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Giving the Cat Claws: Proposed Amendments to the International Whaling Convention

I. INTRODUCTION

In 1982 the International Whaling Commission (IWC or Commission) passed a moratorium on all commercial whaling which runs from 1986 until at least 1990.¹ However, while the moratorium is part of the substantive international law of whaling, the Commission is essentially powerless to enforce it.²

On the night of November 9, 1986, a private international conservation group took the enforcement of the moratorium into their own hands.³ A two-man team from the Sea Shepherd Conservation Society (Sea Shepherd) opened the bottom valves on two Icelandic whaling boats (the Hvalur 6 & 7) sending them to the bottom of Reykjavik harbor.⁴ Sea Shepherd justified its actions on the grounds that the Icelandic whaling fleet was violating the International Whaling Commission's moratorium on commercial whaling.⁵ Icelandic officials, however, claimed that the fleet was not violating the moratorium, but rather was operating legitimately under the authority of the Whaling Convention and condemned Sea Shepherd's actions as acts of "terrorists."⁶

This incident and subsequent actions of the Commission expose several of the basic weaknesses of the IWC and the problems it has in enforcing international whaling law. If the moratorium on commer-

1. 34 REP. INT'L WHAL. COMM'N, Chairman's Report, at app. 6, para. 2 (1982).

2. The scope of the IWC's management powers presently includes both large cetaceans (sperm, sei, fin, blue, humpback, right, bowhead and pygmy right whales) and some small cetaceans (minke, Bryde's and orca (killer) whales, and bottlenose dolphins). P. BIRNIE, INTERNATIONAL REGULATION OF WHALING: FROM CONSERVATION OF WHALING TO CONSERVATION OF WHALES AND REGULATION OF WHALE-WATCHING 31 (1985). There is controversy over the IWC's authority regarding other types of small cetaceans. *Id.* This Note will look at the moratorium as it regards the cetaceans over which the Commission has unchallenged management authority. Therefore, this article will not deal with any of the issues surrounding the taking of pilot whales by the Danish Faroe Islands.

3. SEA SHEPHERD LOG, Feb. 1987, at 1. See also Stewart, *Militants Damage Iceland Whale Processing Plants: Official Calls it Terrorism*, L.A. Times, Nov. 11, 1986, at I8, col. 1.

4. SEA SHEPHERD LOG, Feb. 1987, at 1. See also Stewart, *supra* note 3, at I8, col. 1.

5. Stewart, *supra* note 3, at I8, col. 1.

6. *Id.*

cial whaling is to achieve its purpose of replenishing depleted whale stocks, then either the IWC's authority will have to be strengthened or alternative methods of enforcement will have to be adopted.

However, it is not merely the power to enforce the moratorium which is in question. The weaknesses in the IWC are general rather than particular to the moratorium. The weaknesses are in the fundamental construction of the IWC.

This Note will identify and examine some of the weaknesses of the IWC in light of the moratorium and the surrounding conflict. It will begin with an examination of the origins and structure of the IWC in general and of the moratorium in particular. Next, it will look at three provisions in the IWC's charter⁷ which, when taken together, disable the Commission: the objections clause (article V, para. 3), the scientific permit provision (article VIII, para. 1) and the enforcement provision (article IX). This Note will then look at the positive and negative aspects of various alternative methods of enforcement, and finally will examine the possible solution of revising the IWC's charter to eliminate at least some of the inherent weaknesses.

II. THE INTERNATIONAL WHALING COMMISSION AND THE MORATORIUM

The International Whaling Commission was established in 1946 by the International Convention for the Regulation of Whaling⁸ (Convention or Whaling Convention) and was the first global organization of its kind.⁹ The major whaling nations which originally formed the Commission¹⁰ were concerned with the effect declining whale stocks would have on the economic viability of the whaling industry.¹¹ This concern was set out in the Convention's preamble, where the parties officially recognized their common interest in achieving "the optimum level of whale stocks as rapidly as possible without causing wide-

7. International Convention for the Regulation of Whaling, Dec. 2, 1946, 161 U.N.T.S. 74. (hereinafter Int'l Whaling Regulation Convention).

8. *Id.*

9. P. BIRNIE, *supra* note 2, at 168 (1985).

10. Int'l Whaling Regulation Convention, *supra* note 7, at 74 n.1.

11. P. BIRNIE, *supra* note 2, at 2. Birnie also points out that in 1967: the United Kingdom abandoned whaling because the International Whaling Commission (IWC) . . . had failed to arrest the decline in commercially exploited stocks, so that whaling ceased to be an economic activity for many of the states that had traditionally engaged in it.

