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## The International Whaling Commission and the Elusive Great White Whale of Preservationism

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THE INTERNATIONAL WHALING COMMISSION AND THE ELUSIVE GREAT WHITE WHALE OF PRESERVATIONISM

GERRY J. NAGTZAAM\*

ABSTRACT

This article explores the attempts by international states and organizations to create a global legal whaling regime and examines its underlying competing environmental norms of exploitation, conservation, and preservation. It outlines a history of whaling exploitation over the centuries and tracks the development of early whaling regimes, as well as examines the development of the International Whaling Commission and treaty. Legro’s test of the robustness of a norm is applied to the whaling regime to determine when, why, and through whose agency normative change was effected within the Commission.

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## INTRODUCTION

The fight by Environmental Non-Governmental Organizations ("ENGOS") to preserve whales is considered to be the first modern, global environmental campaign, and in many ways the whale is still regarded as the symbol of the ENGO trans-national movement.<sup>1</sup> Environmentalists often cite this campaign as a model of how to achieve environmental goals.<sup>2</sup> Yet these claims belie a more complex history, characterized by a morass of competing interests and positions regarding the killing of whales, that continues to this day.<sup>3</sup> This article will examine the modern exploitation of whales and the competing attempts by various normative entrepreneurs to introduce their preferred competing environmental norms of exploitation, conservation, or preservation. The arena of normative contestation to be examined is the meetings to regulate the whaling industry held primarily under the auspices of the International Whaling Commission ("IWC"), as well as other forums held to regulate the practice of whaling.

This paper focuses on the case study of whaling because it is a less clear-cut example of normative change, which reveals much of the underlying positioning of various norm proponents to promote their preferred position. Initially, the exploitation of whale species to the brink of extinction led to a push by whaling states and companies for a conservationist regime under the IWC to be put in place.<sup>4</sup> The failure of whalers to adhere to a conservationist approach opened the door for anti-whaling states and ENGOS to propose and promote a preservationist approach to global whale stocks that still underpins the IWC today, despite a fierce backlash from whaling states that threatens to tear the organization apart.<sup>5</sup>

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<sup>1</sup> Niels Einarsson, *All Animals Are Equal but Some Are Cetaceans: Conservation and Culture Conflict*, in ENVIRONMENTALISM: THE VIEW FROM ANTHROPOLOGY 73, 75 (Kay Milton ed., 1993); Paul Wapner, *Horizontal Politics: Transnational Environmental Activism and Global Cultural Change*, GLOBAL ENVTL. POL., May 2002, at 37, 48.

<sup>2</sup> See Paul Wapner, *Politics Beyond the State: Environmental Activism and World Civic Politics*, 47 WORLD POL. 311, 320 (1995).

<sup>3</sup> See Wapner, *supra* note 1.

<sup>4</sup> M.J. Peterson, *Whalers, Cetologists, Environmentalism and the International Management of Whaling*, 46 INT'L ORG. 147, 147 (1992).

<sup>5</sup> See William C.G. Burns, *The Berlin Initiative on Strengthening the Conservation Agenda of the International Whaling Commission: Toward a New Era for Cetaceans?*, 13 REV. OF EUR. COMMUNITY & INT'L ENVTL. L. 72, 73-74 (2004); Charlotte Epstein, *The Making of Global Environmental Norms: Endangered Species Protection*, GLOBAL ENVTL. POL., May 2006, at 32, 45.

## I. DEFINING INTERNATIONAL ENVIRONMENTAL NORMS

This paper analyzes global moral norms in international environmental agreements, how they evolve, the role of norm advocates, and how norms become accepted by the global community. In particular, this paper will focus on the environmental norms of exploitation, conservation, and preservation. However, before examining their role in changing regimes, the role played by norms in international regimes needs to be understood. Norms can be defined for the purposes of this article as "shared expectations about appropriate behavior held by a collectivity of actors."<sup>6</sup> At the global level, norms can be found operating in international regimes of all persuasions, and the development of a more nuanced understanding of their functions has provided a clearer picture of how regimes evolve.<sup>7</sup> Stephen Krasner originally defined regimes as "sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations."<sup>8</sup> Robert Keohane, building on the earlier work of John Ruggie and Ernst Haas, has argued that within a regime

Norms contain somewhat clearer injunctions to members about legitimate and illegitimate behaviour, still defining responsibilities and obligations in relatively general terms. . . . The rules of a regime are difficult to distinguish from its norms; at the margin, they merge into one another. Rules are, however, more specific: they indicate in more detail the specific rights and obligations of members.<sup>9</sup>

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<sup>6</sup> Jeffrey T. Checkel, *Norms, Institutions and National Identity in Contemporary Europe*, 43 INT'L STUD. Q. 83, 83 (1999).

<sup>7</sup> See Robert O. Keohane, *The Demand for International Regimes*, 36 INT'L ORG. 325, 325-26 (1982).

<sup>8</sup> Stephen D. Krasner, *Structural Causes and Regime Consequences*, in INTERNATIONAL REGIMES, 1, 2 (Stephen D. Krasner ed., 1983). The regime definition promulgated by Krasner is not without its detractors. O'Riordan et al. are critical of the distinction in that it "is rather broad and ambiguous in delimiting whether phenomena fall under the rubric of international regimes in empirical research. It includes both formal governmental organizations (such as the various UN agencies) and regularized forms of policy coordination on a specific issue." Ian H. Rowlands, *Classical Theories of International Relations*, in INTERNATIONAL RELATIONS AND GLOBAL CLIMATE CHANGE 43, 55 (Urs Luterbacher & Detlef F. Sprinz eds., 2001) (quoting O'Riordan et al., *Institutional Frameworks for Political Action*, in HUMAN CHOICE AND CLIMATE CHANGE 345, 361 (Steve Rayner & Elizabeth L. Malone eds., 1998)).

<sup>9</sup> ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 58 (1984).

Norms function within regimes in a number of ways. They can provide a basis for shaming or pressuring actors, or they can provide the basis of social learning of appropriate or moral behavior and become internalized by agents and guide actions.<sup>10</sup> As R. Charli Carpenter argues, "norms provide an intersubjective context in which discourse and behavior are interpreted and either condoned or condemned by third parties. As general standards, norms are codified and (sometimes) implemented in the form of specific rules, which actors then chose to obey, break, or re-define."<sup>11</sup> Norms in one sense are counterfactual since the mere violation of a norm does not necessarily disprove its existence or its impact; much depends on the response to violations.<sup>12</sup> However, norms are not "causes" for behavior but they can serve as reasons for behavior, providing a component of the essential deliberative process of making choices.<sup>13</sup> At the international level such norms are often codified within international law, which provides an important indicator of the presence and strength of a global norm.<sup>14</sup> When states make agreements, the benefits that accrue from normative compliance may not necessarily be material, but may include the need for legitimacy, credibility, status, or a concern to be perceived as a good global citizen.<sup>15</sup>

Although descriptions and evaluations of norms in environmental literature proliferate, studies as to why people adhere to particular norms are rare. Even in strategic studies of norms, little analysis has been carried out on the dynamics of norm articulation and internalization and "how [norms] can get started, how a partial norm can be sustained and

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<sup>10</sup> Jeffrey T. Checkel, *International Norms and Domestic Politics: Bridging the Rationalist-Constructivist Divide*, 3 EUR. J. INT'L REL. 473, 474-75 (2003).

<sup>11</sup> R. Charli Carpenter, 'Women and Children First': Gender, Norms, and Humanitarian Evacuation in the Balkans 1991-95, 57 INT'L ORG. 661, 670 (2003).

<sup>12</sup> Radoslav S. Dimitrov, *Hostage to Norms: States, Institutions and Global Forest Politics*, 5 GLOBAL ENVTL. POL., Nov. 2005, at 1, 12.

<sup>13</sup> Friedrich Kratochwil, *Thrasymachos Revisited: On the Relevance of Norms and the Study of Law for International Relations*, J. INT'L AFF., Spring 1984, at 343, 356.

<sup>14</sup> Within international law, we can speak of a hierarchy of norms when it comes to examining the efficacy and durability of a norm: international treaties; customary international law; general principles of law recognized by civilized nations; judicial decisions and; teachings of the most highly qualified proponents of the various states. HENNING BOEKLE, VOLKER RITTBERGER & WOLFGANG WAGNER, NORMS AND FOREIGN POLICY: CONSTRUCTIVIST FOREIGN POLICY THEORY 20 (1999), available at <http://www.uni-tuebingen.de/uni/spi/taps/tap34a.htm>.

<sup>15</sup> See Petrice R. Flowers, *International Norms and Domestic Policies in Japan: Identity, Legitimacy and Civilization* 4 (Aug. 2002) (unpublished Ph.D. dissertation, University of Minnesota).

become well established and how one norm can displace another.”<sup>16</sup> As Jeffrey Legro argues, “The literature on norms has generally misspecified their impact because of several conceptual and methodological biases . . . by concentrating on showing that norms ‘matter,’ analysts have given short shrift to the critical issues of which norms matter, the ways they matter, and how much they matter relative to other factors.”<sup>17</sup>

Legro posits that analysts, whatever their theoretical persuasion, have at least two biases relevant to the study undertaken here, which has rendered their analysis flawed.<sup>18</sup> The first bias is an inability to perceive “norm robustness” as an independent variable, separate from the effects attributed to the norm.<sup>19</sup> There is such a plethora of norms competing in the international arena that one can always “discover” a norm to explain an effect cited. It is crucial, therefore, to be able to understand why some norms are *more* influential than others *in a particular forum*. The second bias is that most analysis to date focuses on norms perceived to have “worked” rather than examining case studies where norms have failed to find purchase and have failed to be accepted.<sup>20</sup> To better understand the influence of norms in the global community, it is also necessary to study cases of the success, failure and obsolescence of norms. As Legro correctly argues, “Why norms did not emerge or were not consequential is as important as why they did or were.”<sup>21</sup>

This article responds to these criticisms by Legro by seeking to discover which of the environmental norms of exploitation, conservation, and preservation “won,” or at least predominated, in a given situation of normative contestation and why. This entails exploring how *much* rival norms have played a critical role within negotiations to create environmental regimes, and when and how normative transformation was brought about. It will ask how much the successful norm has mattered relative to other norms and material factors and will also examine cases of norm failure, where “progressive” environmental norms such as conservation and preservation were unsuccessful, such as the case of tropical timber where conservation has failed to supplant exploitation.

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<sup>16</sup> ROBERT M. AXELROD, *THE COMPLEXITY OF COOPERATION: AGENT-BASED MODELS OF COMPETITION AND COLLABORATION* 56 (1997).

<sup>17</sup> Jeffrey W. Legro, *Which Norms Matter? Revisiting the “Failure” of Internationalism*, 51 INT’L ORG. 31, 31 (1997).

<sup>18</sup> See *id.* at 33.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 34.

<sup>21</sup> *Id.*

Unlike much of the research into norm behavior, this article is primarily concerned then with analyzing *competing* norms. As Robert Jackson argues, "the international sphere, like most spheres of human conduct, is fraught with normative tensions, anomalies and conflicts," but they are rarely directly analyzed because they are either seen as irrelevant by neorealists describing them as "epiphenomena" or are seen as a subset of the main game, such as actors' interests, by neoliberal institutionalists.<sup>22</sup> Before engaging with the research questions posed, it is necessary to gain an understanding of the philosophical and practical distinctions between the competing three norms under scrutiny: exploitation, conservation, and preservation.

Further, to better understand competing normative development, Jeffrey Legro's test for the robustness of a norm will be employed.<sup>23</sup> This paper will compare and contrast three competing norms within the one environmental regime to see which has emerged as the *more* robust norm over time and *why*. Legro is rightly critical of the constructivist approach to normative analysis, arguing that to date such research mostly studies one norm in isolation and has not focused on cases where norms compete, nor has it investigated cases of normative failure.<sup>24</sup> Legro's work enables us to examine more sharply the evolution of norms and to determine their *relative robustness*. Legro proposes a three-pronged test to determine the strength of a particular norm: "*specificity, durability, and concordance*."<sup>25</sup>

A norm's strength can be judged on its specificity or "how precisely a norm distinguishes appropriate from inappropriate behavior."<sup>26</sup> In other words, the specificity prong of Legro's test judges "how well the guidelines for restraint and use are defined and understood."<sup>27</sup> Are they overly complex and ill-defined, or simple and precise? This is "assessed by examining actors' understandings of the simplicity and clarity of the prohibition."<sup>28</sup> This precision depends to a great extent on the explication of the norm in such documents as written conventions. A non-specific standard of behavior means that there could be a wide range of behavioral possibilities that could be determined as appropriate and do not allow any straightforward assessment

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<sup>22</sup> ROBERT H. JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS, AND THE THIRD WORLD 172 (1990).

<sup>23</sup> See Legro, *supra* note 17, at 34.

<sup>24</sup> See *id.*

<sup>25</sup> *Id.*

<sup>26</sup> BOECKLE, RITTBERGER & WAGNER, *supra* note 14, at 6.

<sup>27</sup> Legro, *supra* note 17, at 34.

<sup>28</sup> *Id.*

of whether a norm has been violated. Such unspecified norms are "unsuitable as a standard for appropriate behaviour" and cannot be treated as an independent variable that can explain a norm's efficacy.<sup>29</sup>

Legro goes on to look at how *durable* a norm can be by asking us to demonstrate "how long the rules have been in effect and how they weather challenges to their prohibitions."<sup>30</sup> Are violators and violations of the norm penalized and in what way? The violation of a norm does not necessarily mean that the norm has no validity. For example, the norm against incest is a strong one despite there being repeated infractions of the taboo. For Legro the point is that the actors are punished or censured, either at a societal level or at a personal level where they sanction themselves for their transgressions.<sup>31</sup>

Lastly Legro examines the concept of *concordance* or commonality,<sup>32</sup> that is, "how widely accepted the rules are in diplomatic discussions and treaties (that is, the degree of intersubjective agreement)."<sup>33</sup> Do states agree on the acceptance of the validity of a norm? Has it been internalized? Do they put conditions on acceptance and therefore diminish it? Are these rules so taken for granted that no actor even considers violating them?<sup>34</sup>

The strength of the obligation inherent in a norm is determined in these cases by the units within a system who share that norm's values. Thus we can speak of a high degree of commonality if *all* actors share a certain value-based expectation of behavior, a medium degree if a *majority* of actors share the same expectation of behavior, and a low degree of commonality if a *minority* ascribe to the expectation of behavior.<sup>35</sup> According to Legro, a norm must have at least a medium level of commonality before it can be said to be exerting any influence on a state's behavior.<sup>36</sup> This can be examined by evaluating records of national and international discussions on particular norms as will be done in this article. The expectation of this approach "is that the

<sup>29</sup> BOEKLE, RITTBERGER & WAGNER, *supra* note 14, at 7.

<sup>30</sup> Legro, *supra* note 17, at 34.

<sup>31</sup> *Id.* at 35.

<sup>32</sup> By commonality, constructivists mean "how many actors of a social system share a value-based expectation of behavior." BOEKLE, RITTBERGER, AND WAGNER, *supra* note 14, at 7.

<sup>33</sup> Legro, *supra* note 17, at 35.

<sup>34</sup> *See id.*

<sup>35</sup> *See* BOEKLE, RITTBERGER, AND WAGNER, *supra* note 14, at 6.

<sup>36</sup> *See* Legro, *supra* note 17, at 35.



clearer, more durable, and more widely endorsed a prescription is, the greater will be its impact" and consequently its robustness.<sup>37</sup> The greater the level of commonality, the more robust the explanation that constructivism provides. The lower the commonality the greater the likelihood that the expectation is not an independent variable but rather some other variable. Analysts must demonstrate "that certain groups assert themselves over their rivals *because of* the norms they share" and only then will that norm be the explanatory variable.<sup>38</sup>

This paper will take up the challenge issued by Legro and, using his test of norm robustness, seek to unpack the notion of normative competition and transformation within the global whaling regime. It will attempt to answer the following questions: How can we explain the ascendancy of some environmental norms over others? In particular, how can we explain the rise of, and resistance to, conservation and preservation norms over exploitation norms in environmental regimes? To answer the proposed questions this article will investigate the discursive fora and contexts through which the examined norms were negotiated as well as the main whaling sub-issues still being debated today within the IWC. This includes examining the proffered arguments put forward by actors and the ideational frameworks utilized to defend positions. The strategies and tactics employed to persuade and manipulate other actors are also analyzed along with a critical reading of the way the normative preferences of the parties are transformed through social interaction.

## II. THE NORMS OF EXPLOITATION, CONSERVATION, AND PRESERVATION

All three environmental norms examined in this article started as domestic norms but have become global due to the increasingly transboundary character of environmental problems and the transnational activism of ENGOs. Thus norms have histories that can be "subject to change over time" as a "result of the communicative process in which value-based expectations of behavior are socialized and as a result of which the contents of socialization can change in the long term."<sup>39</sup> The global environmental norms examined here are not categorical; rather

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<sup>37</sup> *Id.*

<sup>38</sup> BOEKLE, RITTBERGER, AND WAGNER, *supra* note 14, at 6.

<sup>39</sup> *Id.* at 10.

they evolved over time in the language used by various norm advocates to advance their cause.<sup>40</sup> Such practices then determine the legitimacy of global actors within social contexts.<sup>41</sup>

It is useful to begin with an examination of the norms of exploitation, conservation, and preservation from a philosophical viewpoint before embarking on an analysis of how such norms compete within environmental regimes. This is not to say that there is one *correct* definition of the terms examined. Advocates, as will be seen in the case study, use differing and sometimes multiple definitions of norms to advance their cause.<sup>42</sup> Many proponents mistakenly conflate the terms when defining their positions, and some advocates hide their real position within the rhetorical definitions of another.<sup>43</sup> However, offering conceptual distinctions based on a long history of environmental philosophical engagement will help to shed light on the varieties of ways in which the norms are deployed and/or understood by social agents.

The concept of "exploitation" has received scant conceptual analysis compared to the concepts of conservation and preservation.<sup>44</sup> One of the few authors to explore the meaning of the general concept in any depth is Alan Wertheimer, who argues that at the most general level, exploitation occurs when "A takes unfair advantage of B" thus connoting a wrongful action.<sup>45</sup> However, Wertheimer does not consider the exploitation of nature by humans.<sup>46</sup> Taylor, rather than defining exploitation *per se*, speaks in terms of an *exploitative attitude* which he defines as occurring "whenever nature is thought of as nothing more than a vast repository of resources, both physical and biological, to be developed, used, and consumed by humans for human ends."<sup>47</sup>

<sup>40</sup> Christian Reus-Smit, *The Politics of International Law*, in *THE POLITICS OF INTERNATIONAL LAW* 14, 35 (Christian Reus-Smit ed., 2004).

<sup>41</sup> *See id.*

<sup>42</sup> *See infra* Part X.

<sup>43</sup> For an example of conflation, see Birnie and Boyle who define conservation in preservationist terms as "to keep in safety or from harm, decay or loss; to preserve in being; to keep alive." P.W. BIRNIE AND A.E. BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT* 550 (2d ed. 2002). While conservationist rhetoric about the need to save the environment is standard, it would be a brave state or company that would argue in this day and age for reckless exploitation of a resource to occur. Rather, the position is put that global resources needs careful conserving or "wise use" to ensure there are resources available for future generations of humans.

<sup>44</sup> *See* ALAN WERTHEIMER, *EXPLOITATION* 5 (1996).

<sup>45</sup> *Id.* at 10.

<sup>46</sup> *Id.* at 10-12.

<sup>47</sup> PAUL W. TAYLOR, *RESPECT FOR NATURE: A THEORY OF ENVIRONMENTAL ETHICS* 95 (1986).

Even in the ecophilosophical literature, the concept of exploitation only has been cursorily explored as part of an overarching Western narrative of historically dominating nature. Most ecophilosophical attention has been devoted to the new environmental norms that have challenged exploitation, namely conservation or preservation.<sup>48</sup> Taylor argues that for some, the advancement of western civilization is intricately bound up with the domination of nature in pursuit of the goal of ensuring a better life for the bulk of humanity.<sup>49</sup> Alternatively, some ecophilosophers have made the point that there is a conceptual link between the exploitation of nature and the exploitation of disadvantaged groups within society, such as women or indigenous peoples, but again the term is not spelled out but rather is left undefined and generally understood as "bad."<sup>50</sup>

Humankind has traditionally attempted to portray and justify its environmentally exploitative practices as beneficial to itself.<sup>51</sup> For example, Francis Bacon argued at one point that the dominion of the planet by man gave him the right to utilize nature for "man's" benefit exclusively.<sup>52</sup> Such exploitation has been described as springing from the human belief that there is an "inherent right to take and plunder" natural resources which has been justified using the Christian Bible passage that God gave dominion of the planet to humanity for its own uses.<sup>53</sup>

However, it is possible to perceive exploitation as a good if it is in the service of a higher moral goal, such as the provision of a better quality of life for the citizens of a state. Taylor argues that in human/ecology there is nothing *morally* wrong with choosing an exploitative attitude towards nature.<sup>54</sup> Such non-respect towards nature is permissible since from a human-centered ethical standpoint the environment is "rightly controlled, transformed, and consumed in the service of human interests alone" and "[a]side from their actual or potential usefulness to humans, they lack all worth."<sup>55</sup>

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<sup>48</sup> WARWICK FOX, TOWARD A TRANSPERSONAL ECOLOGY: DEVELOPING NEW FOUNDATIONS FOR ENVIRONMENTALISM 152-53 (1990).

<sup>49</sup> TAYLOR, *supra* note 47.

<sup>50</sup> Robyn Ekersley, *Politics*, in A COMPANION TO ENVIRONMENTAL PHILOSOPHY 316, 321 (Dale Jamieson ed., 2003). For research on the link between nature, feminism, and indigenous peoples, see VAL PLUMWOOD, FEMINISM AND THE MASTERY OF NATURE (1990).

<sup>51</sup> Robin Attfield, *Christianity*, in A COMPANION TO ENVIRONMENTAL PHILOSOPHY 96, 104-05 (Dale Jamieson ed., 2001).

<sup>52</sup> *Id.* at 105.

<sup>53</sup> PETER G. BROWN, ETHICS, ECONOMICS AND INTERNATIONAL RELATIONS: TRANSPARENT SOVEREIGNTY IN THE COMMONWEALTH OF LIFE 44 (2000).

<sup>54</sup> TAYLOR, *supra* note 47, at 51-52.

<sup>55</sup> *Id.* at 52.

States have historically viewed their exploitation of natural resources, both domestic and global, as a right and, in some cases, as a good.<sup>56</sup> Principle 21 of the 1972 Stockholm Declaration has enshrined this internationally recognized right to the effect that "states have . . . the sovereign right to exploit their own resources pursuant to their own environmental policies . . . ."<sup>57</sup> Exploitation of resources such as those examined in this article—minerals, whales or timber—has long been accepted as a corollary of state sovereignty, and part of the principle of permanent sovereignty over natural resources.<sup>58</sup>

Given the lack of definitional precision of the term exploitation as it applies to nature, it is necessary to advance a working definition for the purposes of this article that encapsulates the morally pejorative meaning of the term as well as the morally non-pejorative sense of the unrestrained use of natural resources. Consequently, the term will be understood, drawing on the work of Taylor, as referring to a situation where humanity treats resources as merely instruments to be developed and consumed without consideration for the survivability of the resource, the overall ecosystem, or the rights of future generations of humans. This definition incorporates the idea that such resource usage is unsustainable with no consideration for resource replenishment or for the integrity of the overall ecosystem from which it is drawn.

