36 B.C. ENVTL. AFF. L. REV. 319, 324 (2009).

The scientific exception does have its own exceptions. In 1994, the IWC passed a resolution banning all scientific permit whaling within the Antarctic sanctuary.¹²² Japan formally objected to this resolution and continues to hunt within the southern sanctuary.¹²³ Anti-whaling nations accuse Japan of frustrating the purpose of the IWC; however, it is well within their right to object and abstain to a resolution if they do so within the formal objection procedure.

6. CONCLUSION

There are several issues within the International Whaling Commission.¹²⁴ One of the more noticeable problems is the moratorium-scientific permit system conflict. An exception to the moratorium in order to collect data for scientific research seems rationale enough. While whale stocks could conceivably be collected without lethal means, other forms of research regrettably involve methods that must be done on an animal postmortem. However, the majority of scientific information Japan is collecting is in regards to population numbers which could be gathered without whaling.¹²⁵

Japan has a legitimate interest in researching the whale population. Japan has a culture of whaling. Japan started whaling in the twelfth century.¹²⁶ As with whaling practices throughout

¹²² HARRIS, *supra* note 111, at 383.

¹²³ *Id.*

¹²⁴ Beyond the issues discussed in this paper, there are several other major issues with the IWC scholars and politicians are attempting to tackle. Some of these issues include allegations of vote buying, the proposed blind-ballot voting, implementing a revised method of measuring whale stocks and possible enforcement mechanisms.

¹²⁵ However, Japan also collects information that is much easier to obtain by removing the animal from the water such as sex and age of the specimen whale.

¹²⁶ KLEIN, *supra* note 89, at 155.

the world, the amount of whales harvested grew as new technologies were invented.¹²⁷ Like many countries, Japan resisted an effort to limit the whaling industry. Whaling was part of the Japan economy until the passage of the moratorium. Japan has an economic and cultural interest in whaling.

However strong their whaling interest is, the sustainability of a species is going to be a competing interest. The extinction of a species can't be reversed. Not only does the world lose a certain amount of biological diversity, the potential within that species is lost as well. As a human race, we don't know the scientific potential a species holds whether that be in evolutionary biology, pathology, biomedical research, or other beneficial applications. There exists a certain amount of responsibility in every human to prevent extinction of a species especially if our behavior is contributing to population decline.¹²⁸

If there exists a duty to protect a species from extinction, how far does that duty extend? At what point does a species move from possible extinction to sustainability? Both pro-whaling nations and anti-whaling nations will provide evidence in the form of statistics of whale stocks. The first issue with the moratorium is the lack of a definitive time table.

The moratorium amendment to the ICRW was passed in a direct effort to prevent further depletion of the whale population which, by most accounts, would have lead to extinction of various species of whales within the foreseeable future. The amendment itself indicates the ban wasn't intended to be permanent, and periodic review of the whale stocks is required.

If the rationale behind the amendment is preventing extinction, and the amendment is reversible pending an increase in whale populations, at what point does the moratorium become

¹²⁷ KLEIN, *supra* note 89, at 155.

¹²⁸ More specifically to whales, Australia and several ENGO's believe whales have a probability of being highly intelligent therefore making hunting of whales more morally culpable. NAGTZAAM, *supra* note 6, at 414.

unnecessary? This area creates one of many gray areas within the IWC. The Scientific Committee never recommended a moratorium, so as far as the committee is concerned, there was never a need for a moratorium. This leaves the Commissioners to decide when populations of whales have reached such a level of sustainability that limited hunting practices would not be detrimental.

The problem with this method is that the Commissioners do not have the educational background to decide at what point whales populations are out of danger. The power must be vested in the Scientific Committee. There must be a change in the policy of the IWC by allowing the Scientific Committee to decide if the whale populations have reached sustainable levels.

The second issue with the moratorium is the scientific research permit system. The IWC has taken issue with Japan's scientific permit use. However, the issue isn't with Japan, but rather with the system they created. The scientific research permit system must be completely overhauled to benefit both anti-whaling and pro-whaling member nations.

The IWC and its Commissioners must create a scientific research system that actually provides legitimate scientific data to the Scientific Committee. With recommendations by the Scientific Committee, the IWC needs to create an explicit research plan. Rather than allowing member nations to decide what data will be collected and how the collection will be done, this research plan will tell member nations exactly what research must be done and how to proceed with data collection in a scientifically sound method. This will allow the Scientific Committee to get information it can actually use and allow it to make educated recommendations based on this data.

If the Scientific Committee finds that the scientifically sound method of data collection is selective whaling with a scientific permit, then that method must be employed. However, with a

research plan created by leading biologists, countries like Japan won't be on a wild goose chase in the Antarctic. They will know exactly how many whales will need to be collected, exactly what information must be recorded, and how to legitimately record this information. This will benefit Japan since it will: one, bring legitimacy to the whaling they are conducting since the information and method were certified by the Scientific Committee; and two, create a data set that is scientifically sound and can be used to review the moratorium.

A structured research plan would also benefit anti-whaling member nations as well. The anti-whaling nations would be able to know the exact method the Japanese are using for their scientific research. In addition, any deviance from the system would give the IWC evidence of abuse. While there are no disciplinary protocols in the ICRW, there have been other effective methods of enforcement of the Convention. If an anti-whaling nation would like to utilize these methods again, the decision to do so would be based on an exact violation, rather than a hunch that the system is being violated. These changes would tighten up loopholes and give member nations less latitude in the scientific research exception.

The International Whaling Commission provides whales protection from the threat of extinction. As with any international agreement, the logistics of implementation of objectives creates the most issues. The system created to work on the problem inevitably creates more problems. The synergy of the IWC is a work in progress. The IWC was created with a morally sound objective: prevent extinction of a species. Through diligence and innovation, the IWC has the ability to achieve its objective.