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NAMMCO Defies the International Whaling Commission's Ban on Commercial Whaling: Are Whales in Danger Once Again?

Kaye Anable

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NAMMCO Defies the International Whaling Commission's Ban on Commercial Whaling: Are Whales in Danger Once Again?

Whales Weep Not!

They say the sea is cold, but the sea contains the hottest blood of all, and the wildest, the most urgent.

All the whales in the wider deeps, hot are they, as they urge on and on, and dive beneath the icebergs.

The right whales, the sperm-whales, the hammer-heads, the killers there they blow, there they blow, hot wild white breath out of the sea!

....

And enormous mother whales lie dreaming suckling their whale-tender young and dreaming with strange whale eyes wide open in the waters of the beginning and the end.

—D.H. Lawrence¹

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1. D.H. Lawrence, *Whales Weep Not!*, in ANTHOLOGY OF CHIEF MODERN POETS OF BRITAIN AND AMERICA 102 (Gerald DeWitt Sanders et al. eds., 5th ed. 1970).

I. INTRODUCTION

Since its creation in 1946, the International Whaling Commission (IWC) has maintained the position of being the only international organization which manages the whale populations of the world.² The twin goals of the IWC are the preservation of whales as a great natural resource and the management of the whaling industry.³ These inherently conflicting goals, the problematic structure of the IWC, and the inability of its members to create a compromise led to the creation of the North Atlantic Marine Mammal Commission (NAMMCO), a rival pro-whaling organization whose existence threatens the future of all whales.

In 1992, NAMMCO was formed by Iceland, Norway, Greenland, and the Faroe Islands.⁴ As this Comment will illustrate, the IWC has survived resistance from member nations that disagree with the policy or actions of the IWC. However, the creation of NAMMCO is an unprecedented showing of opposition to the IWC, posing a serious threat to its existence. Moreover, the formation of a rival organization is a symbolic move which represents a complete discord with the IWC. The likelihood of other nations following suit presents an even stronger possibility that the future of the world's whales are in danger.

In 1992, Iceland terminated its membership in the IWC due to dissatisfaction with the organization and divergent philosophies on whaling.⁵ Iceland's position is that the IWC is being excessively influenced by conservationists and that this influence is standing in the way of the resumption of whaling.⁶ The other members of NAMMCO agree with this proposition and have thus joined forces with Iceland.⁷ This Comment addresses the tension surrounding the creation of NAMMCO and examines the ramifications of this new organization. Part II of this Comment reviews the history of the regulation of the whaling industry and sets forth the structure of the IWC.⁸ It also describes the controversy which surrounded the adoption of the worldwide moratorium.⁹ Part III critiques the IWC and discusses the problems that led to the creation of NAMMCO.¹⁰ Part IV discusses the

2. Gare Smith, *The International Whaling Commission: An Analysis of the Past and Reflections on the Future*, 16 NAT. RESOURCES LAW. 543, 547 (1984).

3. International Convention for the Regulation of Whaling, Dec. 2, 1946, pmbli., 161 U.N.T.S. 72 [hereinafter Whaling Convention].

4. See Agreement on Cooperation in Research, Conservation and Management of Marine Mammals in the North Atlantic, art. I; Bronwen Maddox, *Whalers Form Own Grouping*, FIN. TIMES, Sept. 9, 1992. See also *infra* notes 97-124 and accompanying text (discussing NAMMCO in detail).

5. Iceland withdrew from the IWC on June 30, 1992 in accordance with art. XI of the International Whaling Convention, DEP'T ST. BULL., Dec. 1991; Maddox, *supra* note 4.

6. Maddox, *supra* note 4.

7. *Id.* Norway, Greenland, and the Faroe Islands are concurrently members of the IWC and NAMMCO. *Id.*

8. See *infra* notes 14-73 and accompanying text.

9. *Id.*

10. See *infra* notes 74-96 and accompanying text.

creation of NAMMCO and the goals of this new organization.¹¹ This section also addresses the viability of NAMMCO and its likely effect upon the whaling industry.¹² Finally, Part V analyzes options for the IWC and suggests a workable compromise.¹³

II. HISTORY OF REGULATION IN THE WHALING INDUSTRY

A. Creation of the IWC

The nature of whales as a migratory species of mammals raises the issue of the right to hunt whales as they move between territorial seas and into high seas.¹⁴ Under international law, whales are subject to the ancient doctrine of "freedom of fishing on the high seas."¹⁵ Under this doctrine, whales found in the high seas are treated as a "common property resource," which means that no state can be excluded from using whales as a resource.¹⁶ Because the legal status of whales is not internationalized, regulatory agreements among the various states must be voluntary.¹⁷ This status sets the stage for regulation of the whaling industry.¹⁸

The unregulated history of industrial whaling and the technological developments of the mid-eighteenth century created serious threats of overexploitation and ultimately extinction of whales.¹⁹ Innovations which increased the precision and efficiency of whale hunting led to economic exploitation and eventually to the overproduction of whale products.²⁰ Prior to 1946, before the IWC was created, there were several attempts to regulate the whaling industry.²¹ An early form of regulation came from the whaling companies themselves. Intercompany agreements set quotas based on the Blue Whale Unit

11. See *infra* notes 97-124 and accompanying text.

12. *Id.*

13. See *infra* notes 125-36 and accompanying text.

14. Territorial waters are the waters under the sovereign jurisdiction of a nation or state including both marginal sea and inland waters. WEBSTER'S DICTIONARY 2361 (3rd ed. 1981). High seas are the open part of a sea or ocean especially outside territorial waters. *Id.* at 1069.