A major problem in analyzing the norm of exploitation, then, is that in contemporary times, given its commonly accepted pejorative meaning, arguments for the unrestrained or minimally restrained utilization of a resource are rarely couched in the language of exploitation by its proponents, who prefer to use the language of sustainable utilization or conservation. It is ultimately an empirical question whether the argument proposed by a stakeholder is a conservationist one or whether it is exploitationist under the "cover" of the language of conservation. For example, we shall see that in the case of whaling, many whaling states such as Japan and the former Soviet Union, despite a stated commitment to conservationist principles, continued to engage in exploitative whaling practices

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<sup>56</sup> See Sompong Sucharitkul, *State Responsibility and International Liability Under International Law*, 18 LOY. L.A. INT'L & COMP. L.J. 821, 837 (1996).

<sup>57</sup> United Nations Conference on the Human Environment Twenty-first Plenary Meeting, June 16, 1972, *Declaration*, available at <http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=97&ArticleID=1503>.

<sup>58</sup> See *id.*

leading to the near extinction of certain whale types.<sup>59</sup> However, the choice not to use the explicit language of exploitation also provides a revealing indication that support for the norm has waned.

In contrast to the norm of exploitation, the norms of conservation and preservation have enjoyed prominence and influence within global environmental regimes.<sup>60</sup> The debate at the domestic level between those advocating conservationism and those promoting preservationism served to create the first wave of domestic ENGOs "in the nineteenth and early twentieth centuries."<sup>61</sup> The role played by the transnational successors of these domestic ENGOs will form a key part of this article. That domestic debate is now being played out on a global scale.<sup>62</sup>

Human understanding of the need to conserve resources is an ancient one. The ancient idea of conservation can be found in such early texts as the Bible, and the writings of Plato and Cicero.<sup>63</sup> Conservationism as a concept "concedes that nature is not inexhaustible: accordingly, that there are limits to material growth, and that husbandry must therefore be practised because it becomes necessary to consider the interests of human generations as yet unborn when determining courses of action."<sup>64</sup> The conservationist approach is bound up with the production process and regards the nonhuman world merely in terms of its use-value terms, as a resource to be utilized.<sup>65</sup> Therefore a conservationist perspective treats the biosphere as a reservoir of matter-energy to be altered by technology for human consumption.<sup>66</sup> Such conservation can be of renewable or non-renewable resources providing there is a husbanding of the resource for the future where it is acknowledged that "it will be needed as much as at present."<sup>67</sup>

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<sup>59</sup> See *infra* Part IV.

<sup>60</sup> See Aynsley Kellow, *Norms, Interests and Environment NGOs: The Limits of Cosmopolitanism*, ENVTL. POL'Y, Autumn 2000, at 1, 17.

<sup>61</sup> NEIL CARTER, *THE POLITICS OF THE ENVIRONMENT: IDEAS, ACTIVISM, POLICY* 27 (2001).

<sup>62</sup> See MARK J. SMITH, *ECOLOGISM: TOWARDS ECOLOGICAL CITIZENSHIP* 12-13 (1998).

<sup>63</sup> ROBYN ECKERSLEY, *ENVIRONMENTALISM AND POLITICAL THEORY: TOWARD AN ECOCENTRIC APPROACH* 35 (1992).

<sup>64</sup> PETER HAY, *MAIN CURRENTS IN WESTERN ENVIRONMENTAL THOUGHT* 33 (2002).

<sup>65</sup> ECKERSLEY, *supra* note 63, at 36.

<sup>66</sup> This approach "mirrors Judeo-Christian traditions, especially in its anthropocentric outlook. Nature and natural entities are not sacred, have no end or justification in and of themselves, and exist solely as means in terms of which human ends might be fulfilled." MAX OELSCHLAEGER, *IDEA OF WILDERNESS: FROM PREHISTORY TO THE AGE OF ECOLOGY* 287 (1993).

<sup>67</sup> TAYLOR, *supra* note 47, at 298.

This norm can be seen as a breaking away from the exploitative practices of the past and accepting a more rational, cautious approach to the husbanding of potentially scarce resources. Mark Smith argues that the idea of conservationism has tended to act as a brake "to moderate the pressures for an *exploitative* 'free for all' inherent in the drives which propel actions in economic markets" thus ameliorating damaging practices of the past.<sup>68</sup> Robyn Eckersley supports this position and argues further that resource conservation can be seen as the first step away from unrestrained development.<sup>69</sup>

Conservation is in many ways the least controversial environmental norm since it has at its heart a utilitarian, human-centered perspective that seeks the greatest good for the greatest number of humans. Using this norm to underpin a global environmental regime tends to invite greater consensus from stakeholders as its argument that the environment is a resource that wisely must be utilized resonates deeply with many cultures.<sup>70</sup> It embodies a rhetoric of restraint which also suits the interests of states seeking better economic returns from their resources. Scientists have often been the transmitters for conservationist norms within environmental regimes since the approach that resources should be wisely used and husbanded for future generations has been central to agriculture and forestry.<sup>71</sup>

If the saving of a resource is *from* utilization rather than *for* utilization, however, we are generally speaking of "preservation."<sup>72</sup> John Passmore defines preservation as "the attempt to maintain in their present condition such areas of the earth's surface as do not yet bear the obvious marks of man's handiwork and to protect from the risk of extinction those species of living beings which man has not yet destroyed."<sup>73</sup> Max Oelschlaeger expands on this by arguing that preservationists reject the notion that nature is merely a resource and instead prize wilderness values, species rarity, and diversity.<sup>74</sup> Anne and Paul Erlich are typical

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<sup>68</sup> SMITH, *supra* note 62, at 11 (emphasis added).

<sup>69</sup> ECKERSLEY, *supra* note 63, at 37.

<sup>70</sup> See, e.g., *infra* Part XIII.

<sup>71</sup> TAYLOR, *supra* note 47, at 300-01.

<sup>72</sup> See JOHN PASSMORE, *MAN'S RESPONSIBILITY FOR NATURE: ECOLOGICAL PROBLEMS AND WESTERN TRADITIONS* 101 (1974).

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

<sup>74</sup> R.C. Paehlke, *Environmental Values and Public Policy*, in *ENVIRONMENTAL POLICY IN THE 1990S: REFORM OR REACTION* 75, 78 (Norman J. Vig & Michael E. Kraft eds., 3d ed. 1997).

of those who espouse a preservationist viewpoint in that they argue that the biosphere has a right to exist.<sup>75</sup> Thus, at its heart, preservationism accords an *intrinsic* or non-instrumental value to the world even if it conflicts with human interests.<sup>76</sup>

Passmore, however, takes it as axiomatic that "true" preservationist arguments *must* rely on the concept of intrinsic value.<sup>77</sup> This position is at odds with many preservationist theorists who also include instrumental arguments to support the preservation of nature.<sup>78</sup> However, while it is possible to argue preservationist positions from an instrumental perspective, doing so does a disservice to the intentions of many global actors advocating preservation who argue that whales or other creatures deserve not to be culled because they intrinsically have a right to exist.<sup>79</sup> At the global level, ENGOs have been the prime norm entrepreneurs advocating, with some success, that the intrinsic strand of preservationism should underpin global environmental regimes concerned with the management of species and wilderness areas.<sup>80</sup>

Bryan Norton argues, at least in the short term, there is little difference between advocating conservationism and preservationism since both views are dedicated to saving ecosystems and species.<sup>81</sup> However, the two views often diverge at critical moments and may be traced to differing philosophical belief systems. A conservationist may only save a resource for use at a future time, while a preservationist desires to keep the resources forever untrammelled and protected—thus sooner or later they will find themselves at loggerheads.<sup>82</sup> The case studies that are examined in this article bear this out since the norm advocates of conservation and

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<sup>75</sup> George Sessions, *Ecocentrism, Wilderness, and Global Ecosystem Protection*, in *THE WILDERNESS CONDITION: ESSAYS ON ENVIRONMENT AND CIVILIZATION* 90, 102 (Max Oelschlaeger ed., 1992).

<sup>76</sup> William Godfrey-Smith, *The Rights of Non-Humans and Intrinsic Values*, in *ENVIRONMENTAL PHILOSOPHY* 30, 31 (D.S. Mannison, M.A. McRobbie & R. Routley eds., 1980).

<sup>77</sup> PASSMORE, *supra* note 72, at 124-26.

<sup>78</sup> William Godfrey-Smith, *The Value of Wilderness*, 1 *ENVIRONMENTAL ETHICS* 309, 310 (1979); Bryan G. Norton, *Conservation and Preservation: A Conceptual Rehabilitation*, 8 *ENVTL. ETHICS* 195, 196 (1986).

<sup>79</sup> Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 *AM. J. INT'L L.* 21, 45-46 (1991).

<sup>80</sup> Bryan G. Norton, *The Cultural Approach to Conservation Biology*, in *ENVIRONMENTAL ETHICS: AN INTRODUCTION WITH READINGS* 143, 149-50 (John Benson ed., 2000).

<sup>81</sup> *Id.* at 146.

<sup>82</sup> *Id.* at 146-47.

preservation want different outcomes and work to achieve new practices and goals which are, at times, totally disparate.

### III. GLOBAL INDUSTRIAL EXPLOITATION OF WHALES

Whaling as an activity has been carried out from the dawn of human history in many parts of the globe.<sup>83</sup> For centuries humans treated whales as a "free resource," in the sense that they were considered a gift from nature to be exploited by anyone who could catch them.<sup>84</sup> Until the development of more efficient harvesting technologies, however, humans lacked the ability to catch pelagic or large whales in large numbers, so overexploitation of whales was not a problem.<sup>85</sup>

All that changed with the advent of *industrial* whaling, however, which is thought to have originated with the Basques in the eleventh century in the Bay of Biscay.<sup>86</sup> Such whaling was initially limited to coastal shores and done from small boats.<sup>87</sup> By the middle of the fifteenth century, however, Basque whalers were venturing further afield, in ever-larger boats, as far as the eastern coasts of Canada.<sup>88</sup> Other nations soon joined the hunt for what was then a huge population of different species of whales.<sup>89</sup> By the seventeenth century whaling countries ventured as far as the Arctic in pursuit of whales.<sup>90</sup> In this period English and Dutch vessels in the hundreds hunted primarily right whales—greenland whales and nordcapers—in the Arctic, bringing untold wealth to their national treasuries.<sup>91</sup> From 1750 to 1870 whales were considered an economically valuable source of oil, bone, and other products, such as perfume and

<sup>83</sup> Sebastian Oberthür, *The International Convention for the Regulation of Whaling: From Over-Exploitation to Total Preservation*, in YEARBOOK OF INTERNATIONAL CO-OPERATION ON ENVIRONMENT AND DEVELOPMENT 1998/99 29, 29 (Helge Ole Bergesen, Georg Parmann, and Øystein B. Thomnessen eds., 1998).

<sup>84</sup> D'Amato & Chopra, *supra* note 79, at 28.

<sup>85</sup> Oberthür, *supra* note 83.

<sup>86</sup> D'Amato & Chopra, *supra* note 79, at 28-29. Industrial whaling refers to the commercial hunting of the larger, migratory seventy-nine whale species, for example, the blue whale. Oberthür, *supra* note 83.

<sup>87</sup> ELIZABETH DESOMBRE, *THE GLOBAL ENVIRONMENT AND WORLD POLITICS* 150 (2d ed. 2007).

<sup>88</sup> *Id.*

<sup>89</sup> See FARLEY MOWAT, *SEA OF SLAUGHTER* 210 (1989).

<sup>90</sup> DESOMBRE, *supra* note 87.

<sup>91</sup> COMM. FOR WHALING STATISTICS, *INTERNATIONAL WHALING STATISTICS II* 4 (1931).



clothing.<sup>92</sup> From the mid to late 19th century, a whale carcass sold for over U.S. \$2000 making whaling a highly profitable enterprise.<sup>93</sup>

Modern whaling is considered to have commenced in 1864 when Svend Foyn of Norway first used explosive grenade harpoons fired by cannon to hunt whales from the northeast coast of Norway.<sup>94</sup> This enabled whalers to hunt larger, faster-swimming, rorqual whales such as blue, fin, sei, and minke whales.<sup>95</sup> Instead of rowboats, Foyn introduced small, fast steamers, which came to be called catchers.<sup>96</sup> These hunted whales for permanent whale oil factories set up close to the whaling grounds.<sup>97</sup> The advent of these new technologies enabled whalers for the first time to begin harvesting whales in large numbers, to the point that they threatened the viability of several species of pelagic whales.<sup>98</sup> These new whaling technologies enshrined exploitationist practices as the global standard.<sup>99</sup>

Both Elizabeth DeSombre and F. D. Ommanney maintain that it was not until the middle of the nineteenth century that it became readily apparent that human hunting of whales was having a negative impact on whale stocks, but whaling continued at ever increasing rates, threatening the species as a whole.<sup>100</sup> Robert Ellickson points out that prior to this point, there might well have been a short-term economic incentive for states to continue excessive hunting to prevent other whaling nations from exploiting this resource.<sup>101</sup> This type of state interest prevented a conservationist regime from being put in place, as states jostled to secure relative gains over

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<sup>92</sup> See ALEXANDER STARBUCK, *HISTORY OF THE AMERICAN WHALE FISHERY FROM ITS EARLIEST INCEPTION TO THE YEAR 1876* (Argosy-Antiquarian 1964) (1878).

<sup>93</sup> Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 J.L. ECON. & ORG. 83, 84 (1989).

<sup>94</sup> See F. D. OMMANNEY, *LOST LEVIATHAN* 95 (1971). Svend Foyn's first use of the harpoon gun was not auspicious. He managed to become entangled in the line and was hurled into the water, but was rescued. *Id.*

<sup>95</sup> COMM. FOR WHALING STATISTICS, *supra* note 91, at 5; Ray Gambell, *The International Whaling Commission and the Contemporary Whaling Debate*, in *CONSERVATION AND MANAGEMENT OF MARINE MAMMALS* 179, 180 (John R. Twiss Jr. & Randall R. Reeves eds., 1999); PETER J. BRYANT, *BIODIVERSITY AND CONSERVATION: A HYPERTEXT ARTICLE*, <http://darwin.bio.uci.edu/~sustain/bio65/lec07/b65lec07.htm> (last visited Nov. 28, 2008).

<sup>96</sup> OMMANNEY, *supra* note 94, at 95-96.

<sup>97</sup> COMM. FOR WHALING STATISTICS, *supra* note 91, at 5.

<sup>98</sup> See OMMANNEY, *supra* note 94, at 95-96.

<sup>99</sup> See DESOMBRE, *supra* note 87, at 151.

<sup>100</sup> See *id.*; OMMANNEY, *supra* note 94, at 92. European whalers, such as the British, French, and the Germans, continued large-scale hunting of Greenland bowhead whales and Biscayan right whales throughout the 19th Century leading to the decimation of these whale populations. D'Amato & Chopra, *supra* note 79, at 28-29.

<sup>101</sup> Ellickson, *supra* note 93, at 96.

other states, leading to what we would now consider to be a classic instance of the "tragedy of the commons."<sup>102</sup>

At this point in time the idea of "frontier economics," with no oversight of whaling practices, defined the whaling industry.<sup>103</sup> Whalers assumed that the marine environment consisted of virtually limitless resources and that economic growth could be decoupled from nature.<sup>104</sup> The industry operated on a "boom to bust financial cycle,"<sup>105</sup> driven by the need to maximize financial returns; short-term exploitation was enhanced by the biological nature of whales, which are slow to mature compared to fish stocks.<sup>106</sup> By the nineteenth century whalers exploited whales so severely that whaling vessels were compelled to go further out to hunt every year.<sup>107</sup> Individually, whalers maximized their returns by taking all the whales they could, using the newly developed technologies, without considering managing the resource for the long term. This led to the inevitable extinction of coastal whale stocks.<sup>108</sup>

By the twentieth century whaling had developed into a global industry, supplying the world economies with whale oil and other byproducts in vast quantities.<sup>109</sup> By the season of 1904-05 the newly developed factory whaling ships had reached the hitherto pristine Antarctic waters at South Georgia and there was no longer any place where whalers had not ventured.<sup>110</sup> The use of steam was followed by diesel-powered floating factories, which enabled the whalers to catch the faster-moving large fin-whales (blue, fin, humpback and sei) and not to waste time towing carcasses to land-based factories and risking loss of the corpse.<sup>111</sup>

The increased scale of exploitation caused concern in the traditional whaling states of Scandinavia, which attempted to regulate domes-

<sup>102</sup> PETER J. STOETT, *THE INTERNATIONAL POLITICS OF WHALING* 48 (1997).

<sup>103</sup> *Id.* at 48-49.

<sup>104</sup> *Id.* at 48.

<sup>105</sup> JOHN VOGLER, *THE GLOBAL COMMONS: ENVIRONMENTAL AND TECHNOLOGICAL GOVERNANCE* 49 (2d ed. 2000).

<sup>106</sup> STOETT, *supra* note 102, at 52.

<sup>107</sup> Ellickson, *supra* note 93, at 96.

<sup>108</sup> Gambell, *supra* note 95; David G. Victor, *Whale Sausage: Why the Whaling Regime Does Not Need to Be Fixed*, in *TOWARD A SUSTAINABLE WHALING REGIME* 292, 295 (Robert L. Friedheim ed., 2000).

<sup>109</sup> COMM. FOR WHALING STATISTICS, *supra* note 91.

<sup>110</sup> *Id.* at 14.

<sup>111</sup> *Id.* at 5. *See id.* at 14. In 1923 factory ships were made even more efficient when they were built with a ramp at the stern to enable an entire whale to be brought aboard in a matter of minutes. *Id.* at 15.

tic whalers.<sup>112</sup> In 1902 Norway passed a law strictly limiting its whaling companies' activities with the aim of conserving whale stocks as a valuable state asset.<sup>113</sup> The new law stipulated that each whaling station was to have only one catcher and the stations must be fifty miles apart.<sup>114</sup> Iceland was the first state to put in place a domestic whaling moratorium on whaling—for twenty years, starting from 1915.<sup>115</sup>

The taking of so many whales in the early part of the twentieth century led to proposals for limited international regulation of the harvesting of whales by the whaling industry, starting in 1918.<sup>116</sup> Some elements were cognizant that the industry relied on viable numbers of whales to be profitable, but the effort came to naught and regulation was not agreed to.<sup>117</sup> The imminent collapse of the whaling industry became an issue of global concern with even the League of Nations becoming involved.<sup>118</sup>

At approximately the same time, the issue of managing global marine resources as a whole began to emerge as a state issue.<sup>119</sup> Many leaders and diplomats while acknowledging the need to protect these resources from exploitation, felt that they lacked the technical knowledge to guide their actions.<sup>120</sup> As a result, they tended to leave the regulation of different marine species to those states with the greatest interest in harvesting them.<sup>121</sup>

Organizations such as the Whaling Committee, established under the International Council for the Exploration of the Sea, comprised those states that regularly whaled.<sup>122</sup> This started a long trend of whalers being allowed to govern themselves, with disastrous results for whale stocks.<sup>123</sup> The Whaling Committee did attempt to regulate the industry at the 1927 meeting where the Norwegian delegate recommended curbing an open slaughter approach to whaling.<sup>124</sup> He argued that a system of licences

<sup>112</sup> See *id.* at 6-7.

<sup>113</sup> COMM. FOR WHALING STATISTICS, *supra* note 91, at 7.

<sup>114</sup> *Id.* at 10.

<sup>115</sup> Chris Stroud, *The Ethics and Politics of Whaling*, in THE CONSERVATION OF WHALES AND DOLPHINS 55, 61 (Mark P. Simmonds & Judith D. Hutchinson eds., 1996).

<sup>116</sup> D'Amato & Chopra, *supra* note 79, at 30.

<sup>117</sup> See *id.*

<sup>118</sup> *Id.*

<sup>119</sup> See *id.*

<sup>120</sup> See Stroud, *supra* note 115, at 59-63.

<sup>121</sup> See *id.*

<sup>122</sup> See D'Amato & Chopra, *supra* note 79, at 30.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

should be implemented.<sup>125</sup> This plea was unsuccessful, however, and exploitation continued unabated.<sup>126</sup>

#### IV. BUILDING A GLOBAL WHALING REGIME

Prior to the establishment of the IWC in the post-World War II period, there were earlier attempts to create a global whaling regime.<sup>127</sup> The effort, however, was hampered by a lack of commitment from the relevant parties, despite ample long-term economic imperatives to do so.<sup>128</sup> In the early 1930s, the killing of blue whales hit such heights that it depressed whale oil prices.<sup>129</sup> D'Amato and Chopra argue that at this point whaling nations began to recognize the need to regulate the taking of whales to prevent the extinction of the major whale species, acting out of their own self-interest to maintain profits.<sup>130</sup> The whalers themselves also had realized that the national controls proposed by states such as Norway and Iceland were not sufficient and that a global regulatory system aimed at stabilizing prices was needed.<sup>131</sup>

After four years of negotiation between the states attached to the League of Nations, the first Convention for the Regulation of Whaling was created in 1931 in Geneva, Switzerland—the Geneva Convention.<sup>132</sup> The Convention covered all waters—Article 9, including states' territorial waters—Article 1, and it enforced the licensing of whaling vessels—Article 8.<sup>133</sup> It also exempted coastal aboriginal peoples providing they utilized “canoes, pirogues or other exclusively native craft propelled by oars or sails” and did not use firearms or employ non-aboriginals in their whaling activities.<sup>134</sup>

For the first time, conservation as a concept was applied globally to whaling, though D'Amato and Chopra persuasively argue that the norm

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> STOETT, *supra* note 102, at 57.

<sup>128</sup> *Id.*

<sup>129</sup> See THE COMM. FOR WHALING STATISTICS, INTERNATIONAL WHALING STATISTICS VI 4-5 (1935). In 1930-31, 42,874 whales were taken. *Id.*

<sup>130</sup> D'Amato & Chopra, *supra* note 79, at 29.

<sup>131</sup> See STOETT, *supra* note 102, at 57.

<sup>132</sup> D'Amato & Chopra, *supra* note 79, at 30; STOETT, *supra* note 102, at 57.

<sup>133</sup> Convention for the Regulation of Whaling, arts. 1, 8, 9, Sept. 24, 1931, 155 L.N.T.S. 349.

<sup>134</sup> Convention for the Regulation of Whaling, art. 3, Sept. 24, 1931, 155 L.N.T.S. 349, quoted in Randall R. Reeves, *The Origins and Character of 'Aboriginal Subsistence' Whaling: A Global Review*, 32 MAMMAL REV. 71, 72 (2002).

was limited to merely protecting the long term viability of the whaling industry rather than the welfare of whales.<sup>135</sup> The Convention, while outlawing the "killing of calves, immature whales and female whales accompanied by calves" still allowed the hunting of adult whales virtually unhindered.<sup>136</sup> Furthermore, Japan, Germany, and the U.S.S.R., all of which were prolific whaling states, did not sign onto the Convention since the economic incentives, in their eyes, were not sufficient enough to do so.<sup>137</sup> Without several of these key players, who accounted for approximately thirty percent of whale harvesting, the Convention was a collective failure and ineffective in its aims.<sup>138</sup>

The failure of the Geneva Convention opened the door for whaling companies to attempt to stabilize the situation. They created "a regime of mutual production restraint,"<sup>139</sup> known as the International Association of Whaling Companies, to stabilize world oil prices by limiting production of whale oil.<sup>140</sup> For the 1933-34 whaling season, the major Antarctic whaling companies agreed to restrict their actions via this production agreement.<sup>141</sup> However, two British companies and one Norwegian company refused to join the cartel and harvested 344,521 barrels of whale oil.<sup>142</sup> Due to the defections of the British and Norwegian companies and to the collapse of the accord, in the 1934-35 period whaling in Antarctica increased to 26,087 takings from 24,327 takings in the previous year.<sup>143</sup> The global total was reported to the Committee for Whaling Statistics as being 32,167 takings.<sup>144</sup>

John Vogler argues that the behavior of the whaling companies was motivated more "by the need to maintain and support oil prices in a depressed market rather than any concern with long-term sustainable management."<sup>145</sup> The refusal of some companies to amend their behavior led to the Association collapsing, like many voluntary arrangements. This manifests the predictable problem of collective action, as it gets ignored

<sup>135</sup> See D'Amato & Chopra, *supra* note 79, at 31.

<sup>136</sup> *Id.*

<sup>137</sup> DESOMBRE, *supra* note 87, at 151. Germany was using whale oil to lessen their need for importing edible oil and Japan was using the sale of whale oil to pay for its imperial ambitions in China and Manchuria. *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> VOGLER, *supra* note 105, at 49.

<sup>140</sup> DESOMBRE, *supra* note 87, at 151-52.

<sup>141</sup> THE COMM. FOR WHALING STATISTICS, *supra* note 129, at 1.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 4.

<sup>144</sup> *Id.*

<sup>145</sup> VOGLER, *supra* note 105, at 49.

when it goes against a particular agent's interests, it is subject to free riding, and it is not recognized by more aggressive members, like whaling nations such as Japan.<sup>146</sup>

In 1937 another global agreement was attempted between the whaling nations of Argentina, Australia, Germany, the Irish Free State, New Zealand, South Africa, the United Kingdom, and the United States of America.<sup>147</sup> All agreed to implement the 1937 International Agreement for the Regulation of Whaling.<sup>148</sup> This is noteworthy because the Convention covered for the first time shore-based operations and was the first comprehensive global whaling agreement.<sup>149</sup> The Convention outlawed the taking of both gray whales and right whales, limited hunting areas by time and geographic area, and regulated the length of the whaling season in order to protect young and immature whales.<sup>150</sup> The problem was, again, the way the main whaling states of this period—Japan, Germany, Chile, Argentina, and the U.S.S.R.—refused to be bound by its provisions.<sup>151</sup> In 1938, a Protocol to the Convention “banned the taking of humpback whales for two years except in the area south of forty degrees south latitude, where a one-year ban was imposed.”<sup>152</sup> In 1939, the Protocol was amended to slightly increase protection for the humpback whale.<sup>153</sup> The problem remained that, despite these added paper protections, the exploitation of whales in the 1930s continued virtually unchecked.<sup>154</sup>

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<sup>146</sup> See DESOMBRE, *supra* note 87, at 152. With the failure of international accords, some whaling states attempted to put in place domestic controls again. Norway, at this point in time a leading proponent of a conservationist ethos to be applied to global whaling, enacted a law on June 26, 1934, which limited the hunting season in Antarctic waters from December 1st until March 31st from the 1934-35 season. Foreign whaling companies agreed to adhere to the time limit affixed by the Norwegian Act of 1934, except the Southern Whaling and Sealing Co. Ltd. and the Kerguelen Sealing and Whaling Co. Ltd. THE COMM. FOR WHALING STATISTICS, INTERNATIONAL WHALING STATISTICS VII 1-2 (1936). The number of defectors from the production agreements soon doomed the agreement to collapse, as those adhering to the accord were unwilling to allow the free-rider companies to derive economic advantage from it.

<sup>147</sup> INT'L COMM'N ON WHALING, EIGHTH REPORT OF THE COMMISSION 3 (1957).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> D'Amato and Chopra, *supra* note 79, at 31.

<sup>151</sup> STOETT, *supra* note 102, at 57.

<sup>152</sup> D'Amato & Chopra, *supra* note 79, at 32.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 31-32.

By the 1937-38 season the number of whales killed internationally by whalers had risen to 54,664.<sup>155</sup> Patricia Birnie argues that many reasons caused this increase, including the "inadequacy of the scope of the regulations themselves;" "lack of an adequate scientific base;" "non-cooperation of some whaling states;" "poor enforcement [of agreements] without international supervision;" and "lack of international community participation or interest."<sup>156</sup> To this impressive list of regulatory failures can be added that it was in the economic interest of whalers to continue harvesting what was perceived by many to be a "free" resource, to be taken as quickly as technology allowed.<sup>157</sup>

The only thing that prevented complete extinction of major whale species at this time was the advent of World War II. Naval interdictions confined most floating factories to port, while others were destroyed or utilized in the war effort.<sup>158</sup> For example, only 6197 whales were caught in the 1943-44 season, amounting to only about ten percent of pre-war figures and allowing whale stocks to recover slightly.<sup>159</sup> However, there were still attempts by whaling states to better regulate the industry.<sup>160</sup> At the height of World War II in 1944, whaling states agreed that they would attempt to regulate the whaling industry on the basis of how much oil particular whales contained, and to restrict the size of a catch to a standard measure, known as the Blue Whale Unit ("BWU"), regardless of the whale species being hunted.<sup>161</sup>

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<sup>155</sup> PATRICIA BIRNIE, INTERNATIONAL REGULATION OF WHALING: FROM CONSERVATION OF WHALING TO CONSERVATION OF WHALES AND REGULATION OF WHALE-WATCHING 129 (1985).

<sup>156</sup> *Id.* at 129-30.

<sup>157</sup> *Id.*

<sup>158</sup> See INT'L COMM'N ON WHALING, *supra* note 147.

<sup>159</sup> THE COMM. FOR WHALING STATISTICS, INTERNATIONAL WHALING STATISTICS XXXI 8 (1954).

<sup>160</sup> THE COMM. FOR WHALING STATISTICS, INTERNATIONAL WHALING STATISTICS XXX 13 (1953).

<sup>161</sup> DESOMBRE, *supra* note 87, at 152. The BWU, however, was a scientifically dubious measurement devised in the 1930s as a way to quantify the oil produced from various species of whale. Gregory Rose & George Paleokrassis, *Compliance with International Environmental Obligations: A Casestudy of the International Whaling Commission, in IMPROVING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL LAW* 161 (James Cameron, Jacob Werksman & Peter Roderick eds., 1996). One BWU was considered equal to one blue whale, which was equal to two fin whales, which equaled two and a half humpback whales, and six sei whales. INT'L COMM'N ON WHALING, *supra* note 147, at 3. The imprecision of such calculations only exacerbated the situation, since the methodology employed treated whales merely as an exploitable resource, taking the focus away from the number of whales killed and putting it on what each species economically provided.

In the post-World War II period, edible fat was in short supply, causing an upsurge in interest for this resource by even traditionally non-whaling states.<sup>162</sup> At the close of World War II, the victorious Allies resumed negotiations, under the auspices of the 1937 Agreement, to facilitate the orderly exploitation of whales.<sup>163</sup> A new set of regulations was quickly drafted to apply for the 1945-46 season, which incorporated the new BWU measure.<sup>164</sup> It was agreed that the Antarctic season should be ended when whalers had taken the equivalent of 16,000 BWUs.<sup>165</sup> In the 1946-47 season the number of whales taken jumped to 34,720, and by the following season it had increased to 43,378 BWUs.<sup>166</sup>

The concomitant decrease in whale stocks alarmed environmentalists and those who saw this example of over-fishing as leading to not only the extinction of whales, but also to the extinction of the whaling industry.<sup>167</sup> This formed a powerful convergence of interests.<sup>168</sup> Combined with this was a burgeoning understanding that whales should no longer be seen as the property of individual states, but as a global resource.<sup>169</sup> In 1946, U.S. Secretary of State Dean Acheson encapsulated the new mood when he declared, "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."<sup>170</sup>

## V. THE INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING—1946

In this atmosphere of a reinvigorated whaling industry and a greater appreciation of the nature of whales as a global resource, it is clear that most whaling nations recognized that there was a need for a new and more effective convention to prevent over-exploitation.<sup>171</sup> Heeding this call, the United States, architect of much of the post-World War II political landscape, spearheaded a call for an international conference to re-exam-

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<sup>162</sup> Oberthür, *supra* note 83, at 31.

<sup>163</sup> INT'L COMM'N ON WHALING, *supra* note 147.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> COMM. FOR WHALING STATISTICS, *supra* note 160, at 13.

<sup>167</sup> See GRAEME J. APLIN, *GLOBAL ENVIRONMENTAL CRISES: AN AUSTRALIAN PERSPECTIVE* 239-41 (1995).

<sup>168</sup> See *id.*; VOGLER, *supra* note 105, at 49.

<sup>169</sup> See STOETT, *supra* note 102, at 30.

<sup>170</sup> *Id.*

<sup>171</sup> See D'Amato & Chopra, *supra* note 79, at 33.



ine the issues.<sup>172</sup> Out of this conference came a new International Convention for the Regulation of Whaling ("ICRW").<sup>173</sup> This superseded all previous agreements, coming into effect on November 10, 1948.<sup>174</sup> It established the IWC as the preeminent body regulating the global whaling industry.<sup>175</sup> It introduced maximum catch quotas—16,000 BWUs—for the total season for Antarctic pelagic whaling and initially encompassed only the great whales.<sup>176</sup> The Preamble to the Convention highlighted that whales needed to be protected against overfishing and that the delegates' aim was to manage exploitation of the great whales.<sup>177</sup> The Preamble's language, however, incorporated the more conservationist goals of inter-generational equity and the safeguarding of endangered species.<sup>178</sup>

The Preamble outlined the Convention as being about the orderly development of a commercial whaling industry and the conservation of existing whale stocks.<sup>179</sup> The inherent tension between these dichotomous aims would lead to much acrimony between member-states, as they could not be easily reconciled.<sup>180</sup> Vogler argues that whilst the Preamble paid lip service to the norm of conservation, it was essentially an arrangement between states with an interest in commercially exploiting whales.<sup>181</sup> Certainly conservation was understood to be merely the facilitation of an orderly resource allocation regime, rather than the maintenance of sufficient stock for future generations.<sup>182</sup> The ICRW did enable the opening up of a discourse between whaling states, however, whereby it was permissible to consider protecting whales as an objective.<sup>183</sup>

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<sup>172</sup> *Id.* at 33.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> INT'L COMM'N ON WHALING, FIRST REPORT OF THE COMMISSION 3 (1950); Reeves, *supra* note 134. The Convention was signed by the delegates of Argentina, Australia, Brazil, Canada, Chile, Denmark, France, the Netherlands, New Zealand, Norway, Peru, the United Kingdom including Northern Ireland, the United States of America, and the U.S.S.R. on December 2, 1946. INT'L COMM'N ON WHALING, *supra*.

<sup>176</sup> D'Amato & Chopra, *supra* note 79, at 32; VOGLER, *supra* note 105, at 53.

<sup>177</sup> VOGLER, *supra* note 105, at 49.

<sup>178</sup> See INT'L COMM'N ON WHALING, *supra* note 175, at 9.

<sup>179</sup> VOGLER, *supra* note 105, at 49.

<sup>180</sup> Rose & Paleokrassis, *supra* note 161, at 29.

<sup>181</sup> VOGLER, *supra* note 105, at 50. The United Kingdom delegation to the 1945 meeting argued that it would be, in his view, a "tragedy if any international machinery were to get in the way of increased production," and this was indicative of the position of all the whaling nations. *Id.*

<sup>182</sup> *Id.* at 49.

<sup>183</sup> See D'Amato & Chopra, *supra* note 79, at 32-34; Tora Skodvin & Steinar Andresen,

The Convention created the IWC as a supra-authority with the power to issue binding regulations to protect whales.<sup>184</sup> Its establishment as the global regulatory body for whaling meant that the norms underpinning the organization would reflect those operating in the broader world. The IWC was initially composed of delegates of the signatory whaling nations, but was open to all states and was to meet annually to review the schedule on impermissible whaling activities.<sup>185</sup> Allowing other states to join the IWC, whether whaling nations or not, was to prove a critical factor in norm transformation. This step would not have occurred in the absence of this new view that whales should be considered a global resource and not just the property of whaling states. The provision allowed states to circumvent potential veto coalitions by recruiting like-minded allies, a tactic used by both pro- and anti-whaling forces.<sup>186</sup> The powers of the ICW to protect whales from exploitation are enumerated in a Schedule which allowed the body to:

fix protected and unprotected species; open and closed seasons; open and closed areas, including sanctuaries; limitations on the size of species taken; methods and intensity of whaling, including maximum catch; types of gear and equipment used; methods of measuring whales taken; the requirement that returns be made of catch; and statistical and other biological information.<sup>187</sup>

The IWC operates under a majority-voting rule that requires a three-quarter majority of present members to vote to approve changes to the Schedule, which contains the operative rules governing the global whaling regime.<sup>188</sup> The ICRW also allows dissenting states to opt out of any decision arrived at within the IWC by filing an objection within ninety days and applying for an exemption under Article V(3), a loophole that would allow rogue whaling states significant wiggle room in evading IWC

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*Nonstate Influence in the International Whaling Commission, 1970-1990*, GLOBAL ENVTL. POL., Nov. 2003, at 61, 71.

<sup>184</sup> Rose & Paleokrassis, *supra* note 161, at 29.

<sup>185</sup> Skodvin & Andresen, *supra* note 183, at 70-71. Initially only fifteen nations participated in meetings, and they were overwhelmingly whaling nations. *Id.* at 71.

<sup>186</sup> GARETH PORTER, JANET WELSH BROWN & PAMELA S. CHASEK, GLOBAL ENVIRONMENTAL POLITICS 95 (3d ed. 2000).

<sup>187</sup> D'Amato and Chopra, *supra* note 79, at 34.

<sup>188</sup> VOGLER, *supra* note 105, at 51.

directives.<sup>189</sup> Objections were so common in the first few decades of the IWC that it was rendered virtually impotent.<sup>190</sup>

Enforcement of IWC regulations was left to individual member-states, and because their interests lay in the unhindered continuation of whaling, they were unlikely to police themselves rigorously.<sup>191</sup> Further the Commission was powerless to regulate the activities of non-member countries since the Convention was not applicable to non-members.<sup>192</sup>

The ICRW allowed under its "primary rules"—the regulations attached to the Schedule to the ICRW—for the creation of conservationist programs to enhance the protection of existing and future whale stocks.<sup>193</sup> It also allowed for potential preservationist outcomes in that the IWC had the power to create whaling sanctuaries and ban the taking of particular whale species.<sup>194</sup> At this point in time, however, IWC members could not even frame the question as to what whale preservation meant, let alone answer it, since no member-states thought of whales as intrinsically worth saving.<sup>195</sup> The ICRW Schedule also banned the taking of grey, humpback, and right whales in certain areas.<sup>196</sup> However, this restriction, combined with seasonal time limits and quotas, was unsuccessful in stopping the ongoing exploitation of whales, despite the emphasis on limited conservationist aims in the ICRW.<sup>197</sup>

<sup>189</sup> See Oberthür, *supra* note 83, at 30.

<sup>190</sup> See, e.g., *infra* notes 205-06 and accompanying text.

<sup>191</sup> See Adrienne M. Ruffle, *Resurrecting the International Whaling Commission: Suggestions to Strengthen the Conservation Effort*, 27 BROOK. J. INT'L L. 639, 642 (2002).

<sup>192</sup> *Id.*

<sup>193</sup> Rose & Paleokrassis, *supra* note 161, at 154. To amend the constitution requires the agreement of all IWC member-states, but amendments to the Schedule Regulations, under Article III, can be passed with merely a three-quarters majority. These regulations are also binding on all members whether they vote for them or not. *Id.* These two factors had a profound effect on the normative direction of the organization since most normative advocacy focused on changing the regulations due to the relative ease of doing so.

<sup>194</sup> *Id.*; see also *infra* Part XIV.

<sup>195</sup> See Milton M.R. Freeman, *Political Issues with Regard to Contemporary Whaling, in WHO'S AFRAID OF COMPROMISE?* 10, 12-13 (Simon Ward ed., 1990).

<sup>196</sup> INT'L COMM'N ON WHALING, *supra* note 175, at 5. Yet, the IWC, as one of its first acts, passed Resolution 11 which permitted the hunting of 1250 humpback whales south of forty degrees South Latitude in both the 1949-50 and 1950-51 seasons. *Id.*

<sup>197</sup> The initial IWC Regulations were similar to those in force in the 1937-38 season. The maximum pelagic catch of baleen whales was set at 16,000 blue whale units. The harvest period was fixed from December 15, 1948 until April 1, 1949, and whaling from shore stations was fixed at six months. THE COMM. FOR WHALING STATISTICS, INTERNATIONAL WHALING STATISTICS XXIV 7 (1950). If the level of 16,000 BWUs was reached before the end of the hunting season, the operations were to stop immediately. *Id.* at 8.

In fact, the restrictions on taking certain whale species has had an effect opposite to that intended. It set in train a technological race to create better ships and more advanced killing technologies to achieve designated quotas as rapidly as possible, leading to whalers to refer to the period as the "Whaling Olympic."<sup>198</sup> During this period in the late 1940s, whalers raced the clock to catch whales before the season ended, in an effort to beat the competition.<sup>199</sup> From 1946 to 1951 the whaling season shrank from 112 days to only 64, but the catching technologies became more efficient.<sup>200</sup> An unintended consequence of the new, deadlier ships, however, was a significant increase in the cost of outfitting a whaling fleet.<sup>201</sup> By 1960, some nations had ceased whaling on economic grounds, due to the prohibitive capital costs against returns.<sup>202</sup>

Problematically, the IWC set initial whaling quotas too high to ensure whaling states would not pull out of the IWC, yet even so, they were usually exceeded.<sup>203</sup> By the 1948-49 season, whaling had rebounded from the World War II interregnum, and 31,262 whales were taken.<sup>204</sup> Throughout the 1950s, the whale catch continued to increase despite the presence of the IWC and its conservationist edicts.<sup>205</sup> IWC prohibitions to ban the

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<sup>198</sup> Rose & Paleokrassis, *supra* note 161, at 161; DESOMBRE, *supra* note 87, at 154.

<sup>199</sup> DESOMBRE, *supra* note 87, at 154.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* While the number of floating factory ships and catchers were down from pre-World War II numbers, the average size of the catchers ships had increased, as had their engine power. The average horsepower of the catcher ships had increased from 1100 before the war to 1562 in 1948-49, enabling a greater taking capacity. THE COMM. FOR WHALING STATISTICS, *supra* note 197, at 11.

<sup>203</sup> DESOMBRE, *supra* note 87, at 147. See also INT'L COMM'N ON WHALING, THIRD REPORT OF THE COMMISSION 15 (1952). The report stated that the 16,000 BWU limit had been exceeded by 413 for that year.

<sup>204</sup> THE COMM. FOR WHALING STATISTICS, *supra* note 197, at 10.

<sup>205</sup> The IWC responded to the ongoing situation by resolving at its fourth meeting to stop taking blue whales smaller than seventy feet, sei whales smaller than forty feet, and humpback whales smaller than thirty-five feet. The same meeting banned factory ships and catchers from catching baleen whales in certain areas. INT'L COMM'N ON WHALING, FOURTH REPORT OF THE COMMISSION 12-13 (1953). At the 1955 IWC meeting, members approved conservationist measures with and placed prohibitions on the taking of any blue whales in parts of the North Pacific Ocean and humpback whales in the North Atlantic Ocean for five years. Similar prohibitions banned the taking of sperm whales or minke whales except as permitted by contracting governments. INT'L COMM'N ON WHALING, SIXTH REPORT OF THE COMMISSION 5 (1955). In 1955, the Scientific Sub-committee recommended that the Pacific Sanctuary be re-opened; the recommendation was accepted, but the delegates refused to reduce the BWU limit by 500, negating the decision. *Id.* at 17, 19.

taking of certain species for a limited time were met by numerous states lodging objections, including Canada, Japan, the United States, and the Soviet Union.<sup>206</sup> This enabled these states to continue their ability to exploit whales unchecked.<sup>207</sup> In the 1950-51 whaling period, 55,795 whales were taken globally, the largest number to recorded kills until then.<sup>208</sup> By the 1957-58 season, the number of floating factories operating in Antarctic waters had increased to twenty with two shore stations and 257 catchers, and by the following season whalers killed a new high of 64,586 whales.<sup>209</sup>

D'Amato and Chopra characterize the period from 1948 to 1960 as "wasted years," in that states continued to argue mainly over quota allocations, backed by grandstanding threats of withdrawal from the IWC.<sup>210</sup> Before 1960, the whaling industry dominated the IWC, mostly through their national government delegates. The IWC was still "a whalers' club" and the majority of members were themselves whaling nations whose interests were synonymous with whaling industry interests.<sup>211</sup>

Indeed, not only were many state delegations filled with members with a pro-whaling bent, but from the second meeting onwards attendance at the IWC included representatives of the Association of Whaling Companies.<sup>212</sup> The IWC in this period had little sense of urgency when it came to protecting whales, perceiving them only as a resource to be utilized.<sup>213</sup> For many states, the establishment of a regime was considered to have "solved" the problem, despite the voluminous evidence that the problem was worsening.<sup>214</sup> Frustrated delegates to the ICW, who wanted to promote a conservationist platform, could not alter the situation in a context where there was little public knowledge of whaling issues and practices.<sup>215</sup>

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<sup>206</sup> INT'L COMM'N ON WHALING, SEVENTH REPORT OF THE COMMISSION 6 (1956).

<sup>207</sup> *Id.*; Peterson, *supra* note 4, at 157.

<sup>208</sup> THE COMM. FOR WHALING STATISTICS, *supra* note 160, at 2.

<sup>209</sup> COMM. FOR WHALING STATISTICS, INTERNATIONAL WHALING STATISTICS XLI 1 (1959); COMM. FOR WHALING STATISTICS, INTERNATIONAL WHALING STATISTICS XLIII 8 (1960).

<sup>210</sup> D'Amato and Chopra, *supra* note 79, at 34-35.

<sup>211</sup> Skodvin & Andresen, *supra* note 183, at 63.

<sup>212</sup> INT'L COMM'N ON WHALING, SECOND REPORT OF THE COMMISSION 3 (1951).

<sup>213</sup> Peterson, *supra* note 4, at 158.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 158-59.