15. Pat W. Birnie, *International Legal Issues in the Management and Protection of the Whale: A Review of Four Decades of Experience*, 29 NAT. RESOURCES J. 903, 904 (1989) [hereinafter Birnie I].

16. See *id.* at 904-06 (reviewing the early history of whaling).

17. BURNS H. WESTON ET AL., INTERNATIONAL LAW AND WORLD ORDER 393, 395 (2d ed. 1990).

18. See *id.* (discussing inadequacy of regulations prior to 1946).

19. See Smith, *supra* note 2, at 544-45 (discussing the nature of whaling prior to creation of the IWC, stating that by the end of the nineteenth century the whaling industry was on the verge of collapse as the gray, bowhead, right, and Northern humpback whales had been hunted nearly to extinction). Examples of innovations that produced the need to develop a management system for whaling to curtail the risk of total depletion of whale stocks include the inventions of the explosive harpoon in 1868 and the factory ship in 1903, both of which significantly increased the precision and efficiency of whale hunting. *Id.*

20. See Birnie I, *supra* note 145 at 904-07 (reviewing the early history of whaling).

21. See PATRICIA BIRNIE, INTERNATIONAL REGULATION OF WHALING: FROM CONSERVATION OF WHALING TO CONSERVATION OF WHALES AND REGULATION OF WHALE WATCHING 143-69 (1985) [hereinafter BIRNIE II] (reviewing early fisheries agreements, used as guidelines in drafting the Whaling Convention, such as the Bering Fur Seal Treaty 1911, International Council for the Exploration of the Sea (ICES) 1902, and International Pacific Salmon Fisheries Convention 1930). The focus of these earlier attempts was the issue of jurisdiction and the allocation to coastal states of exclusive access to seabed resources, including whales. *Id.*

(BWU) calculations.²² These efforts had only minimal effects on controlling the overexploitation because not all companies participated and, as was later discovered, there were problems inherent in the BWU calculations.²³ The IWC's creation is significant because it is the only organization dealing with the management of whales on a global level.²⁴

B. History and Structure of the IWC

The IWC was created by the International Convention for the Regulation of Whaling (Whaling Convention),²⁵ to carry out the Whaling Convention's goals.²⁶ The preamble to the Whaling Convention sets forth the chief objective of the IWC, which is the preservation and expansion of the whaling industry.²⁷ By regulating whale hunting, the IWC hopes to further the conservation of whale stocks.²⁸ The articles of the Whaling Convention apply to "factory ships, land stations, and whale catchers under the contracting governments and to all waters in which whaling is prosecuted."²⁹

The IWC is made up of one representative from each member nation.³⁰ Each member has one vote.³¹ Membership is open to whaling and nonwhaling countries, and today the IWC is comprised of both.³² International organizations and observers from non-member nations are allowed to attend the annual meetings of the IWC.³³

The IWC meets annually to review and revise the schedule governing the conduct of whaling.³⁴ The Whaling Convention created the IWC to carry out its objectives, and its

22. Birnie I, *supra* note 15, at 905; Smith, *supra* note 1, at 546-53. The BWU calculation was a measurement of oil production from different whale species. *Id.* According to the BWU calculations, one blue whale was deemed equivalent to the following: three humpbacks, five sei whales, or two fin whales, etc. *Id.* This calculation system was highly criticized for its scientific inaccuracy and rough estimations. *Id.*

23. *Id.*

24. See BIRNIE II, *supra* note 21, at 143-69 (discussing the history leading to the development of the IWC).

25. Whaling Convention, *supra* note 3, art. III, § 2.

26. See *id.*, pmb. (discussing the purpose and goals of the organization). The Whaling Convention recognizes whales as a great natural resource and acknowledges the historical overfishing which threatened the whale stocks and created the need for management and conservation. *Id.* The Whaling Convention states that whaling operations should be confined to species capable of withstanding exploitation to give depleted whale species time to replenish their stocks. *Id.*

27. *Id.*

28. See Birnie I, *supra* note 15, at 912.

29. Whaling Convention, *supra* note 3, art. 1, para. 2.

30. The IWC has 37 members. Smith, *supra* note 2, at 557 n.109. The members of the IWC are: Antigua & Barbuda, Argentina, Australia, Brazil, Chile, People's Republic of China, Costa Rica, Denmark, Dominica, Ecuador, Finland, France, Germany, India, Ireland, Japan, Kenya, Republic of Korea, Mexico, Monaco, Netherlands, New Zealand, Norway, Oman, Peru, Russian Federation, Saint Kitts & Nevis, St. Lucia, Saint Vincent and the Grenadines, Senegal, Seychelles, South Africa, Spain, St. Lucia, St. Vincent, Sweden, Switzerland, United Kingdom, United States, and Venezuela. *Id.*

31. Whaling Convention, *supra* note 3, art. III, para. 1.

32. BIRNIE II, *supra* note 21, at 174. The countries which support or are involved in whaling are: Norway, Japan, U.S.S.R., Peru, South Korea, Brazil, and Iceland. Iceland is no longer a member of the IWC. See Smith, *supra* note 2, at 557 n.109 (citing the members' votes on the 1986 Moratorium).

33. The Whaling Convention defines international organizations as those that have either attended previous meetings or that have offices in three or more countries. BIRNIE II, *supra* note 21, at 175.

34. *Id.*

articles allowed the creation of committees to perform various functions.³⁵ The Commission is comprised of three committees: Scientific, Technical, and Finance and Administration.³⁶ The Scientific Committee studies the status of various whale stocks and provides statistics and information regarding the whales.³⁷ The Technical Committee develops the regulations for the Commission's approval based on information provided by the Scientific Committee.³⁸

C. Conservation and Management Efforts of the IWC

The IWC's early attempts at whale stock management sought to establish restrictions such as fixed hunting seasons and a quota system based on the BWU calculations.³⁹ In the 1960s, the quotas set by the IWC exceeded those suggested by the Scientific Committee.⁴⁰ As a result of these high quotas and the inaccuracy of BWU calculations, early restrictions increased, rather than controlled, the number of whales killed.⁴¹ This surge in killing resulted when the whaling nations polished their techniques in order to fulfill the generous quotas set by the IWC.⁴² There was a constant battle among IWC members to set the annual quotas.⁴³ This disagreement resulted in discord among the members and produced quotas that the whale stocks could not effectively sustain.⁴⁴ Although the objective of the IWC was to manage and conserve whales, twenty years after its formation several species were severely depleted and near extinction.⁴⁵

35. Whaling Convention, *supra* note 3, art. III, para. 4.

36. International Whaling Convention, Press Information (unpublished material on file with *The Transnational Lawyer*) [hereinafter Press Information].

37. *Id.*

38. *Id.*

39. See Smith, *supra* note 2, at 546-53 (reviewing the history of the IWC and quota system). See also *supra* note 22 (discussing the inaccuracy of BWU calculations).

40. See Smith, *supra* note 2, at 550-54 (discussing the IWC's problem of setting quotas in the 1960s).

41. *Id.*

42. *Id.* at 550-51.

43. *Id.* at 550-54. In 1956, the IWC lowered the annual quota from 16,000 to 14,500 BWU because of reports that the worldwide whale stocks were becoming seriously depleted. *Id.* However, pressure from the Netherlands resulted in an increase to 15,000 BWU despite evidence that the stocks could not sustain this level. *Id.* In 1959, no quotas could be agreed upon and the self-imposed quotas averaged 17,600 BWU. *Id.*

44. *Id.* Throughout the 1960s, the IWC continued to set quotas far above those suggested by the Scientific Committee. *Id.* These quotas were inconsistent with the Scientific Committee's discovery that it had underestimated the length of the reproduction cycle for whales, resulting in an overly optimistic estimation of the whales' ability to reproduce and replenish their populations. *Id.*

45. *Id.* at 559. The IWC is often viewed as an organization which failed terribly at its objective to manage the world's whale population, which was exploited beyond their limits at the hands of the IWC's quotas. *Id.* One criticism attacked the IWC for failing to (1) reduce quotas early enough to preserve some species from economic extinction, (2) create an international enforcement program that secured accurate data, and (3) adopt quotas for individual species when it first realized such quotas were necessary. *Id.* Another criticism of the IWC is: "The Whaling Commission will be known to history as a small body of men who failed to act responsibly in the terms of a very large commitment to the world and who protected the interest of a few whalers and not the future of thousands of whales." *Id.* at 543 (citing the Friends of the Earth organization).

I. Adoption of a Worldwide Moratorium

The 1970s and 1980s brought pressure from conservationists which motivated changes within the IWC.⁴⁶ The most important change occurred in 1982 when the IWC adopted a three-year moratorium on all commercial whaling, scheduled to begin in 1986 (1986 Moratorium).⁴⁷ The 1986 Moratorium called for a complete ban on commercial whaling until 1990, when a comprehensive assessment of the whale stocks was to take place.⁴⁸ The composition of the IWC's membership changed dramatically during this period. In 1980, there were nine whaling and fifteen nonwhaling members.⁴⁹ By 1982, the number of nonwhaling members increased to twenty-nine, while the whaling coalition gained only two members.⁵⁰ This shift to predominantly nonwhaling members fueled the historic changes that occurred.