## VI. SCIENTISTS AND THE INTERNATIONAL WHALING COMMISSION

By the 1960 IWC meeting in London, it was clear to most IWC members, based on their own compiled figures, that stocks of blue whales, fin whales, and humpback whales had declined to crisis levels.<sup>216</sup> With the situation at crisis point, the delegates turned to a hitherto ignored group, cetologists, to provide a new conservationist policy direction.<sup>217</sup> Up until this point, scientists had been perceived, and had acted, as virtual mouth-pieces for their states, with their policy prescriptions tending to reflect nationalistic demands for whale products.<sup>218</sup> To ensure that scientific advice given to the member-states was not tainted by states' interests, the United Kingdom proposed that a Committee of three independent scientists, and later four, be established and the motion was passed.<sup>219</sup> The Committee's role would be to quantify potential catch reductions to allow policy to be determined on more objective grounds.<sup>220</sup>

Once freed of the constraints of serving as states' spokesmen, the scientists quickly exhibited a high degree of independence in their scientific advice.<sup>221</sup> Given that most cetologists' backgrounds were in biology, it was not surprising that their advice regarding whaling reflected that background and focused on the conservation of whale stocks.<sup>222</sup> Acting as normative entrepreneurs, they advocated quotas to protect scientifically determined, fragile whale stocks, to impose temporary moratoriums, and to reduce the overall catch.<sup>223</sup>

Despite their efforts, their efficacy as advocates was severely limited by a number of factors. They were small in number, thirty at most, and their advice was merely advisory in nature, advice which member-states were free to disregard or object to if it was not in accordance with their interests.<sup>224</sup> Problematically, cetologists also lacked the theoretical

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<sup>216</sup> INT'L COMM'N ON WHALING, TWELFTH REPORT OF THE COMMISSION 14-15 (1961).

<sup>217</sup> See Skodvin & Andresen, *supra* note 183, at 71-72. During the first few years of the IWC, the scientific representation to the Committee was sporadic, with few states sending representatives and the state of knowledge of whale stocks minimal and disputed. When scientific advice was considered, it was generally ignored by states. *Id.* at 71.

<sup>218</sup> PORTER, BROWN & CHASEK, *supra* note 186, at 94; Skodvin & Andresen, *supra* note 183, at 75-76.

<sup>219</sup> Peterson, *supra* note 4, at 162-63.

<sup>220</sup> Skodvin & Andresen, *supra* note 183, at 75-76.

<sup>221</sup> See Peterson, *supra* note 4, at 163.

<sup>222</sup> *Id.*

<sup>223</sup> See *id.* at 153; Rose & Paleokrassis, *supra* note 161, at 154.

<sup>224</sup> Charlotte Epstein, *Knowledge and Power in Global Environmental Activism*, 10 INT'L J. PEACE STUD. 47, 53-54 (2005); Peterson, *supra* note 4, at 154.

models and a consensus amongst themselves as to the correct policy prescriptions, without which they could not plausibly convince whaling states to abandon exploitationist practices.<sup>225</sup> Further, they were unable to link their arguments with higher values that would persuade whaling states to adopt conservationist practices.<sup>226</sup> Lastly, they were constrained by the platform from which they had to communicate. Scientists were forced to conform to the agenda and operating norms of the IWC. This limited their effectiveness.<sup>227</sup> It limited their ability to communicate the need for conservationist mores and despite their best efforts, the overall harvest rate was not limited for a further eighteen years.<sup>228</sup>

By the 1967 IWC meeting in London, the Joint Parliamentary Under-Secretary of State for Scotland, Mr. Buchan, revealed in his opening speech to the IWC some sobering statistics regarding the perilous state of global whale stocks.<sup>229</sup> In 1937 there were approximately 100,000 blue whales in the oceans.<sup>230</sup> By 1967, there were approximately 1000.<sup>231</sup> The official BWU catch limit set at that meeting was only 3500,<sup>232</sup> but there were reports that whalers were going after younger whales.<sup>233</sup> By the 1971 IWC meeting it was clear to many IWC members that whale stocks were not recovering, but were going backwards.<sup>234</sup> In a breakthrough, however, the United States due to domestic pressure decided to put eight types of whales on the domestic Endangered Species List and that, as a country, it would no longer issue licenses for its whalers to hunt.<sup>235</sup> This defection by the United States from the whalers' faction would prove a critical factor in the normative battles ahead, since its relative economic power in the global system ensured states were wary of crossing it, for fear of sanctions or other retributive action.<sup>236</sup>

It was clear that the IWC as an entity was unable to change the exploitationist ways of its members, in view of the vested economic interests at play, which were dedicated to preserving the status quo. However, the sea change in the U.S. foreign policy on whaling led them to seek another

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<sup>225</sup> See Oberthür, *supra* note 83, at 31; Peterson, *supra* note 4, at 160.

<sup>226</sup> Peterson, *supra* note 4, at 161.

<sup>227</sup> Skodvin & Andresen, *supra* note 183, at 71.

<sup>228</sup> Rose & Paleokrassis, *supra* note 161, at 154.

<sup>229</sup> INT'L COMM'N ON WHALING, NINETEENTH REPORT OF THE COMMISSION 15 (1969).

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> See PORTER, BROWN & CHASEK, *supra* note 186, at 94.

<sup>234</sup> See *id.*

<sup>235</sup> *Id.*

<sup>236</sup> See Oberthür, *supra* note 83, at 33-34.

forum to raise the matter, which they duly did, at the 1972 United Nations Conference on the Human Environment in Stockholm, Sweden.<sup>237</sup> At Committee Two of the Conference, which examined questions of natural resource management, the United States called for a ten-year moratorium —Resolution 33—on whaling to enable stocks to replenish.<sup>238</sup> States at this point were still advocating the conservation of species for future use.<sup>239</sup> Predictably, whaling nations, like Japan, automatically opposed such a measure since it was not in their interests.<sup>240</sup> Over their objections, the motion was passed 52-0<sup>241</sup> and was included in the conference recommendations, despite the IWC's Scientific Committee arguing that any such action was not scientifically valid.<sup>242</sup>

The passing of the motion by such an overwhelming margin indicates that saving the whales was now perceived by much of the world as an issue of critical importance. Further, the IWC as an organization was put on notice that other parties challenged the IWC's ineffective approach to date. D'Amato and Chopra argue it is difficult to pinpoint when measures undertaken to protect the whaling industry started "to become transformed into protective measures undertaken for the survival and longevity of whales as a species" because it is difficult to measure when global psychological change becomes reflected in legal texts.<sup>243</sup>

To focus on the economic or institutional arguments, however, is to overlook the moral sea-change in general attitudes to the depletion of whale stocks. Critically, the issue of overexploiting whales was becoming one of global concern at a time when the global public was becoming more worried and better educated on global environmental issues. This global concern provided both a backdrop and a fillip to ENGO articulations of a preservationist position and to the attempt to persuade IWC members of the need to alter their behavior.<sup>244</sup>

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<sup>237</sup> See David D. Caron, *The International Whaling Commission and the North Atlantic Marine Mammal Commission: The Institutional Risks of Coercion in Consensual Structures*, 89 AM. J. INT'L L. 154, 156 (1995).

<sup>238</sup> STOETT, *supra* note 102, at 65; REX WEYLER, GREENPEACE: HOW A GROUP OF JOURNALISTS, ECOLOGISTS AND VISIONARIES CHANGED THE WORLD 211 (2004).

<sup>239</sup> See DE SOMBRE, *supra* note 87, at 155.

<sup>240</sup> D'Amato & Chopra, *supra* note 79, at 38. Japan's response to the UN Conference on the Human Environment was to label the moratorium proposal as "dramatic and emotional." *Id.*

<sup>241</sup> PORTER, BROWN & CHASEK, *supra* note 186, at 94.

<sup>242</sup> D'Amato & Chopra, *supra* note 79, at 39.

<sup>243</sup> *Id.* at 32-33.

<sup>244</sup> Oberthür, *supra* note 83, at 31.



## VII. ENGOS AND THE INTERNATIONAL WHALING COMMISSION

Any understanding of the shift in the IWC's operating norm must account for the role played by ENGOS, who in the 1970s pushed a preservationist agenda both within the IWC and to the global society in general.<sup>245</sup> Initially ENGOS had little interest in the IWC and they did not even attend until the fifteenth meeting when Major K.R.C. Priestley represented the International Society for the Protection of Animals.<sup>246</sup> In the 1960s, the environmental movement's arguments on whaling were in accord with the position of scientists, namely that conservationist programs were needed.<sup>247</sup> However, the decision by the IWC in 1970 to allow ENGOS to make statements opened the door for the more forceful articulation of environmental positions to the IWC members.<sup>248</sup> Despite this availability, it was not until Greenpeace, an organization founded on a "biocentric philosophy that challenged the idea that humans were the supreme beings on the face of the planet," became involved in the mid-1970s that a preservationist normative position was put forth.<sup>249</sup> For environmentalists, whales became a potent symbol of the entire environmental movement's commitment to save the planet and bring about a more ecologically aware society.<sup>250</sup>

ENGOS like Greenpeace, the World Wildlife Fund, the International Fund for Animal Welfare, and the Environmental Investigation Agency were able to tap into, articulate, and publicize the Western public's horrific response to whaling.<sup>251</sup> Their tactics were to use mostly peaceful protests and public information campaigns to highlight the brutality of whaling and its impact on whale species and persuade the global populace to end whale hunting and reframe the debate from one of exploitation or conservation to one of preserving all whales in perpetuity.<sup>252</sup>

Their aim was to put pressure on the regime states to change their expectations, behaviors, and identities. DeSombre argues that rather than

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<sup>245</sup> See *id.*

<sup>246</sup> See INT'L COMM'N ON WHALING, FIFTEENTH REPORT OF THE COMMISSION 11 (1965).

<sup>247</sup> Skodvin & Andresen, *supra* note 183, at 73.

<sup>248</sup> See INT'L COMM'N ON WHALING, TWENTY-SECOND REPORT OF THE COMMISSION 20 (1972). Representatives of the Fauna Preservation Society, the International Society for the Protection of Animals, the International Union for the Conservation of Nature and Natural Resources, and the World Wildlife Fund all made statements. *Id.*

<sup>249</sup> See Peterson, *supra* note 4, at 184.

<sup>250</sup> *Id.*

<sup>251</sup> VOGLER, *supra* note 105, at 50.

<sup>252</sup> STOETT, *supra* note 102, at 94-95.

using science to advance their position, the ENGOs conducted a campaign that focused on brutality, capturing images that promoted their view that whaling was barbarous and should be ended.<sup>253</sup> They linked their arguments to higher values that highlighted the intelligence and uniqueness of whales and argued that they therefore deserved to live unhindered.<sup>254</sup> Framing their approach in this way helped their arguments resonate with the global public in a way scientists, up until that point, had been unable to do. This put increased pressure on states to alter their behavior.<sup>255</sup> By the early 1980s, over fifty ENGOs were represented at the IWC in an effort to influence debates, either by persuasion, by direct action, or by putting states on notice that the constituents they represented were watching.<sup>256</sup>

The IWC's own downplayed, but still worrying figures backed up the ENGO's case that the whale conservation methods that had been utilized to date were not working. Initially, anti-whaling groups concentrated on arguing their case in terms of extinction. However, when nations like Japan were able to argue plausibly that there was no threat of extinction of certain species (such as minke whales), anti-whaling states and ENGOs shifted ground to argue that it was simply unethical to kill whales.<sup>257</sup>

Initially, the ENGOs made little headway despite the global paradigm shift in thinking on the issue that had begun to manifest.<sup>258</sup> However, there were signs that the member-states knew that their approach to date had not been effective in promoting conservationist practices. For example, upon the advice of the Scientific Committee, the IWC voted to discard the BWU measurement in favor of fixing catch limits by species for the future. The larger issues of catch size remained off-limits, though.<sup>259</sup>

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<sup>253</sup> DESOMBRE, *supra* note 87, at 163.

<sup>254</sup> Wapner, *supra* note 1, at 48. ENGOs mounted a campaign to educate the global public about the anthropomorphic qualities of whales, using photographs, film, and audio recordings purported to show "evidence" of the intelligence and uniqueness of whales. Some ENGOs pursued direct action methods against whalers and promoted these mini-dramas to global media outlets to emphasize their points. *Id.*

<sup>255</sup> See DESOMBRE, *supra* note 87, at 163-64.

<sup>256</sup> See Oberthür, *supra* note 83, at 31. These included such well-known ENGOs as Friends of the Earth, Greenpeace International, the World Wildlife Fund, and the International Society for the Protection of Animals. See STOETT, *supra* note 102, at 95.

<sup>257</sup> ISAO MIYAOKA, LEGITIMACY IN INTERNATIONAL SOCIETY: JAPAN'S REACTION TO GLOBAL WILDLIFE PRESERVATION 90-91 (2004).

<sup>258</sup> See *infra* Part VIII.

<sup>259</sup> See INT'L COMM'N ON WHALING, TWENTY-FOURTH REPORT OF THE COMMISSION 20 (1974).

## VIII. THE PUSH TO IMPOSE A MORATORIUM

At the 1972 IWC meeting in London, Maurice Strong, the U.N. Secretary-General put to members the case that as the just-completed U.N. Conference on Human Environment had resolved that there should be a ten-year moratorium on all commercial whaling, the IWC should address the issue.<sup>260</sup> The United States and the United Kingdom delegations moved a global moratorium motion, arguing that the current assessment of whale stocks was so poor that it would be prudent to stop whaling.<sup>261</sup> Such a moratorium on whaling was initially perceived as a conservationist measure that would allow stocks to recover over time.<sup>262</sup> However, the Scientific Committee argued successfully that a blanket ban should not be imposed since whaling was better regulated at the individual species level, and a moratorium would lead to a reduced research program on whales and possibly the unregulated taking of whales.<sup>263</sup> The IWC voted the motion down with four countries voting for the proposal and seven against, and three abstentions.<sup>264</sup> To make matters worse, the IWC yet again set quotas that were higher than the previous year's catches.<sup>265</sup>

At both the 1973 and 1974 IWC meetings, the U.S. delegation, backed by Argentina and France, again called for the moratorium to be implemented, citing new research that whaling populations had been reduced from four to five million down to a few hundred thousand.<sup>266</sup> A similar appeal for a ban, backed by Mexico, was also made to the IWC in 1974.<sup>267</sup> The petitions were unsuccessful in the face of opposition from Japan and the U.S.S.R., who, acting in concert, argued that stocks of fin, sei, and sperm whales were still plentiful enough to hunt.<sup>268</sup> However, it did open the door in 1974 for delegates from the Food and Agriculture Organization of the United Nations, the United Nations Environment

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<sup>260</sup> *Id.* at 23-24.

<sup>261</sup> *Id.* at 24.

<sup>262</sup> See D'Amato & Chopra, *supra* note 79, at 38.

<sup>263</sup> INT'L COMM'N ON WHALING, *supra* note 258, at 24-25.

<sup>264</sup> *Id.* at 25.

<sup>265</sup> Compare INT'L COMM'N ON WHALING, TWENTY-FOURTH REPORT OF THE COMMISSION (1974) with INT'L COMM'N ON WHALING, TWENTY-THIRD REPORT OF THE COMMISSION (1973) and INT'L COMM'N ON WHALING, TWENTY-SECOND REPORT OF THE COMMISSION (1972).

<sup>266</sup> INT'L COMM'N ON WHALING, TWENTY-FIFTH REPORT OF THE COMMISSION 26 (1975); WEYLER, *supra* note 237, at 215.

<sup>267</sup> INT'L COMM'N ON WHALING, TWENTY-SIXTH REPORT OF THE COMMISSION 25 (1976).

<sup>268</sup> WEYLER, *supra* note 237, at 215.

Programme, and the International Union for the Conservation of Nature to formally play a part at IWC meetings as a compromise measure.<sup>269</sup> The participation of these international organizations proved to be crucial, as it paved the way for alternative non-state arguments to be presented.<sup>270</sup>

At this point in history, the IWC member-states were unclear in their language as to what the normative position of the IWC should be. At the 1974 meeting, an amending resolution to the global moratorium on commercial whaling, proposed by Australia and Denmark, argued there was a "need to *preserve* and enhance whale stocks as a resource for future use and taking into consideration the interests of consumers of whale products and the whaling industry as required by the International Convention on Whaling."<sup>271</sup> The resolution was adopted by the members with the amendment of "present" being added before the term "future," demonstrating that the member-states were still primarily focused on the short-term at the expense of future generations of whalers and whales.<sup>272</sup>

The same IWC meeting attempted to introduce a new conservationist measure to replace the BWU designation with new terminology.<sup>273</sup> The Australian delegate put forth a selective moratorium schema, which came to be known as the New Management Procedure ("NMP").<sup>274</sup> The NMP placed each whale species into three distinct groupings, as designated by the Scientific Committee.<sup>275</sup> It was intended to manage whale stocks by utilizing the idea of "Maximum Sustainable Yield" ("MSY").<sup>276</sup> This program was implemented in 1975 and reduced quotas for whales.<sup>277</sup> However, the program was ineffective in preventing the exploitation of

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<sup>269</sup> D'Amato & Chopra, *supra* note 79, at 39-40.

<sup>270</sup> *See id.*

<sup>271</sup> INT'L COMM'N ON WHALING, *supra* note 265 (emphasis added).

<sup>272</sup> *Id.* at 26.

<sup>273</sup> *Id.* at 25-26.

<sup>274</sup> *See* D'Amato & Chopra, *supra* note 79, at 40.

<sup>275</sup> INT'L COMM'N ON WHALING, *supra* note 265, at 25-26.

<sup>276</sup> *See id.*; Rose & Paleokrassiss, *supra* note 161, at 161; Stroud, *supra* note 115, at 77. The MSY was calculated by analyzing whale stocks according to three criteria. Level one was "Protection Stocks," where hunting was banned until whale stocks had recovered to acceptable levels. "Sustained Management Stock" were whale types designated "at or near" MSY levels, and were meant to be maintained at those numbers. The third grouping, "Initial Management Stocks," could be lowered, presumably by hunting, to the designated MSY. INT'L COMM'N ON WHALING, *supra* note 265, at 26.

<sup>277</sup> INT'L COMM'N ON WHALING, *supra* note 265, at 26.

whales due to poor biological data on whale species and their decline.<sup>278</sup> This was critical to determining the correct levels to be set.<sup>279</sup>

The creation of the NMP did not achieve its primary conservationist goal.<sup>280</sup> It did improve the tenor of scientific practices that influence decision-making, however.<sup>281</sup> Before, scientific-members gave a unanimous "best estimate" of whale stocks without any concomitant scientific basis.<sup>282</sup> Now, in response to outside pressure from both scientists and ENGOs, committee members created a more open model by which scientific papers were published and criticism sought.<sup>283</sup> This enhanced the credibility of the cetologists as advocates.<sup>284</sup>

Despite being allowed to attend as observers by the IWC in 1977, cetologists were unable to speak with a unified voice, fracturing over questions of "uncertainty" when applied to whale stocks.<sup>285</sup> By 1982, the Scientific Committee was so at war internally between conservationists and preservationists that it was unable to even discuss the content of any paper submitted to it for approval.<sup>286</sup> M. J. Peterson argues that the rift was so wide that cetologists were unable to function as a coherent lobby group between 1974 and 1982, opening the door for ENGOs to become the primary normative advocates on whaling issues.<sup>287</sup>

The ENGOs, building on their successes in domestically altering the whaling policies of states like Australia, Argentina, Uruguay and the Netherlands, were determined to translate their policies into action in the global sphere.<sup>288</sup> By 1979, ENGOs were able to attend IWC meetings officially in the dual roles as observers and in some cases as delegation

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<sup>278</sup> See Stroud, *supra* note 115, at 77.

<sup>279</sup> See INT'L COMM'N ON WHALING, *supra* note 265, at 25-26; Rose & Paleokrassis, *supra* note 161, at 161; Stroud, *supra* note 115, at 77.

<sup>280</sup> See Stroud, *supra* note 115, at 77.

<sup>281</sup> Skodvin & Andresen, *supra* note 183, at 72.

<sup>282</sup> See *id.* at 76.

<sup>283</sup> *Id.* at 72.

<sup>284</sup> See *id.* at 72-73.

<sup>285</sup> Peterson, *supra* note 4, at 169-70.

<sup>286</sup> HIGH NORTH WEB, THE MORATORIUM, <http://www.highnorth.no/iwc2000/briefings/Moratorium.htm> (last visited Dec. 1, 2008).

<sup>287</sup> See Peterson, *supra* note 4, at 169-70.

<sup>288</sup> See DESOMBRE, *supra* note 87, at 137-38. For example, in Australia, this occurred because of domestic anti-whaling campaigns which won the support of the National Liberal government after the 1977 election. In the case of the Netherlands, the country had stopped whaling but remained in the IWC to prevent commercial whaling. See *id.* at 138; Peterson, *supra* note 4, at 169-70.

members.<sup>289</sup> Vogler argues that their activities were particularly effective in regards to nations that had stopped whaling (because it was no longer a viable business) as well as on traditional non-whaling states.<sup>290</sup>

The 1977 meeting in Canberra set a new benchmark for ENGO protests and political actions. The ENGOS were determined to forcibly make their point that whales were not to be hunted.<sup>291</sup> ENGO tactics to pressure the IWC included a coalition of ENGOS, with the Whale and Dolphin Coalition and Project Jonah at the forefront.<sup>292</sup> They placed a twelve metre inflatable white whale in the lake next to the meeting place.<sup>293</sup> At the same meeting, Jean-Paul Forton-Gouin, a wealthy Frenchman who supported the ENGO position, managed to gain entrance to the IWC by funding a Panamanian delegation and having himself declared a Commissioner, a tactic which the ENGOS would later use to great effect.<sup>294</sup>

That meeting also saw for the first time a ban on aboriginal whaling of the Arctic bowhead whale, the most threatened whale species, though the ban was subsequently lifted in 1978 at the request of the United States, where domestically indigenous groups had brought legal action arguing that the ban infringed their Constitutional rights.<sup>295</sup> The United States had been at the vanguard of the moratorium approach, so this perceived backdown weakened its moral legitimacy.<sup>296</sup> Peru advanced two more moratorium proposals, but these were quickly taken off the table when it was obvious they would not be successful.<sup>297</sup>

Despite its lack of moral legitimacy, the United States was willing to use its economic power to achieve its goal of imposing a global moratorium on whaling.<sup>298</sup> Under the U.S. Pelly Act provisions, the United States certified Chile, Peru, and South Korea in 1978 for continued whaling.<sup>299</sup>

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<sup>289</sup> INT'L COMM'N ON WHALING, TWENTY-NINTH REPORT OF THE COMMISSION 31 (1979).

<sup>290</sup> See VOGLER, *supra* note 105, at 51.

<sup>291</sup> See Warwick Stanley, *A Whale of a Time*, THE SYDNEY MORNING HERALD, Nov. 7, 2008 (reviewing CHRIS PASH, *THE LAST WHALE* (2008)).

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*; see also Mark Whittaker, *Whale Tales*, THE AUSTRALIAN, Aug. 11, 2007. The whale was eventually discovered "blown up inside a hotel where many of the delegates were staying." This led to a situation where hotel staff and police destroyed the inflatable whale with knives in front of the media's television cameras in a wonderful publicity coup for the ENGOS. *Id.*

<sup>294</sup> See WEYLER, *supra* note 237, at 472.

<sup>295</sup> See D'Amato and Chopra, *supra* note 79, at 41-42.