The dissenting whaling nations objected to the 1986 Moratorium, claiming it was adopted in contravention of the IWC's amendment procedure for regulations.⁵¹ Pursuant to the articles of the Whaling Convention, there are specific amendment procedures which the IWC must follow when amending regulations.⁵² Article V(2) states:

The amendments "shall be such as are necessary to carry out the objectives and purposes of this Convention and provide for the *conservation, development, and optimum utilization of the whale resources*; shall be based on scientific findings; and shall take into consideration the interests of the consumers of whale products and the whaling industry."⁵³

The dissenters had three principle arguments against the adoption of the 1986 Moratorium. First, they contended the 1986 Moratorium violated the Whaling Convention's commitment to "optimum utilization of the whale resources."⁵⁴ Second, the dissenters objected to the Scientific Committee's inability to make any recommendations on the moratorium.⁵⁵ The Scientific Committee was plagued with inadequate data and inaccur-

46. *Id.* at 554 (discussing the development of an active environmental movement in the United States). This environmental movement prompted the U.S. to add all commercial whales to the Endangered Species List. *Id.* This classification banned the importation of all whale products and closed the remaining American whaling station. *Id.* Another development was the IWC's International Observer Scheme whereby violations of the IWC could be more readily discovered and remedied. *Id.*

47. See International Whaling Commission, *Whaling—The Present Situation* (unpublished report on file with *The Transnational Lawyer*) (discussing the adoption of the 1986 Moratorium). The 1986 Moratorium was adopted by a vote of 25 to 7; catch limits for killing for commercial purposes were set at zero. *Id.* Japan, Norway, Peru, and the former Soviet Union filed formal objections. *Id.* Japan and Peru later withdrew their objections. *Id.*

48. Press Information, *supra* note 36.

49. See BIRNIE II, *supra* note 21, at 600-13 (discussing the 32nd, 33rd, and 34th meetings of the IWC).

50. *Id.*

51. *Id.*

52. Whaling Convention, *supra* note 3, art. V, para. 2.

53. *Id.* (emphasis added).

54. See BIRNIE II, *supra* note 21, at 600-13 (discussing the 32nd, 33rd, and 34th meetings of the IWC).

55. *Id.*

rate methods of assessing the true status of the whale stocks.⁵⁶ Finally, the dissenters argued that the 1986 Moratorium failed to consider "the interests of the consumers of whale products and the whaling industry," thereby violating an express provision in the Whaling Convention's articles.⁵⁷

The 1986 Moratorium was to be reviewed in 1990 after the scientific committee completed a comprehensive assessment of whale stocks.⁵⁸ However, in 1990, the Commission extended the moratorium in light of the need for further research.⁵⁹ The 1986 Moratorium and the 1990 extension are at the heart of the current controversy between the whaling and the nonwhaling members of the IWC.

Another important change was the adoption of a classification scheme called the New Management Procedures (NMP) which classify different stocks of whales and dictate the specific stock's optimum levels or maximum sustainable yield (MSY).⁶⁰ The NMP are a more accurate measure of the amount of hunting that whale stocks can realistically sustain.⁶¹

2. Aboriginal Whaling

Aboriginal subsistence whaling⁶² is permitted under the IWC's regulations and is unaffected by the moratorium.⁶³ A special management procedure governs the allocation of quotas for aboriginal whaling.⁶⁴ The policy behind this exception to the moratorium stems from the recognition of the cultural and subsistence needs of the aboriginal peoples.⁶⁵ This exception is heavily criticized by NAMMCO, Japan, and Norway because they say the IWC maintains a double standard.⁶⁶ The whaling countries oppo-

56. *Id.*

57. *Id.*

58. International Whaling Commission, *supra* note 47.

59. *Id.*

60. BIRNIE II, *supra* note 21, at 453.

61. *See id.* The Initial Management Stocks were those that could be harvested according to the Scientific Committee in a controlled manner so as to achieve the optimum level. *Id.* The Sustained Management Stocks were those already near their optimum level and were to be maintained according to scientific advice. *Id.* The Protection Stocks were those below their optimum level and harvesting was prohibited. *Id.*

62. Aboriginal subsistence whaling allows aboriginal peoples to whale based on their perceived subsistence and cultural needs. *Whaling—The Present Situation, supra* note 46. Aboriginal subsistence whaling continues in the following countries: Russian Federation, Siberian Aleuts—gray whales, United States, Alaskan Eskimos—bowhead whales; Denmark, Greenlanders—minke and fin whales; St. Vincent and the Grenadines—humpbacks. *Id.*

63. *Id.*

64. *See* Press Information, *supra* note 36 (stating the current catch limits for aboriginal sustenance whaling: Alaskan Eskimos—bowhead whales, total strikes for years 1992-94 shall not exceed 141; Russian Federation Eskimos—gray whales, for 1992, 1993, and 1994, the annual catches shall not exceed 169, Greenlanders—fin whales; annual limit for 1993 and 1994 is 21; Greenland—minke whales, for 1992-94 strikes shall not exceed 315; St. Vincent and the Grenadines—humpback whales, for seasons 1990-93, annual catch shall not exceed 3).

65. International Whaling Commission, *supra* note 47.

66. *See* Toby Moore, *Whale Ban Facing Challenge*, THE DAILY TELEGRAPH, Sept. 9, 1992.

sing aboriginal subsistence whaling contend that they should be afforded the same recognition of their cultural need for whaling.⁶⁷

3. Scientific Research Permits

The Whaling Convention allows any member government to grant a special permit for the purpose of killing whales for scientific research.⁶⁸ The Scientific Committee reviews permit proposals which are put forth at the annual meetings.⁶⁹ The Scientific Committee issues comments on the proposal and the IWC passes resolutions which suggest whether the permits should be granted.⁷⁰ Under the Whaling Convention, the IWC has no power to forbid the issuance of a scientific research permit.⁷¹ Currently, Norway and Japan participate in this permit method of scientific research,⁷² although their motives are often challenged as being commercial, as opposed to scientific.⁷³

III. CRITIQUE OF THE IWC

The problematic structure of the IWC, the divergent philosophies of its members, and the inability of its members to create a compromise led to the creation of NAMMCO, a rival pro-whaling organization. The creation of the IWC was plagued with several problems, including the language of the preamble which states as objectives, both conservation and the development of the whaling industry.⁷⁴ These dual goals appear to be at odds with one another, and this lack of clarity has contributed to the dissension among its members.⁷⁵

The most troublesome problem with the IWC is its lack of enforcement capabilities.⁷⁶ International organizations face the challenge of creating agreements that are intended to bind sovereign nations.⁷⁷ However, since sovereign nations are generally unwilling to give one nation a dominant power to enforce the agreement, members must take measures to punish infractions that occur.⁷⁸ The Whaling Convention left enforcement

67. *Id.*

68. *Whaling—The Present Situation*, *supra* note 47.

69. *Id.*

70. *Id.*

71. Whaling Convention, *supra* note 3, art. VIII.

72. Press Information, *supra* note 36. Norway has a permit to kill 110 minke whales in the north-eastern Atlantic in 1992, 136 in 1994, and 136 in 1995. *Id.* Japan has a permit to kill 300 minke whales in the Antarctic in 1992-93 as part of a continuing scientific program. *Id.*

73. See *Whale Brain Sherbet Ends Whale Meat Lovers' Party*, AGENCE FRANCE PRESSE, Oct. 15, 1992 (stating that eating whales is part of Japan's food culture).

74. See Whaling Convention, *supra* note 3, pmbl. (citing the objectives of the organization). The Whaling Convention's objectives are: "recognizing the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks," and "recognizing whale stocks are susceptible of natural increases if properly regulated and increases in whale stocks will permit increases in the number of captures without endangering the resource." *Id.*

75. Birnie I, *supra* note 15, at 909.

76. Valeria Neale Spencer, *Domestic Enforcement of International Law: The International Convention for the Regulation of Whaling*, 2 COLO. J. INT'L ENVTL. L. & POL'Y 109, 115 (1991).

77. WESTON ET AL., *supra* note 17, at 403.

78. *Id.*

to national means, mandating that each government take "appropriate measures" to punish violations.⁷⁹ As will be illustrated, the efforts toward enforcement have been less than ideal.

The United States, through fishery legislation,⁸⁰ provides an example of an enforcement scheme, which creates a remedy for violations of the policies or requirements of the IWC. The Pelly and the Packwood-Magnuson Amendments use a process called certification to determine if a country has triggered the amendments.⁸¹ This certification process obligates the Secretary of Commerce to determine whether a country took action which "diminished the effectiveness" of international conservation programs.⁸² Certification of a country gives the President of the United States power to impose sanctions.⁸³

Under the Pelly Amendment, the President has the discretion to impose sanctions on a certified country.⁸⁴ This Amendment proved unavailing because the President failed to impose sanctions and instead attempted to bargain with the violating country to encourage compliance in the future.⁸⁵

In response, Congress passed the Packwood Amendment which requires mandatory sanctions as a result of the Secretary of Commerce's certification.⁸⁶ In effect, the Packwood Amendment takes away the discretionary aspect of the Pelly Amendment.⁸⁷ Despite these attempts to give the IWC a true enforcement scheme, the results have proved ineffective. Under the Packwood Amendment, the Secretary of Commerce bargained with the violating nations and avoided the certification, thereby avoiding the mandatory sanctions.⁸⁸ The Secretary of Commerce contended that bargaining advanced the conservationist concerns further than the sanctions because the violating nation could agree to limit its catches in the future as a trade off for no sanctions being imposed.⁸⁹

Conservation groups argued to the United States Supreme Court that the amendments required the Secretary to certify the violating nation upon a refusal to comply with IWC whaling policies.⁹⁰ The United States Supreme Court disagreed and found that the decision to certify a nation was within the discretion of the Secretary.⁹¹ The United States' attempt at a regulatory scheme has not done much to change the fact that the IWC lacks an effective means of enforcing its quotas.

Another barrier to the IWC's effective management of the whale stocks is the "objections provision"⁹² in the Whaling Convention's articles, which inhibits the IWC's ability

79. BIRNIE II, *supra* note 21, at 198.

80. Pelly Amendment of 1954, 22 U.S.C. § 1978 (1993); Packwood-Magnuson Amendment of 1976, 16 U.S.C. § 1821 (1993).

81. Spencer, *supra* note 76, at 115.

82. 22 U.S.C. § 1978; 16 U.S.C. § 1821.

83. *Id.*

84. 22 U.S.C. § 1978.

85. Japan Whaling Ass'n v. American Cetacean Soc., 478 U.S. 226 (1986).

86. 16 U.S.C. § 1821.