<sup>296</sup> *Id.* at 42.

<sup>297</sup> *Id.* at 42; see INT'L COMM'N ON WHALING, *supra* note 288, at 18.

<sup>298</sup> See Skodvin & Andresen, *supra* note 183, at 74.

<sup>299</sup> See DESOMBRE, *supra* note 87, at 134. In 1972 the U.S. Congress enacted the Marine Mammal Protection Act ("MMPA") that put in place a moratorium on harvesting and

Under this pressure from a significant trading partner all agreed to be bound by IWC decisions in future.<sup>300</sup> The United States also certified Taiwan, which was not a signatory to the ICRW, in 1980. Fearful of alienating a powerful trading partner, Taiwan decided to ban all foreign whaling from its waters and then imposed on itself a ban on whaling in 1981.<sup>301</sup> Despite the United States actions, commercial whaling continued and it was evident from the significant drop in weight of the average caught whale that whalers were hunting more immature whales—in 1932 the average taken whale weighed sixty-seven tons; by 1978 the average was twenty tons.<sup>302</sup>

The reason why the United States chose to become such an ardent protector of whales is not entirely clear from the literature or the IWC Annual Reports. While whaling was no longer an economic imperative for the United States, it was not in its economic interest to threaten sanctions against long-standing trading partners.<sup>303</sup> It is arguable that the United States might have gained a “reputational advantage” in being perceived as a good environmental citizen.<sup>304</sup> As Vogler argues, for states like the United States, Great Britain, and France, opposing the taking of whales was “a relatively cost-free way of establishing ‘green’ credentials” both domestically and internationally, since none of these states had hunted whales for decades.<sup>305</sup> However, the economic costs in pursuing such a path were most likely greater than the potential reputational benefit since it risked trade relations.<sup>306</sup> Thus, some other factors must have been in play beyond economic considerations.

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importing marine mammal products unless a waiver had been granted. The Pelly Amendment of that year also supported the broad strokes of the MMPA in that it allowed the Secretary of Commerce to certify to the President actions such as sanctions against foreign states that abrogated global nature conservation initiatives (provided such sanctions were not prohibited under the then-existing General Agreement on Tariffs and Trade (“GATT”)). Stephen S. Boynton, *“Whaling Policy” of the United States Yesterday, Today and Tomorrow*, ISANA, N. 11, 1994, available at [http://luna.pos.to/whale/jwa\\_v11\\_boy.html](http://luna.pos.to/whale/jwa_v11_boy.html). The threat to invoke the Pelly amendment by the U.S. government saw the routine defiance of the IWC by whaling states over the previous decades become a thing of the past by the mid-1970s. See Rose & Paleokrassis, *supra* note 161, at 169-70.

<sup>300</sup> See DESOMBRE, *supra* note 87, at 134.

<sup>301</sup> See *id.*

<sup>302</sup> APLIN, ET AL., *supra* note 167, at 239.

<sup>303</sup> See PORTER, BROWN, & CHASEK, *supra* note 186, at 95.

<sup>304</sup> See D'Amato and Chopra, *supra* note 79, at 42.

<sup>305</sup> See VOGLER, *supra* note 105, at 51.

<sup>306</sup> See PORTER, BROWN, & CHASEK, *supra* note 186, at 95.

By the 1979 meeting, the number of members attending the IWC had grown to twenty-three, due in part to U.S. economic pressure on non-member states that were whaling to attend.<sup>307</sup> The other factor in the growth of new IWC members was the ENGOs' strategic plan to end commercial whaling by adding new non-whaling members to the IWC in order to tip the balance in favor of a moratorium and usher in a new era of preservationism.<sup>308</sup> Realizing that moral persuasion was not working quickly enough and that whale species were threatened with extinction, ENGOs elected to act strategically.<sup>309</sup> Although never officially confirmed by Greenpeace, a former Greenpeace consultant recounted that there was a 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.<sup>310</sup>

However, Porter and Brown argue that the recruiting of anti-whaling states was actually conducted by the United States, Sweden, and other conservationist states.<sup>311</sup> They maintain that the recruitment of the Seychelles was followed by seven other states, all dedicated to the ideal that the oceans and their resources should be viewed as "the common inheritance of mankind."<sup>312</sup> While it is impossible to be certain which actors put in place a plan to "stack" the IWC, an examination of the membership list of that period reveals that this is in fact what happened, with countries like Switzerland and the Seychelles joining the IWC.<sup>313</sup>

There appears to be more evidence supporting the contention that it was the ENGO strategy. Alongside the Greenpeace statements, it is clear from the record that the Seychelles delegation appointed naturalist

<sup>307</sup> INT'L COMM'N ON WHALING, THIRTIETH REPORT OF THE COMMISSION 25 (1980). Sweden and the Seychelles joined the IWC in 1979. *Id.*

<sup>308</sup> See Skodvin & Andresen, *supra* note 183, at 81. This was possible because, unlike the Antarctic regime, there is no requirement that a state actively whale for it to become a member of the IWC, which has led to such anomalies as landlocked Switzerland becoming a member. See VOGLER, *supra* note 105, at 51-52.

<sup>309</sup> See Skodvin & Andresen, *supra* note 183, at 81.

<sup>310</sup> *Id.* DeSombre tells a tale of an IWC secretary who alleges that an "unnamed member state . . . simply signed over the check from an environmental organization to pay its dues." *Id.*

<sup>311</sup> See PORTER, BROWN, & CHASEK, *supra* note 186, at 95.

<sup>312</sup> *Id.*

<sup>313</sup> See *id.*; see also HIGH NORTH WEB, *supra* note 285.



Lyall Watson as their plenary delegate and marine biologist Sidney Holt as the scientific committee member, both of whom were linked to ENGOs.<sup>314</sup> Environmentalists maintain they recruited the Seychelles to their cause as a counterbalance to Panama, which had been offered a sugar deal by Japan that ENGOs feared would influence their IWC vote.<sup>315</sup>

In addition to their state infiltration strategy, the ENGOs planned to assemble a three-quarter majority of anti-whaling nations to vote along preservationist lines and ban whaling outright.<sup>316</sup> Since they could not match the incentives offered by states like Japan, they approached traditionally non-whaling states that they felt would be more easily persuaded that banning whaling was the correct moral decision.<sup>317</sup> One view is that it was in the interests of these non-whaling states to join because it was an easy way to acquire the kudos of being a good "green" international citizen without suffering any economic costs.<sup>318</sup> However, doing so ignores the work done by ENGOs to convince both state leaders and domestic populations that whaling was morally repugnant.

At the 1979 IWC meeting Australia announced that its position would be to prohibit whaling in its own waters and oppose the taking of whales in international waters.<sup>319</sup> The reasons cited by the Australian delegation for this new direction were the probable high intelligence of whales; an understanding that such actions were immoral and that methods of taking whales were inhumane; whaling products were economically substitutable; and the survival of some whale species was in doubt, thus requiring a "change in emphasis from one of the conservative utilization of whale stocks to promoting a policy of banning whaling and protecting whale populations."<sup>320</sup> The emphasis on the intelligence of whales and on the immorality of whaling is an indication that the ENGOs' publicity campaign was affecting state direction and identity.

This meant that two traditional whaling states, the United States and Australia, were now staunch advocates of a global commercial whaling moratorium. United States President Jimmy Carter went so far as to send

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<sup>314</sup> See WEYLER, *supra* note 237, at 540-41.

<sup>315</sup> *Id.*

<sup>316</sup> See HIGH NORTH WEB, *supra* note 285; Gregory Rose, *International Law and the Status of Cetaceans*, in THE CONSERVATION OF WHALES AND DOLPHINS: SCIENCE AND PRACTICE 30 (Mark P. Simmonds & Judith D. Hutchinson eds., 1996).

<sup>317</sup> See HIGH NORTH WEB, *supra* note 285 (citing Jan Bollwerk, Richard D. Morais, and Leslie Spencer, *The Not So Peaceful World of Greenpeace*, FORBES, Nov. 11, 1991).

<sup>318</sup> See Rose, *supra* note 315, at 30.

<sup>319</sup> See D'Amato and Chopra, *supra* note 79, at 42.

<sup>320</sup> *Id.*

a letter asking the Commission to carry out "effective action to ensure the survival of the great whales."<sup>321</sup> It is clear that given the resources put into the global moratorium that this was no mere strategic decision by the United States and Australia, but rather symptomatic of a change in their very identity, from passive bystanders to active norm proponents.

The early 1980s saw the idea of a global moratorium become the central issue within the IWC, testing both its identity and future direction.<sup>322</sup> On the one side there were the states and ENGOs that espoused a preservationist creed and wanted "to ban all whaling, irrespective of whether a particular species is stable or endangered."<sup>323</sup> Opposing them was the whaling industry which, at best, favored a conservationist perspective, but in reality had been exploiting whales for decades.<sup>324</sup> Such diametrically opposed positions meant whalers and preservationists were unable to reach any accord, leading to an escalation in what became known colorfully as "the whale wars."<sup>325</sup>

The thirty-second meeting of the IWC had twenty-four nations (Oman and Switzerland having recently joined) in attendance, with three moratorium proposals put up: "a worldwide moratorium, a moratorium on commercial whaling, and a moratorium on sperm whaling."<sup>326</sup> The United States put forward a moratorium amendment to a proposal by France and argued that it was necessary because the IWC had been unable to stop the over-exploitation of whale stocks.<sup>327</sup> The amendment failed, but the vote was close with thirteen votes in favor, nine against and two abstentions.<sup>328</sup> Iceland, Canada, and South Africa all spoke for the need for a policy "which recognizes whales as a harvestable resource subject to the needs of conservation."<sup>329</sup> The global ban that had been promoted by Australia in 1979 and that had been considered by an IWC working group was rejected when the group's report argued such a course of action would probably have adverse economic effects and would "result in the direct loss of over 7,000 jobs and an indirect loss of over 35,000 jobs."<sup>330</sup>

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<sup>321</sup> *Id.*

<sup>322</sup> *See id.* at 45.

<sup>323</sup> *Id.* at 45.

<sup>324</sup> *See id.*

<sup>325</sup> D'Amato and Chopra, *supra* note 79, at 45.

<sup>326</sup> *Id.* at 43.

<sup>327</sup> INT'L COMM'N ON WHALING, THIRTY-FIRST REPORT OF THE COMMISSION 18-19 (1981).

<sup>328</sup> *Id.*

<sup>329</sup> *Id.* at 18.

<sup>330</sup> *Id.* at 18-19.

By the 1981 meeting, global interest in the issue of whaling rose again, and the number of member nations within the IWC increased by 33 percent.<sup>331</sup> New members, like Costa Rica and India, came out in favor of whale preservation.<sup>332</sup> Despite the change in the composition of the members, a call for a global ban on the taking of whales proposed by the United Kingdom and supported by the United States, Sweden, France, and New Zealand again did not pass at the 1981 meeting, with sixteen in favor, eight against, and three abstentions.<sup>333</sup> Also unsuccessful were plans for a ban in the North Atlantic, a ban on minke whaling, and a global phaseout of commercial whaling over the next five years.<sup>334</sup> The only proposal to gain any traction was one put up by the United Kingdom, France, the Netherlands, and the Seychelles, calling for a ban on the culling of sperm whales, which had been hunted in such large numbers that they were virtually extinct.<sup>335</sup>

At the 1982 meeting in Brighton, U.K., over thirty-seven members of the IWC were present, including eight who had never had whaling industries, and fifty-one ENGOs.<sup>336</sup> At that meeting, the IWC received five moratorium proposals from the Seychelles,<sup>337</sup> United Kingdom, United States, France, and Australia.<sup>338</sup> The Seychelles argued for a phase out of commercial whaling, leading to a negotiated ban, because such an approach would "facilitate the adjustment that whaling nations will have to make if the whale is to be saved from extinction, and at the same time [would] safeguard the future work of the Commission as a growing alliance of nations committed to *preserving* all cetaceans for posterity."<sup>339</sup> Japan argued that as per the Scientific Committee Reports, there was no

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<sup>331</sup> See D'Amato and Chopra, *supra* note 79, at 44.

<sup>332</sup> INT'L COMM'N ON WHALING, THIRTY-SECOND REPORT OF THE COMMISSION 17 (1982).

<sup>333</sup> *Id.* at 18.

<sup>334</sup> *Id.*

<sup>335</sup> *Id.* at 19-20.

<sup>336</sup> See VOGLER, *supra* note 105, at 51.

<sup>337</sup> See HIGH NORTH WEB, *supra* note 285. The tiny island nation of Seychelles ended up playing a critical role in the decision to impose a moratorium on whaling since the document was introduced by that nation. Behind that flag of convenience were ENGOs determined to push their own preservationist agenda at the IWC meeting. The Seychelles delegation included Sidney Holt, a key player in the "Save-the-Whale" movement, who had been chairman of Greenpeace U.K. and had been employed for ten years by the International Fund for Animal Welfare ("IFAW"). In partnership with the director of Greenpeace International, David McTaggart, they had worked tirelessly to recruit new, non-whaling nations to the IWC. *Id.*

<sup>338</sup> INT'L COMM'N ON WHALING, THIRTY-THIRD REPORT OF THE COMMISSION 20-21 (1983).

<sup>339</sup> See D'Amato and Chopra, *supra* note 79, at 45 (emphasis added).

scientific basis for a blanket moratorium since some whale stocks had replenished.<sup>340</sup> Further, in Japan's eyes, such a move would be hypocritical and contrary to the Convention since it would also ban traditional aboriginal subsistence whaling.<sup>341</sup> Norway, Iceland and the Republic of Korea all opposed the ban on scientific grounds.<sup>342</sup> Uruguay, Mexico, Argentina, Peru, Brazil, Chile, and Costa Rica supported a moratorium, but expressed worries over the issue of the sovereign rights of coastal states to access their resources within their two hundred mile exclusive economic zones.<sup>343</sup> Australia argued that a moratorium would best balance the competing interests of the whaling industry and the conservation of whales.<sup>344</sup>

The amendment was eventually passed twenty-five to seven with five abstentions.<sup>345</sup> Whaling states were granted a three-year grace period to phase out their hunts to lessen the economic impact of the moratorium in order to comply with the IWC preamble.<sup>346</sup> However, the ban exempted aboriginal subsistence whaling—particularly the endangered bowhead species, hunted by the Inuit in the Arctic regions.<sup>347</sup>

The ENGO twin strategy of bringing in new non-whaling member-states and publicizing the issue to the world, combined with the economic pressure applied by the United States, tipped the balance within the IWC. With the passing of the commercial whaling moratorium in 1982, to become operational in 1986, preservationism became ascendant, if not totally dominant, over both conservationism and exploitation.<sup>348</sup> However, it was not a clean victory. The moratorium was confined to commercial whaling and it allowed exemptions if registered with the IWC, which countries like Japan and Norway were quick to exploit.<sup>349</sup> Japan immediately lodged an objection under Article V(3) which allowed them to legally continue whaling; Canada, an ardent whaler, left the IWC entirely.<sup>350</sup>

Peterson maintains that the passing of the moratorium, while a victory for environmentalists in general, may not have been one for those pushing a preservationist agenda since it "can be read as either

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<sup>340</sup> See INT'L COMM'N ON WHALING, *supra* note 337, at 21.

<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

<sup>345</sup> See D'Amato and Chopra, *supra* note 79, at 46.

<sup>346</sup> *Id.*

<sup>347</sup> *Id.*

<sup>348</sup> *Id.* at 48-49.

<sup>349</sup> *Id.* at 48.

<sup>350</sup> See Ruffle, *supra* note 191, at 651; see Reeves, *supra* note 134, at 90.

conservationist or preservationist in inspiration."<sup>351</sup> The arguments made by the preservationist proponents within the IWC also reflect this ambivalence. Preservationist proponents' arguments were never advanced in terms of preserving whales.<sup>352</sup> Rather, these arguments were defended within the IWC as providing a chance for whale stocks to rebound, which left the door open for whaling to continue at a later date, which is consistent with a conservationist position.<sup>353</sup> This, however, looks more like a strategic decision by proponents to argue in terms they knew would be acceptable to the other delegates.<sup>354</sup> Proposing an indefinite ban would most likely not have been accepted or would have split the IWC to the point where many states would have left, destroying the regime.

States were willing to stop commercial whaling at this particular point for many reasons. From a self-interested perspective, for many states a declining demand globally for whale products had made whaling a marginalized economic activity. The inexorable laws of supply and demand allowed states to change their stance from pro- to anti-whaling at minimal cost to their interests.<sup>355</sup> Further, many non-whaling states supported a moratorium because of domestic political pressure to appease voters who, thanks to the ENGO publicity campaign, perceived whaling as a morally repugnant activity.<sup>356</sup> Voting for the moratorium cost domestic governments little strategically and appeased domestic voters.<sup>357</sup>

One must also consider the interest many states had in being seen as a good international citizen, however, with the concomitant reputational advantage to states of being perceived as good global environmental citizens.<sup>358</sup> Further, United States' threats to impose sanctions under the Pelly Act had an important effect on convincing reluctant states to adhere to the moratorium or risk losing lucrative export markets.<sup>359</sup>

The interest-based arguments ignore the fact that for many states and their citizens there was great concern about declining whale numbers and that many states acknowledged that whaling had been badly regulated.<sup>360</sup> Also, a proper conservationist ethic had not taken hold either

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<sup>351</sup> See Peterson, *supra* note 4, at 148.

<sup>352</sup> See MIYAOKA, *supra* note 256, at 92.

<sup>353</sup> See Peterson, *supra* note 4, at 148.

<sup>354</sup> See Skodvin & Andresen, *supra* note 183, at 81.

<sup>355</sup> See DESOMBRE, *supra* note 87, at 140; see STOETT, *supra* note 102, at 59.

<sup>356</sup> See DESOMBRE, *supra* note 87, at 140.

<sup>357</sup> See Oberthür, *supra* note 83, at 35.

<sup>358</sup> See PORTER, BROWN, & CHASEK, *supra* note 186, at 95.

<sup>359</sup> See Oberthür, *supra* note 83, at 33; see DESOMBRE, *supra* note 87, at 136.

<sup>360</sup> See DESOMBRE, *supra* note 87, at 141.

within the IWC or in the broader world.<sup>361</sup> Further, some states—such as Australia, the United States and the Netherlands—had come to accept that whales had an intrinsic right to live.<sup>362</sup> This altered their identity within the global society. For these states and for most of the ENGOs, whaling was a barbaric practice and the taking of even one whale was anathema.<sup>363</sup> These states have been at the forefront of strengthening the commercial moratorium in the hopes of stopping the taking of any whales.<sup>364</sup>

The moratorium at least put an end to the large-scale exploitation of whale stocks even if it had not ended whaling altogether.<sup>365</sup> Rather, the normative debate appeared to have become one of the proponents advocating conservation or proselytising preservationism.<sup>366</sup> The moratorium subsequently saw a recovery in some whale species in certain areas.<sup>367</sup> For example, in the cases of Southern California grey, blue and humpback whale stocks rebounded.<sup>368</sup> One of the most threatened species, the bowhead whale, has seen a five-fold increase in species total from 1500 in 1976 to 7500.<sup>369</sup> North Atlantic humpback whales increased in numbers from 5505 in the 1980s to approximately 11,000 by the mid 1990s.<sup>370</sup>

## IX. AFTER THE WHALING MORATORIUM

The granting of the moratorium did not end the normative contestation within the IWC and globally as to the standard of behavior to be applied to whales. In many ways the debate became more acrimonious as positions hardened. The contest also shifted to other normative battlegrounds both within and without the IWC. For the pro-whaling states the battle to define the whaling regime was not over and they sought to “refocus the whaling debate from a philosophical dilemma to the practical question

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<sup>361</sup> *Id.* at 139, 141.

<sup>362</sup> *Id.* at 137-38, 140.

<sup>363</sup> *See id.*

<sup>364</sup> *See* DESOMBRE, *supra* note 87, at 136.

<sup>365</sup> *Id.* at 140-41.

<sup>366</sup> *See* D'Amato and Chopra, *supra* note 79, at 42-45.

<sup>367</sup> PETER J. BRYANT, BIODIVERSITY AND CONSERVATION: A HYPERTEXT BOOK, [http://www.dbc.uci.edu/~sustain/bio65/lec07/b65lec07.htm#Recovery\\_of\\_some\\_populations](http://www.dbc.uci.edu/~sustain/bio65/lec07/b65lec07.htm#Recovery_of_some_populations) (last visited Nov. 26, 2008).

<sup>368</sup> *Id.*

<sup>369</sup> NAT'L PARK SERVICE, BERING LAND BRIDGE NATIONAL PRESERVE: BOWHEAD WHALES, <http://www.nps.gov/archive/bela/html/bowhead.htm#top> (last visited Nov. 26, 2008).

<sup>370</sup> RAYMOND L. BRYANT & SINEAD BAILEY, THIRD WORLD POLITICAL ECOLOGY: AN INTRODUCTION 3-4 (Routledge, 1997).

of sustainable activity.<sup>371</sup> While preservationism is now ascendant, it hangs by a slim thread that is challenged yearly at IWC meetings by those seeking to roll back the ban.<sup>372</sup> The tactics and strategies used by the ENGOs to bring about a moratorium have now been copied by states like Japan to end the ban.<sup>373</sup>

The whaling regime at this point can be modeled in game theoretic terms in a number of ways. The actions of the coalition of pro-whaling states indicate that the whaling regime is in a situation of "asymmetric deadlock," with whaling states having no intention of cooperating with other states to preserve whales.<sup>374</sup> The same model could be applied to the preservationist camp as well. Neither side has approached the negotiating table with a willingness to compromise because no diminution of position is possible given the moral and cultural belief structures at stake.

Given the coalition of pro-whaling states' previous behavior, there is a need to be wary about the genuineness of its professed desire for conserving whales. However, it is arguable that these states learned that their previous exploitative behavior led to this outcome, and therefore learned to be genuine in their willingness to whale according to conservationist mores. The fact that this group violated the norm of preservation does not detract from the veracity of the conservationist norm. It still exerts a powerful effect on many states, defining their appropriate behavior and constituting their identities, as well as the practices of many whalers.

Preservationist states and ENGOs have attempted to widen the moratorium into a comprehensive ban on all whaling by creating whale sanctuaries and encouraging whale watching enterprises, while other states like Japan campaign to put in place ostensibly conservationist programs.<sup>375</sup> Despite the global social censure directed at Japan and its allies for refusing to submit to the discursive outcome of the ban, the coalition continues to flout the accepted standard in order to carry out

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<sup>371</sup> Kristen M. Fletcher, *The International Whaling Regime and U.S. Foreign Policy*, in *THE ENVIRONMENT, INTERNATIONAL RELATIONS, AND U.S. FOREIGN POLICY* 224 (Paul G. Harris ed., Georgetown University Press, 2002).

<sup>372</sup> Leo Lewis, *Japan Persuades Commission Whaling Ban Not Necessary*, *TIMES ONLINE*, June 19, 2006, available at <http://www.timesonline.co.uk/tol/news/world/asia/article676344.ece> (last visited Nov. 26, 2008).