87. Japan Whaling Ass'n, 478 U.S. at 226.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. Whaling Convention, *supra* note 2, art. V, para. 3.

to enforce its mandates.⁹³ This objections provision allows any member to file an objection to a scheduled amendment and results in immunity from the amendment's provisions.⁹⁴ Without this option, many more members would likely resort to withdrawing from the IWC because they would have no mechanism with which to control their own actions.⁹⁵ Despite the problems this provision creates, the IWC probably could not exist without it because nations would be unwilling to join an organization which strips them of their control.⁹⁶

IV. WHAT IS NAMMCO?

NAMMCO was formed in 1992 and currently has only four members.⁹⁷ The IWC's decision at the 1992 annual meeting to continue a commercial ban on whaling for another year triggered the formation of NAMMCO.⁹⁸ Although the IWC has lost members in the past,⁹⁹ this new pro-whaling organization, which was born out of dissatisfaction with the IWC, is a blatant showing of opposition to the IWC. The creation of NAMMCO has highlighted the tenuous situation facing the IWC. Japan, Norway, and Iceland are strongly lobbying for a resumption of whaling, while many other members would like to see the moratorium enforced indefinitely.¹⁰⁰

NAMMCO has indicated that initially it will only attempt to regulate outside the jurisdiction of the IWC, specifically seals and small whales.¹⁰¹ This raises the question of what exactly is the IWC's jurisdiction—an issue that has not definitively been resolved. The term "whale" is not defined in the Whaling Convention, leaving open for debate whether the IWC applies to all species of whales or only to a limited number of species. The annex to the Whaling Convention lists the nomenclature of several whales,¹⁰² and there may be an argument that these species are the extent of the IWC's jurisdiction. On the other hand, the Whaling Convention states that it "applies to all waters";¹⁰³ a literal

93. See Birnie I, *supra* note 15, at 913 (discussing the problems created by the objections provision).

94. An example of an objection occurred with the election of the 1986 Moratorium. Smith, *supra* note 2, at 558. Norway, Japan, and Peru filed official objections to the moratorium, the effect of this is that these countries are not subject to the ban on whaling. *Id.*

95. See BIRNIE II, *supra* note 21, at 194 (stating that objections procedures are common within fisheries conventions in order to protect national interest and state sovereignty).

96. See *id.* (attributing the small number of countries withdrawing from the IWC partly to the objections procedure, rationalizing that the objections procedure prevents dissatisfaction and withdrawal from the IWC because it provides a simple procedure for exemption).

97. See *supra* note 4 and accompanying text.

98. *Whales Win a One-Year Reprieve From Hunting*, AGENCE FRANCE PRESSE, July 3, 1992 [hereinafter *One-Year Reprieve*].

99. BIRNIE II, *supra* note 21, at 247-57 (discussing the withdrawal of Norway and the Netherlands in 1959 due to the commission's inability to reach quotas for the Antarctic catch which satisfied them; both countries returned to the IWC shortly thereafter).

100. *One-Year Reprieve*, *supra* note 98. Sixteen countries voted in favor of maintaining the moratorium, 11 abstained, and only Norway voted against the continuance. *Id.* Iceland had already terminated its relations with the IWC. *Id.*

101. *North Atlantic Whale Hunters Set Up Rival Commission*, The Reuter Library Report, Sept. 11, 1992.

102. Whaling Convention, *supra* note 2, Nomenclature of Whales, Annex.

103. *Id.*, art. I, § 2.

reading of the treaty would therefore suggest that it applies to all species. The fact that there is no clear answer obviously fuels NAMMCO's assertion of jurisdiction over smaller whale stocks.

Although NAMMCO may only attempt to manage smaller whale stocks, the mere creation of a rival organization creates a risk for the IWC. If the IWC fails to create a solution that satisfies its nonwhaling as well as its whaling members, NAMMCO has intimated it would attempt to control the larger stocks as well.¹⁰⁴

Iceland's desire to resume whaling is motivated by economic concerns.¹⁰⁵ Iceland's officials claim that approximately 100,000 minke whales are eating the valuable stocks of cod in Iceland's 200-mile exclusive economic zone.¹⁰⁶ Iceland's exports are eighty percent fish, forty percent of which is cod.¹⁰⁷ Depletion of cod stocks resulted in Iceland cutting the 1993 quotas by twenty-seven percent.¹⁰⁸ Iceland is concerned about the effect minke whales could have on their primary economic resource.¹⁰⁹ The right to utilize their marine resources has always been important to Iceland, and the IWC's decision to extend the moratorium was the final incident that prompted their walk-out and subsequent formation of NAMMCO.¹¹⁰

The position of the IWC as the world's primary whale management organization is being challenged from several angles. The rebellious spirit behind NAMMCO has sparked further showings of opposition to the IWC's ban against whaling. Norway and Japan are examples of countries that have begun to follow NAMMCO's lead. The IWC's response to these challenges will be a critical factor in predicting the future of whaling. Norway, currently a member of both the IWC and NAMMCO, killed ninety-three minke whales in 1992 under permits issued for "scientific research" purposes.¹¹¹ The permits which Norway received were proposed to the IWC at the annual meeting in 1992.¹¹² The IWC adopted a resolution in 1992 requesting Norway to reconsider the proposal.¹¹³ The IWC found that Norway failed to establish that the minke allocation was critical to their scientific research efforts.¹¹⁴ This action of Norway resulted in a certification¹¹⁵

104. *Japan Backs Rival North Atlantic Whaling Body*, The Reuter Library Report, Sept. 14, 1992.