<sup>373</sup> *Id.*

<sup>374</sup> *See id.*

<sup>375</sup> *See* GREENPEACE, *THE HISTORY AND FUTURE OF WHALE SANCTUARIES*, <http://archive.greenpeace.org/oceans/whales/history.htm> (last visited Nov. 26, 2008).

"scientific whaling."<sup>376</sup> The remainder of this article will examine key actors and issue flashpoints in the whaling saga to determine whether the norm of preservationism has strengthened or weakened since the implementation of the commercial ban on whaling.

Japan immediately registered an objection to the moratorium on the grounds that the ban was not justified given the available scientific evidence, a theme it has consistently pushed since then.<sup>377</sup> Of the six remaining active whaling states at that time, three filed formal objections to the ban—Norway, Peru and the U.S.S.R., while three other nations, together with one of the absentees—Brazil, Chile, Iceland and the Republic of Korea, decided to take no action.<sup>378</sup> At the meeting, Peru withdrew its objection leaving only the three whaling nations of Norway, Japan and the U.S.S.R. as formal objectors.<sup>379</sup> This made the latter increasingly isolated.<sup>380</sup>

The United States then informed Norway and Japan that under the Pelly Amendment it would seek to impose an embargo, banning the importation of their fish products to force them to comply with the IWC decision.<sup>381</sup> The United States was unable to use such pressures on the U.S.S.R. since the United States did not import fish products from the Soviet Union.<sup>382</sup> The threat by the United States to impose sanctions was not enacted however, since it was found to be illegal under the GATT—a decision that eliminated a key weapon of coercion used to force states to abide by IWC decisions.<sup>383</sup>

By 1986 Brazil agreed to abide by the moratorium and Japan decided to stop commercial whaling activities by 1987.<sup>384</sup> The five-year moratorium on commercial whaling was re-examined at the 1990 meeting, but the Commission refused to change the moratorium's conditions.<sup>385</sup> D'Amato and Chopra believe that from this point in time, commercial whaling of the larger whale species had become obsolete.<sup>386</sup> The situation is

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<sup>376</sup> See D'Amato and Chopra, *supra* note 79, at 48; Ruffle, *supra* note 191, at 651; see also Peter Alford, *Defeated Whalers Sense Tide Turning*, THE AUSTRALIAN, June 25, 2005, available at <http://www.theaustralian.news.com.au/story/0,25197,15722278-30417,00.html> (last visited Nov. 26, 2008).

<sup>377</sup> INT'L COMM'N ON WHALING, THIRTY-FOURTH REPORT OF THE COMMISSION 13 (1984).

<sup>378</sup> See D'Amato and Chopra, *supra* note 79, at 46.

<sup>379</sup> *Id.*

<sup>380</sup> *Id.*

<sup>381</sup> *Id.*

<sup>382</sup> *Id.*

<sup>383</sup> APLIN ET AL., *supra* note 167, at 353.

<sup>384</sup> See D'Amato and Chopra, *supra* note 79, at 48.

<sup>385</sup> *Id.*

<sup>386</sup> *Id.*



more complex and not settled, however. States like Japan, Iceland and Norway continue to hunt using the pretext of scientific research, or alternatively, refuse to recognize the authority of the IWC, thereby casting themselves as rogue states in the eyes of much of the world.<sup>387</sup>

Japan has emerged as the leader of a veto coalition determined to roll back the moratorium, to prevent the ban from widening, and to replace it with conservationist whaling practices.<sup>388</sup> Japan appears to have learned from its ENGO opponent's strategies; it has been accused by ENGOs of attempting to "stack" the IWC by using the leverage of potential fishery markets and aid money to convince South Pacific and Caribbean states to join the organization.<sup>389</sup>

Such allegations have been widely reported, such as the case of the Solomon Islands and the Caribbean states reputedly receiving "aid money" to support Japan at the IWC.<sup>390</sup> Their voting records certainly indicate a pro-whaling bias but this is not conclusive evidence in and of itself.<sup>391</sup> The Japanese deny such aid is linked to votes, and accusations of this nature are impossible to prove given Japanese aid is distributed to over 150 states.<sup>392</sup> The policy continues to this day.<sup>393</sup> The Whale and Dolphin Conservation Society reported that of the six new states to join since June 2004

<sup>387</sup> See GREENPEACE, *supra* note 374.

<sup>388</sup> ANDREW DARBY, *HARPOONED: INTO THE HEART OF WHALING* 212 (NSW: Allen & Unwin 2007).

<sup>389</sup> Matthew Denholm, *Push to Harpoon Ban on Whaling*, THE AUSTRALIAN, January 21, 2005, at 3.

<sup>390</sup> DARBY, *supra* note 387, at 213. St. Lucia and St. Vincent were the first in 1986 and a year later fisheries grant aid began to flow into those States. *Id.*

<sup>391</sup> INT'L FUND FOR ANIMAL WELFARE, JAPAN'S WHALE VOTE BUYING: UNDERMINING THE IWC, [http://www.ifaw.org/ifaw\\_germany/join\\_campaigns/protecting\\_whales\\_around\\_the\\_world/at\\_risk\\_the\\_worlds\\_forum\\_for\\_whales/international\\_whaling\\_commission\\_\(iwc\)/japan's\\_whale\\_vote\\_buying\\_undermining\\_the\\_iwc.php](http://www.ifaw.org/ifaw_germany/join_campaigns/protecting_whales_around_the_world/at_risk_the_worlds_forum_for_whales/international_whaling_commission_(iwc)/japan's_whale_vote_buying_undermining_the_iwc.php) (last visited Nov. 26, 2008). During the 2005 IWC meeting there were again many allegations of Japan attempting to buy votes. The Solomon Islands National Planning and Aid Coordination Minister Fred Fono, reportedly agreed to support the Japanese position after meeting the Japanese delegation, who offered the Solomon Islands an extended aid package of 39 million USD. Peter Alford, *Whaling Ban Faces Extinction*, THE AUSTRALIAN, June 20, 2005, available at <http://www.theaustralian.news.com.au/story/0,25197,15667505-2702,00.html> (last visited Nov. 26, 2008). Japan has recently been discovered paying the IWC's annual levies on behalf of Grenada and the Solomon Islands. In the case of Grenada, support for the Japanese position was bought, according to former IWC Commissioner, Micheal Baptiste, for support of Grenada's fishing industry. Clay Lucas, *Evidence of Whale Vote Bribery*, THE AGE, Jul. 18, 2005, at 4.

<sup>392</sup> See Alford, *supra* note 375, at 16.

<sup>393</sup> See DARBY, *supra* note 387, at 213-29.

(Kiribati, Mali, Surinam, Tuvalu, Belgium and the Ivory Coast), only Belgium voted against lifting the ban; thus giving the pro-whaling faction potentially enough votes to overturn the ban and impose the revised management scheme.<sup>394</sup>

Despite the attempts by Japan to overturn the moratorium, it has continued to be applied since Japan has not yet rallied the two-thirds majority to overturn it.<sup>395</sup> However, Japan is playing a long diplomatic game to achieve their objectives.<sup>396</sup>

#### X. CONTESTING THE DEFINITION OF "CONSERVATION" IN THE ICRW

The Japan-led veto coalition has tried to change the terms of the debate linguistically in arguing for a clearly understood definition of the term "conservation."<sup>397</sup> They seek to define and limit the debate over the direction of the IWC to terms more favorable to themselves.<sup>398</sup> If Japan and its allies can limit and define the normative contest within the IWC to one of only debating conservationist mores and practices, it knows that it has an excellent chance of eventually being allowed to whale legally again.<sup>399</sup> At the thirty-sixth meeting of the IWC in 1984 in Argentina, Japan and the U.S.S.R. both argued that the 1946 Convention clearly spoke of the consumptive uses of whales to ensure a greater emphasis on conservation of whale stocks and greater IWC policy responsiveness.<sup>400</sup>

At the 1986 IWC meeting, the U.S.S.R. (supported by representatives from Norway, Iceland and Japan) proposed that the 1946 Convention be revised to better reflect both scientific research and conservation mores.<sup>401</sup> New Zealand, representing the anti-whaling forces, opposed the need for such a review, noting that the Convention had proved capable of evolution to meet "changing conditions," a view supported by the United States, Sweden, and West Germany.<sup>402</sup> Since there was no consensus achieved, the Chairman decided to retain the item on the agenda for the

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<sup>394</sup> See Denholm, *supra* note 388, at 3.

<sup>395</sup> See Alford, *supra* note 375.

<sup>396</sup> *Id.*

<sup>397</sup> *Id.*

<sup>398</sup> *Id.*

<sup>399</sup> *Id.*

<sup>400</sup> INT'L WHALING COMM'N, 35 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION 20 (1985).

<sup>401</sup> *Id.*

<sup>402</sup> *Id.*

next meeting to allow governments to evaluate this matter further.<sup>403</sup> In 1987 the U.S.S.R. proposed that a special working group be established to consider the issue, one that would meet in November/December 1987 and was agreed to by the members.<sup>404</sup>

The tensions between the conservationist-arguing states and the preservationist-leaning nations flared again at the thirty-ninth annual meeting when the *Working Group to Examine Questions Related to the Operation of the International Convention for the Regulation of Whaling*, created at the previous meeting, met.<sup>405</sup> The issues raised by the working group included the operation of the convention and whether it needed to be revised—particularly whether the convention should focus more on conservation.<sup>406</sup> However, other members, not identified in the Chairman's Report, argued that the current convention was sufficient and there was no pressing need to alter the convention at this time, if ever.<sup>407</sup> The Working Group met annually but never seemed to make progress in its stated aims, due to intransigence by preservationist states.<sup>408</sup> By the forty-second meeting the U.S.S.R. was complaining that the issue was not being debated seriously and that the progress to date was unacceptable.<sup>409</sup>

At the forty-third meeting the issue of the operation of the convention was revisited.<sup>410</sup> Again the same fault lines were present with states like Japan and Norway arguing that the IWC had departed significantly from the original convention.<sup>411</sup> The anti-whaling coalition states argued that change was unwarranted since there were no fundamental changes in

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<sup>403</sup> INT'L WHALING COMM'N, 37 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION 10 (1987).

<sup>404</sup> INT'L WHALING COMM'N, 38 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION 10 (1988).

<sup>405</sup> INT'L WHALING COMM'N, 39 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION 10 (1989). The membership of the Committee comprised both preservationist and conservationist states including representatives from Australia, Brazil, People's Republic of China, Denmark, Iceland, Japan, Republic of Korea, Mexico, New Zealand, Norway, Seychelles, Spain, Sweden, Switzerland, U.S.S.R., United Kingdom, and the United States. *Id.*

<sup>406</sup> *Id.*

<sup>407</sup> *Id.*

<sup>408</sup> *Id.*

<sup>409</sup> INT'L WHALING COMM'N, 41 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION 11 (1991).

<sup>410</sup> INT'L WHALING COMM'N, 43 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION 11 (1993).

<sup>411</sup> *Id.*

circumstances or to existing international law.<sup>412</sup> After much debate at the Plenary discussion, it was agreed to create terms of reference for the working group to enable it to initiate a thorough review and, with the advice of experts, to ascertain those parts of the schedule that needed altering.<sup>413</sup> The group was to report to the IWC by October 31, 1991.<sup>414</sup> Japan continued to press for adherence to conservation protocols, but at the 1993 meeting in Kyoto, it was dealt a severe blow when the working group decided it could not proceed until the Revised Management Scheme ("RMS") was implemented.<sup>415</sup> To this day implementation of the RMS has not occurred and just prior to the 2006 meeting the Japanese, after years of anguish and deadlock, declared that, for them, the RMS was dead.<sup>416</sup>

In response, preservationist states have attempted to control the terms of the debate by using conservation rhetoric against whaling states to undermine their arguments. Both sides to the debate have used conservationist rhetoric for their own ends rather than actually discussing exploitation and preservation.<sup>417</sup> The IWC meeting in Mexico in 2003 saw Mexico introduce a draft Resolution: *The Berlin Initiative on Strengthening the Conservation Agenda of the International Whaling Commission*.<sup>418</sup> It aimed to create a Conservation Committee (with appropriate funding) composed of all contracting parties to the Convention, to provide the institutional structure to examine conservation issues and to overcome what Mexico saw as the "stagnation" of the IWC.<sup>419</sup>

Australia argued that such a resolution was a milestone in the evolution of the organization.<sup>420</sup> New Zealand posited that the resolution had the potential to meet the obligations imposed by the preamble to protect

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<sup>412</sup> INT'L WHALING COMM'N, 42 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION 11 (1992).

<sup>413</sup> *Id.* app. 1 at 46.

<sup>414</sup> *Id.*

<sup>415</sup> INT'L WHALING COMM'N, 44 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION 11 (1994).

<sup>416</sup> See DARBY, *supra* note 387, at 240.

<sup>417</sup> INT'L WHALING COMM'N, 55 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION (2004).

<sup>418</sup> INT'L WHALING COMM'N, 54 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION (2003).

<sup>419</sup> *Id.* at 7-8. Mexico moved the motion on behalf of the co-sponsors Australia, Brazil, Finland, France, Germany, Ireland, Italy, Kenya, Monaco, the Netherlands, New Zealand, Portugal, San Marino, South Africa, Spain, Sweden, the United Kingdom and the United States. See INT'L WHALING COMM'N, 55 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION 7 (2004).

<sup>420</sup> *Id.*

whale stocks for future generations.<sup>421</sup> The United States, which was in support of the proposal, maintained that the proposal was not necessarily anti-whaling and supported the draft.<sup>422</sup> Ireland hoped that such an entity could reinvigorate the moribund Revised Management Scheme debate.<sup>423</sup> However, the traditional whaling states and their allies all spoke out against the proposal.<sup>424</sup> Denmark was concerned that the resolution did not consider the role played by the North Atlantic Marine Mammals Commission ("NAMMCO") (a rival entity set up by Scandinavian whaling states) and gave too much power to ENGOs to set IWC priorities.<sup>425</sup> Iceland, Norway, the Republic of Korea, Antigua and Barbuda, China, Dominica, the Russian Federation, Japan, Grenada, St. Lucia, and Morocco were all opposed to the creation of such an entity, arguing that it would "create a radical and lasting change in the character of the IWC."<sup>426</sup>

However, the resolution was adopted with 25 votes in favor and 20 against.<sup>427</sup> In closing the debate, the Chair argued that "the establishment of the Conservation Committee would not solve the problems within [sic] IWC" and stressed the need to continue to work to find a balance between conservation and preservation, without directly referring to this balance in these terms.<sup>428</sup> The problems the Chair alluded to appear to be intractable, with neither faction willing to engage in a legitimate dialogue.<sup>429</sup>

At the fifty-sixth meeting the Conservation Committee met for the first time.<sup>430</sup> The Annual Report states that the IWC delegates all agreed they "were committed to conservation" but the term is not defined in the report in any coherent way.<sup>431</sup> While the Committee did discuss the issue in conservationist terminology (for example what constitutes "sustainable use"), it felt it could not give a definitive answer at that point in time.<sup>432</sup> Other pro-whaling states were concerned the term would not be examined

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<sup>421</sup> *Id.*

<sup>422</sup> *Id.*

<sup>423</sup> *Id.* at 8-9.

<sup>424</sup> *Id.* At this time the veto coalition included Denmark, Iceland, Norway, the Republic of Korea, Antigua and Barbuda, China, Dominica, Russia, Japan, Grenada, St. Lucia and Morocco. *Id.* at 9.

<sup>425</sup> See INT'L WHALING COMM'N, *supra* note 418.

<sup>426</sup> *Id.* at 9-10.

<sup>427</sup> *Id.*

<sup>428</sup> *Id.* at 10-11.

<sup>429</sup> *Id.*

<sup>430</sup> *Id.* at 64-65 (2004).

<sup>431</sup> INT'L WHALING COMM'N, *supra* note 418, at 64-65.

<sup>432</sup> *Id.*

in the context of achieving “the orderly development of the whaling industry,” which, for them, was the key aim.<sup>433</sup> At the same meeting Japan attempted to regain the policy initiative by giving a presentation to the other members under the heading *The Centennial of Antarctic Whaling—From the History of Over-Harvesting to the Creation of New Sustainable Whaling*.<sup>434</sup> The presentation focused on learning from what Japan regarded as past mistakes in the region to create a new, sustainable regime.<sup>435</sup> The paper provided a contextual argument highlighting Japan’s traditional whaling culture and how various legal instruments state the need for the full utilization of whales.<sup>436</sup> It concluded with an analysis of how whaling should be conducted in the future and how any Revised Management Procedure (“RMP”) should reflect the ICRW’s original objectives. It defended the practice of scientific whaling as necessary and argued that the whales taken should be fully “utilized” by being used as a food source.<sup>437</sup> Japan requested that this item be placed on the agenda for future meetings.<sup>438</sup> Although the Chair acquiesced, to date the issue has not proceeded any further.<sup>439</sup> Pro-whaling states have been unable to get anti-whaling states to agree to their preferred version of conservation, either rhetorically or in practice.<sup>440</sup>

At the 2006 IWC meeting, Japan looked to “normalizing” relations within the IWC and responded with the “St. Kitts and Nevis Declaration” which demanded a return to a literal interpretation of the ICRW and its conservationist principles, as well as a rejection of the ban.<sup>441</sup> If Japan passed this motion it could argue that a majority—but not a three-quarters majority—wanted a resumption of commercial whaling. The vote was on a knife’s edge until the Senegalese Commissioner turned up to vote.<sup>442</sup> The vote was 33 for, 32 against and one abstention, and, for the first time in fourteen years since the Southern Ocean Sanctuary vote, the preservationist

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<sup>433</sup> *Id.*

<sup>434</sup> *Id.*

<sup>435</sup> *Id.*

<sup>436</sup> *Id.*

<sup>437</sup> INT’L WHALING COMM’N, *supra* note 418, at 64-65.

<sup>438</sup> *Id.*

<sup>439</sup> *Id.* at 67-68.

<sup>440</sup> *Id.*

<sup>441</sup> INT’L WHALING COMM’N, 57 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION 1 (2006).

<sup>442</sup> *Id.* Curiously, after the vote the Senegalese President said he was unaware of the vote. *Id.*

forces had lost.<sup>443</sup> After the St. Kitts conference, Japan set up a "normalization meeting" to put whaling on a "proper course," which was shunned by preservationist states and a report was submitted to the IWC, but there has been no action to date on the issues discussed.<sup>444</sup>

At the 2007 IWC meeting in Anchorage, Alaska, the Conservation Committee met but again could not agree on establishing the terms of reference with the Chair deciding to try to deal with the issue before the next meeting in Chile.<sup>445</sup> When the Committee met in Chile in 2008, it again did not consider the RMS issue.<sup>446</sup>

Instead, the issues facing the Conservation Committee have been subsumed under the broader remit of the inter-sessional Meeting on the Future of the International Whaling Commission, which met for the first time in London in March 2008.<sup>447</sup> The Inter-sessional Meeting, hosted by the Chair of the IWC, Bill Hoggarth of the United States, is tasked with overcoming the polarized nature of the IWC and putting forward suggestions to improve practice and procedures with the overall aim of rebuilding trust in the organization.<sup>448</sup> The IWC has agreed to continue negotiations on the substantive issues raised by the inter-sessional meeting.<sup>449</sup> However, given the impasse at the last few meetings between conservationist and preservationist forces, it seems unlikely that this mechanism can resolve the normative tensions between the two camps.

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<sup>443</sup> See *id.* at 64-65; DARBY, *supra* note 387, at 243-44.

<sup>444</sup> INT'L WHALING COMM'N, 2007 CONFERENCE FOR THE NORMALIZATION OF THE INTERNATIONAL WHALING COMMISSION 5, 10 (2007) *available at* [http://www.iwcoffice.org/\\_documents/commission/IWC59docs/59-7.pdf](http://www.iwcoffice.org/_documents/commission/IWC59docs/59-7.pdf) (last visited Nov. 29, 2008); DARBY, *supra* note 387, at 245.

<sup>445</sup> INT'L WHALING COMM'N, 58 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION 11 (2007).

<sup>446</sup> See generally INT'L WHALING COMM'N CONSERVATION COMMITTEE, REVISED DRAFT AGENDA FOR THE 60TH ANNUAL MEETING OF THE INTERNATIONAL WHALING COMMISSION 2008, IWC/60/CC 1REV, *available at* [http://www.iwcoffice.org/\\_documents/commission/IWC60docs/60-CC1rev.pdf](http://www.iwcoffice.org/_documents/commission/IWC60docs/60-CC1rev.pdf) (last visited Nov. 29, 2008).

<sup>447</sup> INT'L WHALING COMM'N, CHAIR'S REPORT OF THE INTERSESSIONAL MEETING OF THE FUTURE OF IWC 1, 8-11, *available at* [http://www.iwcoffice.org/\\_documents/commission/IWC60docs/60-7.pdf](http://www.iwcoffice.org/_documents/commission/IWC60docs/60-7.pdf) (last visited Nov. 29, 2008).

<sup>448</sup> *Id.* at 8.

<sup>449</sup> INT'L WHALING COMM'N, CHAIR'S SUMMARY OF THE OUTCOME OF DISCUSSIONS ON THE FUTURE OF THE INTERNATIONAL WHALING COMMISSION, IWC/60/24 at 1, *available at* [http://www.iwcoffice.org/\\_documents/commission/IWC60docs/60-24.pdf](http://www.iwcoffice.org/_documents/commission/IWC60docs/60-24.pdf) (last visited Nov. 29, 2008).

## XI. IWC SCIENTIFIC PERMITS AND WHALING

Scientific permits have been a particularly bitterly fought topic between preservationist-minded states and those states dedicated to continuing whaling.<sup>450</sup> Under the ICRW, states are allowed to issue their own scientific permits to hunt whales and the IWC has few powers to prevent such permits for activities it might regard as scientifically dubious—a loophole whaling states have ruthlessly exploited.<sup>451</sup> Preservationist states have attempted over the years to tighten the regulations pertaining to the issuance of individual states' scientific permits, but in the face of the intransigence of states such as Japan and Norway, they have, to date, been unsuccessful.<sup>452</sup>

Japan, Iceland, Russia, and Norway have continued to award themselves scientific permits in the face of global condemnation of the twisting of the term "scientific."<sup>453</sup> They have justified this decision on the grounds that whale numbers for certain species have recovered enough for such activities, or, alternatively, that killing whales is necessary to better understand them.<sup>454</sup> For preservationist-minded states these explanations appear dubious and are perceived as attempts to circumvent the moratorium.<sup>455</sup> However, under the rules of the ICRW, states are allowed their own scientific programs and so the skeptics have been limited to calls to stop such activities.<sup>456</sup>

Following from the IWC meeting that imposed the moratorium in 1985, Japan argued at the Joint Working Group of the Technical and Scientific Committees—chaired by Japan—that there was a need to create better conceptual approaches.<sup>457</sup> The Japanese argued the aim should be to better inform the IWC with effective scientific advice and recommendations, as well as set out timetable for a detailed assessment of whale stocks.<sup>458</sup> The report

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<sup>450</sup> See Rose & Paleokrassis, *supra* note 161, at 157.

<sup>451</sup> *Id.*

<sup>452</sup> See Rose, *supra* note 315, at 39.

<sup>453</sup> *Id.* at 38-39.