105. See Robert Corzine, *Iceland Finds Enemy to Replace Soviet N-Subs: Robert Corzine Reports on Whaling's Cold War*, FIN. TIMES, Oct. 8, 1992 (discussing Iceland's motivation as being economic).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. See *id.* (discussing the foreign minister's opinions on the issue, Mr. Jon Baldvin Hannibalsson was quoted as saying "it would be a death warrant for Iceland unless we are allowed to continue as a hunting nation" although he also acknowledged the threat of sanctions as a retaliatory measure).

111. Stella Bugge, *Norway Says No Point in Whaling Body if Oslo Quits*, The Reuter Library Report, Dec. 1, 1992. See *supra* notes 68-73 and accompanying text (discussing scientific research permits).

112. See Press Information, *supra* note 36 (discussing the two proposed scientific permits at the 1992 meeting which were considered by the Scientific Committee; Norway's proposal for minke whales in the northeastern Atlantic: 1992; 110, 1994; 136 and 1995; 136, Japan's proposal for minke whales in the Antarctic as part of continuing program: 1992-93; 300).

113. See Press Information, *supra* note 36 (stating that resolutions were adopted asking both Norway and Japan to reconsider and improve their proposed takes of minke whales).

114. *Id.*

by the United States Secretary of Commerce under the Pelly and Packwood-Magnuson Amendments.¹¹⁶ As mandated by this legislation and case law interpretation, the President of the United States has the discretion to impose sanctions on Norway,¹¹⁷ although no action has been taken yet.¹¹⁸

Further, Norway resumed commercial whaling in 1993.¹¹⁹ Japan, currently a member of only the IWC, complains that the IWC is prone to political bias which effects the organization's decisions.¹²⁰ Japan is considering a plan to establish a NAMMCO-type organization for the Pacific rim area.¹²¹ The Japanese Fisheries Agency announced that the organization would be similar to NAMMCO.¹²² The IWC adopted a resolution asking Japan to reconsider its research on whale management.¹²³ Japan, like Norway, issues permits for the killing of minke whales for "scientific research" purposes.¹²⁴ If these problems facing the IWC are not resolved, organizations like NAMMCO will become a viable alternative for IWC's whaling members.

V. THE IWC'S RESPONSE—AN ANALYSIS OF THE OPTIONS

The future viability of the IWC depends largely on whether the organization can overcome the challenges it is facing. In overcoming these challenges, the IWC must address the issue of the 1986 Moratorium on whaling. Currently, the moratorium is active and commercial whaling is prohibited. A decision to continue the moratorium will be met with further opposition from whaling nations, and could threaten the future of the IWC. A decision to lift the moratorium and implement a new management scheme for commercial whaling will outrage conservationists. Regardless of the avenue the IWC chooses, the decision will have a significant impact on the future of whales.

A. Continue the Moratorium

A decision to maintain the moratorium, which has been in effect since 1986, will no doubt please conservationists. One risk of banning all commercial whaling is the prospect of retaliation. As shown by the creation of NAMMCO and the displays of opposition from Norway and Japan, the threat of retaliation to an extended moratorium is very real.

115. See *Commerce Notifies President that Norway's Resumption of Whaling Is Basis for Embargo*, Int'l Trade Rep. (BNA), August 18, 1993 (discussing the basis of the United States Commerce Secretary's certification of Norway under the Pelly and Packwood-Magnuson Amendments). See also *supra* notes 80-91 and accompanying text (discussing these amendments in more detail).

116. *Id.*

117. See *supra* notes 80-91 and accompanying text.

118. See *Group Urges United States to Ban Norway Imports over Whaling*, The Reuter European Business Report, Sept. 1, 1993 (stating that the United States Government is expected to announce its decision regarding sanctions in early October of 1993).

119. Mark Meredith, *Whaling Conference Ends in Disarray*, The Reuter Business Report, July 3, 1992.

120. *Id.*

121. *Kyodo News Summary*, Japan Economic Newswire, Nov. 17, 1992, available in LEXIS, Nexis Library, Curmt file.

122. *Id.*

123. Press Information, *supra* note 36.

124. *Id.* See *supra* note 72 and accompanying text.

The 1993 annual meeting of the IWC resulted in a continuation of the 1986 Moratorium against commercial whaling.¹²⁵ However, despite this ban, Norway began hunting minke whales in 1993.¹²⁶ Technically, this whaling is permitted by the Whaling Convention regulations because Norway filed a formal objection to the moratorium when enacted, and is therefore not officially bound by the zero quotas.¹²⁷ Further, Japan kills approximately 300 minke whales per year under the auspices of the scientific research permit provision of the Whaling Convention.¹²⁸ Japan, Norway, and the Russian Federation are pushing for a resumption of whaling.¹²⁹ They are asking to reinstate quotas for the minke whale, a species whose estimated population is 114,000 in the North Atlantic and about 760,000 in the Antarctic seas.¹³⁰ These countries argue the populations are sufficiently high to sustain limited whaling.¹³¹

A decision to continue the moratorium will alienate several members, and may push some towards endorsing or joining NAMMCO. Additionally, it will increase the likelihood of Japan carrying out its proposed plan of a Pacific rim whaling organization. These regional groups will destroy the effectiveness of a moratorium, because they will manage whales according to their own agendas.

B. Implement a New Management Scheme

At the 1993 annual meeting, the IWC voted against adopting a revised management procedure for regulating the resumption of whaling.¹³² This new management scheme would have used a mathematical formula to provide a safeguard against extinction while allowing some commercial whaling.¹³³ The Scientific Committee unanimously submitted its proposal for management procedures, concluding that the minke whale populations were sufficient to allow whaling off the Norwegian coast.¹³⁴ Instead, the IWC opted to continue the 1986 Moratorium and forego the adoption of these new management procedures. Clearly, this decision reflects the IWC's conservationist philosophy. The IWC's rejection of the Scientific Committee's proposal prompted the resignation of the Scientific Committee's chairman, Philip Hammond.¹³⁵ Mr. Hammond resigned because

125. *Fisheries: Ban on Whaling Remains in Force*, European Information Service, May 20, 1993.

126. *Id.*

127. See BIRNIE II, *supra* note 21, at 625 (discussing the four states that objected to the zero quotas: Japan, Norway, Peru, and the former Soviet Union; these members wanted to maintain their previous quotas).

128. Nicholas Read, *Commission Vote Gives Whales Something to Spout About*, THE VANCOUVER SUN, May 9, 1993.

129. Meredith, *supra* note 119.

130. Minke whales are 20-30 feet long and were near extinction in the 1960s. On the commercial market, one minke whale is worth about \$50,000. Meredith, *supra* note 119.

131. *Id.*

132. Read, *supra* note 128.

133. *Whaling: IWC Committee Chairman's Resignation a Shout of Protest*, Europe Information Services, July 6, 1993.

134. *Id.*

135. *Id.*

he felt the IWC treated the Scientific Committee's unanimous recommendations with contempt.¹³⁶

The IWC could adopt these new management procedures in the future. However, the adoption of a scheme to manage the killing of whales is inconsistent with an absolute ban on commercial whaling. The IWC cannot support both positions without perpetuating the conflicts that have plagued the organization for many years. Further, the structure of the IWC, specifically the objections provision and the scientific research permits, preclude the possibility of an effective, worldwide ban against commercial whaling. Therefore, unless the entire framework of the IWC is changed, a workable compromise is the only solution that can satisfy both sides of the controversy.

C. A Workable Compromise

The IWC is facing a serious threat to its existence as the primary whaling regulatory organization. The IWC must create a workable solution to maintain its position, or face the risk of rival organizations regulating whaling in the North Atlantic and the Pacific. Conservationists must face the reality that an absolute ban on whaling is no solution at all. It has now become clear that a relentless push towards such a goal will only result in retaliation from the IWC's whaling members. The calm created by the moratorium was abruptly interrupted by the reality that several nations view whaling merely as a utilization of a natural resource. The issue is not whether these whaling nations can survive without whaling or whether they are morally wrong to continue whaling, but instead, how the various countries can responsibly manage the killing of whales so as to avoid the tragedy of extinction.

While there is not a clear solution to this dilemma, a starting point is determining whether one international organization, such as the IWC, is the most appropriate structure for setting policy and managing whale stocks. The IWC's centralized approach can be defended on a factual basis. The migratory nature of whales results in a constantly changing marine environment. The benefit of an effective centralized organization is the management of whales as a species, as opposed to a fragmented regional management scheme. With one organization and one set of rules, the risk of overexploitation is reduced, regardless of where in the world whales migrate. Moreover, the limited number of whales is better managed through a centralized scheme. Although today the great whales are not in danger of extinction, history has taught us that whales are capable of becoming endangered or even extinct. An organization such as the IWC is more appropriate for the management of a limited resource than are regional organizations which function separately. If NAMMCO is successful in its attempts to manage smaller whales, this could be the beginning of a more decentralized approach to management and policy making. A centralized organization, such as the IWC, is a more effective means of managing finite resources such as whales.

An example of a workable compromise would be to allow a gradual, controlled resumption of whaling in return for an agreement to follow the mandates of the IWC to avoid the risks of extinction. The largest whaling nations are adamant that they will no longer abide by a moratorium. They view the IWC as an organization hostile to whaling

136. *Id.*

and inconsistent with their cultures and views on whaling. If the IWC can implement a revised management scheme based on accurate scientific data, the opposition can be curtailed. In return for allowing a limited amount of whaling, the IWC should impose stricter inspection and observer schemes to assure that the management scheme is being followed. Conservationists who are seeking a complete and permanent ban on whaling will not be satisfied with such a compromise. But these conservationists must consider the ramifications of a continued moratorium. If the IWC loses its ability to effectively control the whale stocks, the future is uncertain. The opposition from NAMMCO, Norway, and Japan is simply too strong to ignore. Forcing the issue of a complete ban on whaling could backfire and cause more harm than good to the whales.

VI. CONCLUSION

In an ideal world, all whales could live free from the danger of harpoons. In our less than ideal world, maybe the most we can realistically expect is that whales be allowed to live free from the danger of extinction. Perhaps the only plausible solution is a compromise that neither forces the whales to extinction nor creates a worldwide sanctuary for them, but instead finds a middle ground that respects both views.

Kaye Anable