<sup>454</sup> *Id.* For example, in the 1987/88 season Japan undertook a research program with the nebulous aim of better understanding the population dynamics of minke whales in Antarctica which apparently means killing three hundred whales a year. See Stroud, *supra* note 115, at 68-70.

<sup>455</sup> See Rose & Paleokrassis, *supra* note 161, at 157.

<sup>456</sup> *Id.*

<sup>457</sup> See INT'L WHALING COMM'N, *supra* note 399, at 9.

<sup>458</sup> *Id.*



was accepted by the commission and this acceptance has allowed Japan and other whaling states to argue that scientific whaling is necessary.<sup>459</sup>

Preservationist states have continually clashed with whaling states in a number of meetings over the regulation of scientific permits. At the 1985 IWC meeting there was vigorous debate as to whether such catches should be allowed to enter into international trade and whether special permit catches should be allowed from protected stocks.<sup>460</sup> A new resolution was adopted by consensus, whereby IWC members agreed to carry out research, wherever feasible, through non-lethal methods and with the goal of rational management of whale stocks.<sup>461</sup>

Following the 1986 decision to review special permits, Iceland, the Republic of Korea, and Japan all submitted proposals to be allowed to catch whales under a scientific permit.<sup>462</sup> All three requests were turned down by the IWC, citing, in the case of Korea, that it would not contribute information that answers significant management questions, while arguing that Iceland's request did not meet the 1986 criteria.<sup>463</sup> Japan was asked not to take whales, while the Scientific Committee examined Japan's proposed research methods.<sup>464</sup> The following year both Norway and Iceland applied for special permits but both applications were rejected by the IWC.<sup>465</sup>

At the forty-first meeting, Iceland stated it would not seek scientific permits to hunt sei whales, as it had lost faith in the IWC as an organization.<sup>466</sup> Japan, Norway, and initially the Soviet Union sought official permission to kill whales for scientific purposes but have found themselves consistently refused by the other delegates.<sup>467</sup> At the forty-fifth meeting,

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<sup>459</sup> *Id.* at 10.

<sup>460</sup> See INT'L WHALING COMM'N, *supra* note 402, at 11.

<sup>461</sup> *Id.* at 25.

<sup>462</sup> See INT'L WHALING COMM'N, *supra* note 403, app. 2-4 at 28-29.

<sup>463</sup> *Id.*

<sup>464</sup> *Id.* app. 4 at 29.

<sup>465</sup> See INT'L WHALING COMM'N, *supra* note 404, app. 1,2 at 30-31.

<sup>466</sup> See INT'L WHALING COMM'N, *supra* note 408.

<sup>467</sup> INT'L WHALING COMM'N, 40 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION 36 (1989); INT'L WHALING COMM'N, *supra* note 408, app. 1,2 at 47-48; INT'L WHALING COMM'N, *supra* note 411, app. 1,2 at 46-47; INT'L WHALING COMM'N, 43 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION 49 (1992); INT'L WHALING COMM'N, *supra* note 414, at 33; INT'L WHALING COMM'N, 45 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION 29 app. 7 (Resolution 1996-7) (1994); INT'L WHALING COMM'N, 47 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION 51-52 app. 6 (Resolution 1997-6) (1996); INT'L WHALING COMM'N, 48 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION 47-48 app. 2 (IWC Resolution 1998-1) (1997); INT'L WHALING

Norway decided not to ask for a scientific permit leaving Japan isolated as the only state still claiming that whaling is a scientific activity.<sup>468</sup>

In the 1990s the preservationist states sought to limit scientific research carried out by IWC members to research that primarily uses non-lethal means.<sup>469</sup> In 1995 the United Kingdom,—acting on the behalf of Australia, Brazil, France, Netherlands, New Zealand, Oman, South Africa and the United States—introduced a resolution that research should be conducted primarily by non-lethal methods, and lethal methods should only be used in “exceptional” circumstances, in order to address vitally important scientific questions.<sup>470</sup>

There was much debate about the meaning of “exceptional.”<sup>471</sup> St. Vincent and the Grenadines argued this was a moral issue and wondered what made whales so special that they should not be killed.<sup>472</sup> India responded that, in its particular case, it did not carry out lethal research on tigers, elephants, lions and rhinos.<sup>473</sup> Upon being put to a vote, the resolution passed.<sup>474</sup>

At the fiftieth meeting the IWC members passed a resolution on whaling under special permit which regretted that Japan was still carrying out lethal research and recommended that whales taken should be done in a manner consistent with Section III of the Schedule.<sup>475</sup> At the fifty-fifth annual meeting the IWC isolated Japan even further when 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]

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COMM'N, 49 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION 42 app. 4 (Resolution 1999-3) (1998); INT'L WHALING COMM'N, 50 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION 52-52 (Resolution 2000-4, Resolution 2000-5) (1999); INT'L WHALING COMM'N, 51 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION 56 (Resolution 2001-7, 2001-8) (2000); INT'L WHALING COMM'N, 52 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION 57 (2001).

<sup>468</sup> See INT'L WHALING COMM'N, 45 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION, *supra* note 467, at 29.

<sup>469</sup> INT'L WHALING COMM'N, 46 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION 30 (1995).

<sup>470</sup> *Id.*

<sup>471</sup> *Id.*

<sup>472</sup> *Id.*

<sup>473</sup> *Id.*

<sup>474</sup> *Id.* (23 for, 5 against, and 2 abstentions).

<sup>475</sup> See INT'L WHALING COMM'N, 49 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION, *supra* note 467, app. 5 at 43.

contrary to the spirit of the moratorium on commercial whaling and to the will of the Commission."<sup>476</sup>

Despite being virtually alone within the IWC, Japan continues to take whales for "scientific purposes" over the objections of other IWC members.<sup>477</sup> Japan's decision to continue its program has seen it subjected to global censure.<sup>478</sup> Despite its continued intransigence, the fact that it continues whaling in small numbers does not invalidate the preservationist norm. Quite the contrary, Japan stands out as the exception that proves the norm, which is becoming more deeply entrenched among IWC members.

## XII. THE "IRISH PROPOSAL" FOR THE FUTURE OF THE IWC

In an attempt to break the conservationist/preservationist deadlock, Irish Commissioner Michael Canny was asked at the forty-ninth IWC meeting to consult with the other Commissioners regarding the Irish Proposal with the goal of reaching a consensus among members.<sup>479</sup> The Proposal would allow coastal whaling to resume once again, but still continue to ban whaling on the high seas.<sup>480</sup> As a trade-off to the preservationist forces, whaling for "scientific purposes" and the global trade in whale commodities would also be forbidden under the proposal.<sup>481</sup> The submission stipulated that whaling "should be restricted to coastal areas only" but it is unclear as to how it would define "coastal."<sup>482</sup>

Ireland could not put forward a formal proposal at the next meeting, however, because the United States, the United Kingdom, and Australia supported the strict moratorium.<sup>483</sup> The only exception members were

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<sup>476</sup> INT'L WHALING COMM'N, 54 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION, *supra* note 417, at Summary of Decisions and Required Action.

<sup>477</sup> INT'L WHALING COMM'N, 59 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION, RESOLUTION 2007-1: RESOLUTION ON JARPA, *available at* <http://www.iwcoffice.org/Meetings/resolutions/resolution2007.htm> (last visited Dec. 16, 2008).

<sup>478</sup> See generally Andrew C. Revkin, *Japan Widens Whale Hunt, Provoking Objections*, N.Y. TIMES, July 29, 2000.

<sup>479</sup> INT'L WHALING COMM'N, 49 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION, *supra* note 467, at 35.

<sup>480</sup> *Id.* at 36.

<sup>481</sup> *Id.*

<sup>482</sup> *Id.* The submission does not make it apparent whether it is the 200 nautical mile Exclusive Economic Zones, the 12 nautical mile fisheries limit, or the 4 nautical mile territorial zones.

<sup>483</sup> See INT'L WHALING COMM'N, 49 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION, *supra* note 467, at 35.

willing to entertain was that of aboriginal whaling.<sup>484</sup> At this fiftieth meeting of the IWC, debate ensued, and it was clear that there was a vast gulf in views between the two factions.<sup>485</sup> Brazil declared that it wished to see a South Atlantic Ocean Sanctuary created while Denmark argued that the need to preserve whale stocks was critical.<sup>486</sup> Japan was dismissive of this argument, countering that the "IWC has turned into an organization to protect whales, whereas it should consider the sustainable use of ocean resources and the total ecosystem."<sup>487</sup>

At the fifty-first meeting, in a debate over the Irish proposal, Norway argued that the IWC was not adhering to its Convention and had become "a protectionist organization with no will to lift the moratorium."<sup>488</sup> Denmark thought that both sides must give up something to keep the organization functioning.<sup>489</sup> The United Kingdom wanted to see a permanent global ban except for aboriginal subsistence whaling, and that whale watching as "a benign and sustainable way of exploiting natural resources" was a better way forward.<sup>490</sup> Japan chided the United Kingdom for talking in terms of "conservation" when new whaling sanctuaries were annually proposed and a coalition of preservationist states were implacably opposed to whaling.<sup>491</sup> At the fifty-second IWC meeting the Chair reported that, despite there not yet being consensus, there was at least support for a process with the aim of reaching compromise.<sup>492</sup>

However, the Irish compromise has exposed the real positions of IWC states behind their negotiating stances. States like the United States and the United Kingdom, which had opposed the resumption of whaling on ethical grounds, but couched their rhetoric in scientific terms, were met with a plan that would meet their stated scientific goals.<sup>493</sup> If the RMS were implemented, Norway and Japan, which wish to return to full commercial

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<sup>484</sup> See *id.*

<sup>485</sup> See *id.*

<sup>486</sup> *Id.*

<sup>487</sup> See *id.* at 36.

<sup>488</sup> INT'L WHALING COMM'N, 50 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION, *supra* note 467, at 42.

<sup>489</sup> *Id.*

<sup>490</sup> *Id.*

<sup>491</sup> *Id.* at 43.

<sup>492</sup> INT'L WHALING COMM'N, 51 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION, *supra* note 467, at 50.

<sup>493</sup> See DESOMBRE, *supra* note 87 at 142.

whaling, would be forced to concede their true intentions.<sup>494</sup> Given that neither side wants the compromise implemented fully, it appears the proposal has failed to break the normative impasse, and to date it has not been implemented.<sup>495</sup>

### XIII. ABORIGINAL SUBSISTENCE WHALING

An analysis of the case of aboriginal subsistence whaling is critical when examining the normative debate underlying the IWC because it raises three issues.<sup>496</sup> The first issue is best phrased as a question: how strong can the preservationist norm within the IWC be if whales are still killed under the pretext of aboriginal subsistence whaling? If whaling still continues, even with only a few taken, then the preservationist norm has not been fully entrenched but is limited in its application.

The second issue is the attempt by pro-whaling states (particularly those with indigenous populations) to continue to push for the expansion of the ambit of such activities. Countries like Japan and Norway have attempted to use this issue as a wedge to reopen the broader issue of commercial whaling, arguing that some of their traditional cultural activities should fall under this category.<sup>497</sup> Meanwhile, the United States, which opposed commercial whaling has sought to sanction such whaling since it has a large indigenous population which has hunted whales for centuries.<sup>498</sup>

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<sup>494</sup> *Id.*

<sup>495</sup> *Id.* There is no mention of the issue being discussed at all at the 2007 meeting in Alaska or in the 2008 meeting in Chile and it appears to have been allowed to lapse. See INT'L WHALING COMM'N, 58 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION 1 (2007); INT'L WHALING COMM'N, 59 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION 1 (2008).

<sup>496</sup> As per the IWC's ad hoc Committee Working Group on Development of Management Principles and Guidelines for Subsistence Catches of Whales by Indigenous (Aboriginal) Peoples, aboriginal subsistence whaling is defined as "for purposes of local aboriginal consumption carried out by or on behalf of aboriginal indigenous, or native peoples who share strong community, familial, social and cultural ties related to continuing traditional dependence on whaling and on the use of whales." INT'L WHALING COMM'N, 46 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION: 'COMMERCIAL' VS. 'SUBSISTENCE,' 'ABORIGINAL' VS. 'NONABORIGINAL,' AND THE CONCEPT OF SUSTAINABLE DEVELOPMENT IN THE CONTEXT OF JAPANESE COASTAL FISHERIES MANAGEMENT 4 (1994). Conversely, the IWC has never defined the term "commercial whaling," thus any practice not considered to be "aboriginal subsistence" is deemed commercial. Reeves, *supra* note 134, at 76.

<sup>497</sup> See John Vidal and Justin McCurry, *Japan Sets Course for Return to Commercial Whaling*, THE GUARDIAN, May 30, 2006, available at <http://www.guardian.co.uk/environment/2006/may/30/whaling.food> (last visited Dec. 16, 2008).

<sup>498</sup> See D'Amato and Chopra, *supra* note 79, at 42.

The United States has sought to defend their interests within the IWC despite being one of the main sponsors of the moratorium against commercial whaling.<sup>499</sup>

The third issue raised is the normative confusion over this issue adopted by states like the United States as well as the various ENGOs. Despite its staunch opposition to commercial whaling, the United States has also been a supporter of aboriginal whaling, chiefly for its own domestic reasons, differentiating it from industrial whaling.<sup>500</sup> ENGOs have also been strangely quiet on this issue, not wishing to offend aboriginal organizations whose rights they have traditionally supported in other forums.<sup>501</sup> Their silence on the issue, however, undercuts their moral persuasiveness in the eyes of their opponents and to some extent, the rest of the world. The vexed issue of aboriginal subsistence whaling is one that preservationist groups must come to terms with by declaring which set of rights is more important, aboriginal group rights or the intrinsic right of whales to exist.

The rights of aboriginal groups have been enshrined for decades within the IWC. Initially, the right to hunt was felt to be a narrow one and was designed to help indigenous peoples whose economy and culture was based on the traditional hunt for whales.<sup>502</sup> In 1964, after a submission by the United States to the IWC, Paragraph Two of the Schedule was revised to forbid aboriginal hunting unless for local consumption in order to avoid abuse of the rights of aboriginal groups by commercial interests.<sup>503</sup> In 1981, just prior to the imposition of the moratorium, but at the height of discussion about taking whales, it was agreed by the contracting members to the IWC that the three broad management objectives for the aboriginal subsistence whaling scheme would be

- (1) to ensure that the risks of extinction to individual stocks are not seriously increased by aboriginal whaling;
- (2) to enable aboriginal people to harvest whales in perpetuity at levels appropriate to their cultural and nutritional requirements, subject to the other objectives; and

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<sup>499</sup> *Id.*

<sup>500</sup> *Id.*

<sup>501</sup> See The Wilderness Soc'y, Wilderness Protection and Native Title Policy (Queensland), available at <http://www.indig-enviro.asn.au/Support22.htm> (last visited Dec. 16, 2008).

<sup>502</sup> See Fletcher, *supra* note 370, at 221.

<sup>503</sup> INT'L COMM'N ON WHALING, SIXTEENTH REPORT OF THE COMMISSION 20 (1964).

(3) to maintain the status of whale stocks at or above the level giving the highest net recruitment and to ensure that stocks below that level are moved towards it, so far as the environment permits.<sup>504</sup>

It is clear that the IWC always meant aboriginal whaling to be a legitimate exemption to the overall commercial ban, provided that such activities did not threaten the survival of whale species.<sup>505</sup> Over the years the IWC has designated the following whaling operations as qualifying for aboriginal subsistence whaling: the Greenland hunt for minke and fin whales; the hunt for humpback whales in the Lesser Antilles; and for bowhead and gray whales in Alaska, and gray whales in Russia.<sup>506</sup> In the 1990s bowhead whaling in Chukotka, Russia and gray whales by the Makah in the U.S. state of Washington were also authorized.<sup>507</sup>

The United States in particular has traditionally stated that it supports the concept of aboriginal subsistence whaling when applied to its own citizens, following the IWC formulation "when it does not negatively impact whale stocks and when the hunt fulfils nutritional, spiritual, and cultural needs of a traditional whaling people."<sup>508</sup> This has in theory been applied to the Inuit—comprising the indigenous peoples of Arctic Canada, Alaska, Greenland and Siberia—who have also, in previous centuries, hunted whales for food as a means of survival.<sup>509</sup>

In 1996 the United States went to the IWC on the Makah's behalf but it was met with animosity.<sup>510</sup> When it became clear that it would not gather the required three quarter majority, the United States withdrew the motion.<sup>511</sup> In 1997 the United States tried again without success so they arranged a deal with Russia to effectively trade quotas that enabled the

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<sup>504</sup> INT'L WHALING COMM'N TECHNICAL COMM. WORKING GROUP, THE REPORT OF THE TECHNICAL COMMITTEE WORKING GROUP ON DEVELOPMENT OF MANAGEMENT PRINCIPLES AND GUIDELINES FOR SUBSISTENCE CATCHES OF WHALES BY INDIGENOUS (ABORIGINAL) PEOPLES IN REPORTS OF THE INTERNATIONAL WHALING COMMISSION: SPECIAL ISSUE 4: ABORIGINAL/SUBSISTENCE WHALING (WITH SPECIAL REFERENCE TO THE ALASKA AND GREENLAND FISHERIES) 84 (1982).

<sup>505</sup> See generally *id.*

<sup>506</sup> Reeves, *supra* note 134, at 77.

<sup>507</sup> *Id.*

<sup>508</sup> See Fletcher, *supra* note 370, at 217.

<sup>509</sup> See D'Amato and Chopra, *supra* note 79, at 58.

<sup>510</sup> THE HUMANE SOCIETY, MAKAH: THE TRIBE WHO WOULD BE WHALERS, [http://www.hsus.org/marine\\_mammals/what\\_are\\_the\\_issues/whaling/makah\\_the\\_tribe\\_who\\_would\\_be\\_whalers/](http://www.hsus.org/marine_mammals/what_are_the_issues/whaling/makah_the_tribe_who_would_be_whalers/) (last visited Dec. 17, 2008).

<sup>511</sup> *Id.*

Makah to hunt.<sup>512</sup> Most IWC members denounced this arrangement.<sup>513</sup> Their sentiments are best summarized by the Australian delegate who argued that "[t]he only aboriginal people who are authorized to take Gray whales are those whose traditional aboriginal subsistence and cultural needs have been recognized."<sup>514</sup>

At the forty-eighth IWC annual meeting the United States put forward a request from the Makah tribe to be allowed to catch five gray whales.<sup>515</sup> The United States stipulated that it had an agreement with the Makah tribe that there would be no commercial whaling and that the request conformed to the criteria for an aboriginal subsistence quota.<sup>516</sup> France and the Netherlands opposed the motion, with France asking how it could be a cultural event if modern technologies were to be used and whether the Makah arrangement met the definition of subsistence if the tribe had managed for seventy years without hunting whales.<sup>517</sup> The Netherlands was concerned whether this request met the current definition of aboriginal subsistence whaling and questioned the Makah tradition, citing that their whaling had been of a commercial nature.<sup>518</sup> Further discussion exposed that there was clear division on this issue with Japan, the Republic of Korea and the Russian Federation supporting the proposal, but many other members (Australia, Spain, Chile, New Zealand, China and Mexico) opposing the motion.<sup>519</sup> Before it could be put to a vote the item was adjourned in favor of informal discussions.<sup>520</sup>

At the fifty-fourth IWC meeting the issue was again raised.<sup>521</sup> The United States and Russia jointly proposed to renew the existing aboriginal subsistence whaling quota for hunting bowhead whales for the next five years.<sup>522</sup> After fierce debate the motion was defeated, as it did not reach the three-quarter majority necessary for it to pass.<sup>523</sup> However, it was not the

<sup>512</sup> *Id.*

<sup>513</sup> *Id.*

<sup>514</sup> See D'Amato and Chopra, *supra* note 79, at 22-23.

<sup>515</sup> INT'L WHALING COMM'N, 47 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION, *supra* note 467, at 26.

<sup>516</sup> *Id.*

<sup>517</sup> *Id.*

<sup>518</sup> *Id.*

<sup>519</sup> *Id.*

<sup>520</sup> *Id.*

<sup>521</sup> INT'L WHALING COMM'N, 53 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION, *supra* note 417, at 19-22.

<sup>522</sup> *Id.*

<sup>523</sup> *Id.* (32 for, 11 against, 2 abstentions).



preservationist states that voted down the motion.<sup>524</sup> The vote appears to have been an example of payback by whaling states with Japan leading a coalition of states arguing that aboriginal whaling was the "moral" equivalent of Japanese small-type coastal whaling, and if that was not allowed then aboriginal whaling should also be banned.<sup>525</sup> Despite the setback, the United States has still authorized the Makah to take whales domestically.<sup>526</sup> Doing so undercut their moral legitimacy, however, and allowed states such as Japan, Iceland, and Norway to argue for increased whaling through the device of aboriginal whaling.<sup>527</sup>

With indigenous peoples' populations rebounding in certain areas, particularly in the United States and Siberia, there is a growing demand by these parties to take whales.<sup>528</sup> There are concerns that such groups may potentially hunt in commercial quantities and undermine the moratorium.<sup>529</sup> This has placed some anti-whaling states with indigenous populations in a terrible quandary, as well as ENGOS who have traditionally supported indigenous rights.<sup>530</sup> D'Amato and Chopra are rightly critical of leading ENGOS such as the Sierra Club and Friends of the Earth, which have been silent on the issue of protecting the endangered bowhead whale because they are hamstrung by their support for the rights of indigenous peoples.<sup>531</sup>

Their silence runs the danger of undercutting their authority as norm teachers, leaving them open to accusations of hypocrisy by

<sup>524</sup> *Id.*

<sup>525</sup> *Id.*

<sup>526</sup> See Fletcher, *supra* note 370, at 225.

<sup>527</sup> *Id.* By allowing the Makah hunt, the United States has created a new, permissible type of whale killing called "cultural whaling," for those aboriginal people with a cultural desire to hunt but not a subsistence need. Despite its actions on aboriginal whaling the United States still argues it holds the position of being anti-whaling, and the United States' public supports this position. *Id.* at 227-28.

<sup>528</sup> *Id.*

<sup>529</sup> Richard Black, *Greenland Whale Hunt 'Commercial,'* BBC NEWS, June 17, 2008, <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/science/nature/7458155.stm> (last visited Dec. 17, 2008).

<sup>530</sup> See Rose, *supra* note 315, at 41.

<sup>531</sup> See D'Amato and Chopra, *supra* note 79, at 58. With its emphasis on a biocentric approach to the planet, Greenpeace in particular has a problem since its ethos as the "warriors of the rainbow" draws on the mythology of the Inuit tribe of Alaska. Frank Zelko, *"Make it a Green Peace": The History of an International Environmental Organization*, GHI BULLETIN, No. 34, Spring 2004, at 131, available at <http://www.ghi-dc.org/publications/ghipubs/bu/034/34.127.pdf>.

pro-whaling forces. Rather than being drawn into a moral and public battle they may not be able to win, most ENGOs have avoided the issue. Instead, they have supported the right of aboriginal groups with a long history of whaling to continue, provided that the whales being hunted are not endangered and that precautionary monitoring and management protocols are in place.<sup>532</sup> This tension raises the bigger question of whether support for aboriginal whaling necessarily undermines the preservationist norm as a whole. The IWC and its member nations have always recognized the right of indigenous groups to hunt whales in their traditional manner, so does this mean the norm of preservationism is limited, and if so, by how much?

While it is arguable that the practice of aboriginal subsistence whaling could be said to undermine the preservationist norm, one tightly circumscribed exception in this regard does not negate the fact that the majority of states seem implacably opposed to the taking of whales on a commercial level. Preservationist leaning states may eventually hope that the practice will eventually cease but to date have not felt that it was in their interests to push the matter, especially since the United States is so keen for the indigenous whaling to continue. The fear is that pushing the issue may lead to a reopening of the moratorium debate. The preservationist states have focused on ensuring that the exception is not widened, and to date they have been successful in this goal.<sup>533</sup>

#### XIV. WHALING SANCTUARIES

The provision of whale sanctuaries has been another critical battleground between conservationists and preservationists. Preservationists have attempted to widen the scope of the preservationist norm by advocating for sections of the high seas to be declared sanctuaries under Article V of the ICRW.<sup>534</sup> Pro-whaling states are just as determined to prevent new sanctuaries bolstering the ban.<sup>535</sup> There is a long history of such sanctuaries being created by the IWC but the issue took on new significance after the passing of the moratorium.<sup>536</sup>

<sup>532</sup> See Reeves, *supra* note 134, at 73.

<sup>533</sup> See *id.* at 137-44; *infra* notes 583-87 and accompanying text.

<sup>534</sup> See Rose, *supra* note 315, at 37.

<sup>535</sup> See generally Shane Green, *South Pacific Sanctuary Plan Sunk*, SMH.COM.AU, available at <http://www.smh.com.au/articles/2002/05/21/1021882055438.html> (last visited Dec. 17, 2008).

<sup>536</sup> Cassandra Phillips, *Conservation in Practice: agreements, Regulations, Sanctuaries and Action Plans*, in *THE CONSERVATION OF WHALES AND DOLPHINS* 460 (Mark P. Simmonds & Judith D. Hutchinson eds., Chichester: John Wiley & Sons, 1997). The IWC established

### A. *The Indian Ocean Sanctuary*

With whale stocks approaching extinction for some species, preservationist-minded states proposed an old solution for an old problem: sanctuaries.<sup>537</sup> In 1979 the ENGO-infiltrated Seychelles put forward to the Scientific Committee a proposal for a sanctuary in the Indian Ocean, but no consensus was reached despite it being the expressed opinion of several neighboring countries that it was a good idea and that it satisfied the criteria of being an area of ecological coherence.<sup>538</sup> Such a sanctuary, the proposal argued, would enable breeding and other activities to be carried out unhindered.<sup>539</sup> The Technical Committee, after debate as to the length of the review period agreed, to a new paragraph to be inserted into the schedule establishing a new Indian Ocean Sanctuary for an initial period of ten years.<sup>540</sup> The region chosen has not traditionally been a commercial whaling region, which is probably why whaling states (even Japan) agreed to its implementation.<sup>541</sup> The sanctuary created has some flaws in that there are no monitoring or enforcement provisions to oversee the initiative, but it does exert a moral force that most states have accepted.<sup>542</sup>

Again in 1989, as the ten-year period was drawing to a close, the Seychelles, supported by Australia, put forth a proposal that the Indian Ocean Sanctuary created in 1979 should be extended for three years.<sup>543</sup> Both Japan and Iceland were against the creation of any sanctuaries and Iceland opposed the continuation of the sanctuary because few states bordering the area were interested in the issue.<sup>544</sup> Many other states including France, Spain, India, Antigua and Barbados, Oman, United Kingdom, Argentina,

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one in the Southern Ocean (south of 40 degrees, between 160 degrees west and 70 degrees west) in 1946, but it was really the same sanctuary set up in 1938 under the auspices of the 1937 International Agreement for the Regulation of Whaling. *Id.* Whalers accepted the 1946 sanctuary because the region quarantined was not considered economically viable due to whales being scarce in the region. *Id.* However, when blue and fin whale stocks became scarce, whaling states succeeded in convincing the IWC to rescind the sanctuary status of the area and exploitation continued. *Id.*

<sup>537</sup> See INT'L WHALING COMM'N, *supra* note 306, at 34.

<sup>538</sup> *Id.* at 27.

<sup>539</sup> *Id.*

<sup>540</sup> *Id.* (16 votes for, 3 against and 3 abstentions).

<sup>541</sup> See Rose, *supra* note 315, at 37.

<sup>542</sup> *Id.*

<sup>543</sup> See INT'L WHALING COMM'N, 40 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION, *supra* note 467, at 21.

<sup>544</sup> *Id.*

Brazil, Mexico, the Netherlands and the United States supported the proposal.<sup>545</sup> In the face of such strong support for the proposal, Japan and Iceland agreed not to oppose the provision which was consequently accepted.<sup>546</sup> At the 1992 meeting it was agreed that the status of the sanctuary would be reviewed every ten years.<sup>547</sup> To date this area has retained that status.<sup>548</sup>

### B. *Southern Hemisphere Sanctuary*

Emboldened by their success in achieving the Indian Ocean Sanctuary, preservationist-minded states argued for the expansion of whaling sanctuaries throughout the 1980s and early 1990s.<sup>549</sup> The Southern Hemisphere Sanctuary Plan for preservationist states, like Australia, was the first step in preventing all the oceans from whaling.<sup>550</sup>

At the forty-fourth IWC meeting, France put forward a proposal that a sanctuary be created in the Southern Hemisphere, but while many members supported the gist of the proposal, most thought that it was better to seek input from the Scientific Committee first.<sup>551</sup> Japan believed that such a motion was antithetical to the spirit and objectives of the ICRW but the sanctuary proposal was supported by many IWC members as falling within the ambit of the Convention.<sup>552</sup> It was decided that any debate would be deferred to the following meeting to allow the Scientific Committee to more fully examine the idea.<sup>553</sup>

At the forty-fifth meeting the IWC endorsed the concept of creating a Southern Ocean Sanctuary, with Australia offering to hold an inter-sessional, open-ended working group to address outstanding issues so that a decision could be taken at the next meeting—Appendix 6.<sup>554</sup> At the forty-sixth meeting the delegates, following from the decision taken the previous year, voted to create a Southern Ocean Sanctuary for baleen and toothed

<sup>545</sup> *Id.* at 22.

<sup>546</sup> *Id.*

<sup>547</sup> See INT'L WHALING COMM'N, *supra* note 414.

<sup>548</sup> See INT'L WHALING COMM'N, 40 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION, *supra* note 467, at 21-22.

<sup>549</sup> See *supra* Part VIII.

<sup>550</sup> See DARBY, *supra* note 387, at 220.

<sup>551</sup> See INT'L WHALING COMM'N, 43 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION, *supra* note 467, at 41-48.

<sup>552</sup> *Id.*

<sup>553</sup> *Id.* at 41-48.

<sup>554</sup> See INT'L WHALING COMM'N, *supra* note 414, at 32.

whales, to be reviewed in ten years.<sup>555</sup> The creation of the Southern Ocean Sanctuary was resisted strenuously by Japan, which attempted to "stack" the IWC with small states to influence the vote.<sup>556</sup> Norway argued that doing so was contrary to the ICRW, and Japan attempted to utilize conservationist arguments that such resources should not be denied to future generations. Their arguments went unheeded.<sup>557</sup>

Phillips argues that the key factor in building support for the sanctuary was the discovery in November 1993 that the Soviet whaling fleet had been consistently underreporting its catch figures.<sup>558</sup> These revelations, made just prior to the Norfolk Island meeting in February 1994, showed that whalers had been ignoring IWC directives. This undercut the argument that whalers could be trusted to regulate their activities.<sup>559</sup> This revelation was so morally shocking to the other states that it proved to be a critical factor in the successful vote to create a whale sanctuary in the region in May 1994.<sup>560</sup>

Japan was not prepared to concede defeat, however. It lodged an objection and thus can still legally hunt minke whales in the region as well as continue to and try to eliminate the sanctuary exception.<sup>561</sup> At the fiftieth meeting, Japan, Antigua, Dominica, Grenada, St. Lucia, St. Vincent, and the Grenadines proposed a resolution to abolish the Southern Ocean Sanctuary, but it was declared out of order.<sup>562</sup> At the fifty-first meeting Japan attempted to lift the prohibition on hunting minke whales in the Southern Ocean Sanctuary; the motion was defeated.<sup>563</sup> The United States argued that the robust nature of the minke whale population was not a factor in determining the validity of the sanctuary.<sup>564</sup>

<sup>555</sup> See INT'L WHALING COMM'N, 45 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION, *supra* note 467, at 28. The vote result was 23 in favor, 1 against, and 6 abstentions. *Id.*

<sup>556</sup> See Phillips, *supra* note 535, at 460.

<sup>557</sup> See INT'L WHALING COMM'N, 45 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION, *supra* note 467, at 28.

<sup>558</sup> See Phillips, *supra* note 535, at 461. The Soviet whaling fleet from 1948 to 1973 reported taking a mere 2710 Humpback Whales, but it was later revealed by Russia that the real take was over 48,000. See Caron, *supra* note 236, at 171.

<sup>559</sup> See Phillips, *supra* note 535, at 461.

<sup>560</sup> See Caron, *supra* note 236, at 172.

<sup>561</sup> See Rose, *supra* note 315, at 37-38.

<sup>562</sup> See INT'L WHALING COMM'N, 49 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION, *supra* note 467, at 28.

<sup>563</sup> See INT'L WHALING COMM'N, 50 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION, *supra* note 467, at 10 (9 votes in favor, 22 against and 1 abstention).

<sup>564</sup> *Id.*

At the fifty-third meeting Japan changed its strategy and attempted to modify the Southern Ocean Sanctuary by amending the schedule to state that any prohibition would be applied if so advised by the Scientific Committee. The amendment was not passed.<sup>565</sup> At the fifty-sixth IWC meeting Japan again tried to have the Southern Ocean Sanctuary abolished but was not able to get the required three-quarter majority.<sup>566</sup> However, Japan seems determined to continue raising the issue until it is successful.

The creation of the Southern Hemisphere Sanctuary represents a highwater mark in the attempt to preserve whales through the mechanism of sanctuaries.<sup>567</sup> Since the late 1990s, a proposed South Pacific Sanctuary, put forth by Australia and New Zealand, has not received a three-quarters majority, nor has a joint proposal by Brazil and Argentina to create a South Atlantic Whale Sanctuary been successful.<sup>568</sup> The fact that the sanctuaries were meant to be temporary is significant in that preservationist states have managed to have their sanctuary status continued indefinitely in the face of contrary scientific advice.<sup>569</sup> At the moment there appears to be a normative deadlock with neither group able to expand their sphere of influence. At both the 2006 and 2007 meetings, proposals for a new sanctuary in the South Atlantic were defeated without going to a vote.<sup>570</sup> A Japanese motion at the 2006 meeting to abolish the Southern Ocean Sanctuary was defeated again and was not raised at the 2007

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<sup>565</sup> See INT'L WHALING COMM'N, 51 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION, *supra* note 467, at 17 (13 votes for, 23 against and 1 abstention).

<sup>566</sup> See INT'L WHALING COMM'N, *supra* note 429, at 46-47 (19 for, 30 against, and 2 abstentions).

<sup>567</sup> See INT'L WHALING COMM'N, 52 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION, *supra* note 467, at 18-19.

<sup>568</sup> See INT'L WHALING COMM'N, 51 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION, *supra* note 467, at 15-17; INT'L WHALING COMM'N, 52 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION, *supra* note 467, at 17-19; INT'L WHALING COMM'N, 53 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION, *supra* note 417, at 19; INT'L WHALING COMM'N, 54 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION, *supra* note 417, at 33-34; INT'L WHALING COMM'N, *supra* note 429, at 48-50.

<sup>569</sup> In *The Age* newspaper, Andrew Darby cited a report being prepared by scientists for the 2004 IWC meeting in Sorrento, Italy which argues that the creation of the Southern Ocean Sanctuary was not ecologically justified since it did not conform to the principles of marine reserve design, nor did it protect the whale's habitat. Rather, the sanctuaries were a political and social compromise, not based on any hard scientific data. Andrew Darby, *Scientists Attack Whale Sanctuary*, *THE AGE*, July 13, 2004, at 5, available at <http://www.theage.com.au/articles/2004/07/13/1089484316355.html?from=storylhs> (last visited Nov. 29, 2008).

<sup>570</sup> See INT'L WHALING COMM'N, *supra* note 429, at 34-36; INT'L WHALING COMM'N, *supra* note 226, at 4.

meeting.<sup>571</sup> At the 2008 Chile meeting, Brazil, Argentina, and South Africa were planned to again call for the creation of a South Atlantic Sanctuary.<sup>572</sup> However, in a spirit of amity they did not, citing that they did not wish to call for a vote on the issue while ongoing negotiations were occurring on the future of the IWC.<sup>573</sup>

## CONCLUSION

Undoubtedly the whaling moratorium has had a positive effect in terms of reversing decades of exploitation and allowing whale stocks to recover.<sup>574</sup> However, the question of how entrenched the norm of preservation has become is the subject of fierce debate amongst researchers in the field.<sup>575</sup> It is clear that for the moment preservationist norms are ascendant and that most members of the IWC favor the total extinction of the whaling industry.<sup>576</sup> Utilizing Legro's test for the robustness of the norm, it is observable that as to specificity, the commercial moratorium is reasonably understood and adhered to. However, the exemptions allowing for scientific and aboriginal subsistence whaling complicate the operation of the ban.<sup>577</sup> The vexed anomaly of aboriginal whaling continues, and given the ENGOs'

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<sup>571</sup> See INT'L WHALING COMM'N, *supra* note 429, at 36-37 (28 votes for, 33 against with 4 abstentions).

<sup>572</sup> Press Release, Int'l Whaling Comm'n, Details for The International Whaling Commission's 60th annual meeting in Chile 2008: Day 4 (June 26, 2008), *available at* <http://www.iwooffice.org/meetings/meeting2008.htm> (last visited on Nov. 29, 2008).

<sup>573</sup> *Id.*

<sup>574</sup> See INT'L WHALING COMM'N, 49 ANNUAL REPORT OF THE INTERNATIONAL WHALING COMMISSION, *supra* note 467, at 3. At the fiftieth meeting, Dr. Peter Bridewater, past Australian Chairman, noted that in the past decade there had been a recovery in the population of most whale species. *Id.*

<sup>575</sup> Kristin Fletcher maintains that since the moratorium, the IWC is split between preservationists and conservationists and has become a forum merely to air grievances. See Fletcher, *supra* note 370, at 226. However, most researchers agree that preservationism is now dominant within the IWC. For example, Victor argues that preservationist values are now pervasive, and combined with the global public losing a taste for whale products, this means there is no need to alter IWC; rather, Victor believes evolving norms are bringing about reform. See Victor, *supra* note 108, at 294. D'Amato and Chopra argue that, due to the efforts of the ENGOs, we can now speak of "an emergent entitlement of whales—not just 'on behalf of' whales—to a life of their own." See D'Amato and Chopra, *supra* note 79, at 23.

<sup>576</sup> See Victor, *supra* note 108, at 292.

<sup>577</sup> See Stroud, *supra* note 115, at 76. Since the moratorium was put in place, there are estimates that over 14,000 whales have been killed under the guise of aboriginal whaling, commercial kills, pirates and scientific whaling. Chris Stroud argues that the moratorium has never been honored by some whaling states. *Id.*

reluctance to tackle the issue, there is no sign of the practice being limited or annulled.<sup>578</sup> While Japan is the only state still continuing "scientific research" on whales, such Japanese research seems set to continue for the foreseeable future.<sup>579</sup>

The issue of the durability of the norm is also complicated. While the moratorium has been in effect for over twenty years, the question of its continuation has been revisited on a yearly basis at the IWC annual meeting.<sup>580</sup> While there have been violations of the preservationist norm by states like Japan and Norway, the majority of states do, at present, accept the ban as legitimate. As Stoett acknowledges, "It may be argued that there is sufficient normative consensus to maintain the present non-consumptive philosophic outlook in the IWC and the broader whaling regime."<sup>581</sup> Other researchers such as Vogler are not so sure, arguing that the failure of the Irish proposal and the RMP threatens the long-term survival of the moratorium.<sup>582</sup>

Delegate numbers are still finely balanced.<sup>583</sup> Both sides seek to attract new numbers supporting their respective positions.<sup>584</sup> Japan still targets poor states wanting for foreign aid, with Mali and Kiribati recently joining under expectations to support conservationist measures.<sup>585</sup> Those seeking to maintain the ban have recruited the Czech Republic and Slovakia to bolster their numbers.<sup>586</sup> However, overturning the moratorium requires a three-quarters majority of members. This seems unlikely in the near future, given how faction numbers are so evenly balanced.<sup>587</sup>

At recent meetings Japan has been unable to advance its position significantly at the IWC, despite being confident initially of success; it has found that the proxy states which receive Japanese aid do not always vote

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<sup>578</sup> See generally Stroud, *supra* note 115.

<sup>579</sup> See *supra* Part VIII.

<sup>580</sup> *Id.*

<sup>581</sup> See STOETT, *supra* note 102, at 132-37.

<sup>582</sup> See VOGLER, *supra* note 105, at 55.

<sup>583</sup> Andrew Darby, *Stormy Seas for Migaloo and Friends*, SYDNEY MORNING HERALD, Apr. 20, 2005, at 14.

<sup>584</sup> *Id.*

<sup>585</sup> *Id.*

<sup>586</sup> *Id.* In the last few years, Panama has rejoined while Morocco, Gabon, Mongolia, Republic of Palau, Portugal, San Marino, Mauritania, Hungary, Tuvalu, Cote d'Ivoire, Belgium, and Suriname have all become IWC members. See INT'L WHALING COMM'N, IWC MEMBERS AND COMMISSIONERS, available at <http://www.iwcoffice.org/commission/members.htm> (last visited Nov. 29, 2008).

<sup>587</sup> Agence France-Presse ("AFP"), *Hunters Push to Harpoon Whaling Ban*, THE AUSTRALIAN, July 20, 2004, at 8.



for Japanese positions at the IWC.<sup>588</sup> Consequently, Japan seems to be losing faith in the process altogether. When asked to vote at the 2007 IWC meeting, Japan called out that they would “not participate,” and it threatened to quit the IWC and to set up an alternative organization based on sustainable utilization.<sup>589</sup> Despite this threat, they still attended the 2008 meeting, perhaps hoping to use the talks on the future of the IWC to advance their cause.<sup>590</sup>

The issue of concordance is also not settled since not all states agree with preservationist ideals, such as Japan, Norway, and Iceland.<sup>591</sup> Proponents of preservationism do not dare make arguments with preservationist language because they know they will not succeed, so they strategically couch their claims in conservationist rhetoric instead.<sup>592</sup> Since both sides use such rhetoric it can appear to an outsider that the points of contention are small. However, the philosophical gulf between the two sides is much greater than the formal rhetoric, which suggests that it is highly unlikely that there will be any increase in concordance over core treaty norms in the near future. Taking the three factors of specificity, durability, and concordance into account, we can only speak of the norm being of medium-to-high commonality.

Some states are pessimistic about the acceptance of the moratorium.<sup>593</sup> They argue that a whaling regime that does not include the major whaling states is futile and that it might be better to relax the ban.<sup>594</sup>

<sup>588</sup> Peter Alford, *Japan's Whaling Friends a No-Show*, THE AUSTRALIAN, June 21, 2005, at 5. At the 2005 IWC meeting in Ulsan, South Korea, Japan appeared to have the numbers to overturn crucial votes. However, three of the putative pro-whaling states—Nauru, Togo and Gambia—failed to present themselves for crucial votes. *Id.* As a result, pro-whaling states lost all the contested votes, including failing to block progress on new whale sanctuaries (new non-whaling zones in the South Pacific and South Atlantic) and on conservation and animal welfare items. It is unclear if this was a strategic blunder on behalf of these states or a deliberate policy to avoid offending anti-whaling forces. *Id.* In 2006, the meeting appeared set for a showdown since it seemed that the whalers had enough members (a simple majority) to push the IWC in a conservationist direction. The first test was over the meeting's agenda. Japan started by proposing to eliminate debate on small cetaceans but surprisingly lost the vote (30-32-1). INT'L WHALING COMM'N, *supra* note 441.

<sup>589</sup> See DARBY, *supra* note 387, at 245-46.

<sup>590</sup> See Press Release, Int'l Whaling Comm'n, Details for the International Whaling Commission's 60th Annual Meeting in Chile: Day 3 (June 25, 2008), available at <http://www.iwcoffice.org/meetings/meeting2008.htm> (last visited Nov. 29, 2008).

<sup>591</sup> See *supra* Parts VIII, IX, X.

<sup>592</sup> See *supra* Parts II, IX, XI.

<sup>593</sup> See DESOMBRE, *supra* note 87, at 149-50.

<sup>594</sup> *Id.* at 173.

However, Friedheim argues that we can observe within the whaling regime that "the preservation norm has gone through a 'tipping point' and has 'cascaded' throughout the world community, and all that needs to be done is to have it 'internalised' by the peoples and governments of the world."<sup>595</sup>

Friedheim's analysis is mostly correct, but he fails to understand that many states have already internalized the preservationist norm. States such as Australia, France, the Netherlands, and the United States appear to have internalized preservationist values as part of their state identities, and as a consequence they have become powerful norm proponents.<sup>596</sup> While preservationist proponents may not yet have brought about a universal shift sufficient to end the normative debate they have been remarkably successful in a relatively short period of time in changing how whales and the practice of whaling are perceived globally.<sup>597</sup> ENGOs have shown themselves to be adept at conducting public education campaigns.<sup>598</sup> If preservationist mores are to become more deeply entrenched in the IWC then these leading norm teachers need to focus on domestic populaces in the recalcitrant states and need to suggest to their citizens that preserving whales is not an insult to traditional customs and practices but rather is a sign of a culture's maturity. Otherwise the normative deadlock at the IWC will continue for the foreseeable future.

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<sup>595</sup> Robert L. Friedheim, *Introduction: The IWC as a Contested Regime*, in *TOWARDS A SUSTAINABLE WHALING REGIME* 9 (Robert L. Friedheim ed., University of Washington Press, 2001).

<sup>596</sup> DeSombre provides an example of how deeply the norm has been internalized in a speech by the UK delegate at the fiftieth IWC meeting. The delegate stated, "We do not believe that any whaling is justified," adding that he desired "the introduction of a permanent, comprehensive moratorium on all whaling other than aboriginal subsistence whaling." DeSombre, *supra* note 87, at 172-73.

<sup>597</sup> See STOETT, *supra* note 102, at 135.

<sup>598</sup> See WHALES NEED US COALITION, U.S. NGO POLICY STATEMENT AGAINST COMMERCIAL AND SCIENTIFIC WHALING, available at <http://whalesneedus.org/> (last visited Nov. 29, 2008); Press Release, Int'l Whaling Comm'n, Details for The International Whaling Commission's 60th annual meeting in Chile: Day 3 (June 25, 2008), available at <http://www.iwooffice.org/meetings/meeting2008.htm> (last visited Nov. 29, 2008).