Id.

spread economic and nutritional distress.”¹² In order to achieve this objective, the convention recognized the need to confine whaling operations “to those species best able to sustain exploitation in order to give an interval for recovery to certain species of whales now depleted in numbers.”¹³ As a result, the Commission’s stated purpose is to ensure the “proper and effective conservation and development of whale stocks”¹⁴ As of 1987, approximately forty states are members of the IWC.¹⁵

The Convention (including the annexed Schedule of Rules) which created the substantive law of whaling, is a multilateral treaty which has been either ratified or adhered to by each member or “contracting” government.¹⁶ The articles in the Convention operate as a framework for the international whaling community. However, most of the day-to-day whaling operations are governed by the annexed schedule of rules (the Schedule).¹⁷ These rules and regulations are highly specific, defining acceptable and unacceptable practices, and establishing catch returns (quotas), zones and seasons.¹⁸ In as much as the Schedule is part of the Convention,¹⁹ it is binding on all contracting governments.²⁰ Amendments to the Schedule, which may be made at the Commission’s annual meetings,²¹ are also binding on any contracting government which does not lodge a formal objection.²²

In 1982, on the basis of recommendations from the Scientific Committee (SC),²³ the IWC passed an amendment to the schedule

12. Int’l Whaling Regulation Convention, *supra* note 7, at 74.

13. *Id.*

14. *Id.* at 74-76.

15. The members of the IWC are Antigua and Barbuda, Argentina, Australia, Belize, Brazil, Chile, People’s Republic of China, Costa Rica, Denmark, Egypt, Finland, France, Federal Republic of Germany, Iceland, India, Ireland, Japan, Kenya, South Korea, Mauritius, Mexico, Monaco, the Netherlands, New Zealand, Norway, Oman, Peru, Phillipines, Saint Lucia, Saint Vincent and the Grenadines, Senegal, The Seychelles, Solomon Islands, South Africa, Spain, Sweden, Switzerland, USSR, United Kingdom, United States, and Uruguay. In addition to member states, meetings are attended by observers from non-member states, international governmental organizations and international non-governmental organizations. 37 REP. INT’L WHAL. COMM’N 5-7 (1987).

16. Int’l Whaling Regulation Convention, *supra* note 7, at 74 n.1.

17. *Id.* at 78-82. This schedule has been amended many times since the original schedule entered into force.

18. *Id.* at 80.

19. *Id.* at 76, art. I, para. 1.

20. *Id.* at 86, art. X, para. 4.

21. *Id.* at 80, art. V, para. 1.

22. *Id.* at 80, art. V, para. 3.

23. The Scientific Committee is a branch of the IWC which “shall be composed of scientists nominated by the Commissioner of each nation which elects, at the Annual Meeting of

implementing the following moratorium on commercial whaling in an effort to replenish depleted whale stocks:

[c]atch limits for the killing for commercial purposes of whales from *all* stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be *zero*. This provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits.²⁴

This amendment, by temporarily removing humans as a major predator, will allow depleted whale populations to grow. In turn, this will increase the chances of achieving the "optimum level" of whale stocks referred to in the Convention's Preamble.²⁵

The moratorium has generally been interpreted by the press as a four year ban.²⁶ However, while the moratorium will remain in effect for at least four years (1986 through 1990, when the first comprehensive assessment will be made), nothing in its language assures that the ban will be lifted in 1990. The moratorium guarantees only that in 1990 the size and strength of whale stocks will be assessed, and that

the Commission, to be represented on that Committee." Rules of Procedure of the Scientific Committee § A, para. 1 (1983) (hereinafter SC Rules), cited in P. BIRNIE, *supra* note 2, at 735. These are the only voting members. *Id.*

There are also additional non-voting participants and observers. Intergovernmental organizations (e.g. UNEP or FAO) may have adviser status, SC Rules, paras. 2-3, while non-member governments and international non-governmental organizations (e.g. Greenpeace or the RSPCA) may send observers. *Id.* at paras. 4-5. Finally, Commissioners may nominate qualified scientists to present and discuss documents and research papers. *Id.* at para. 6.

24. 33 REP. INT'L WHAL. COMM'N 40 (1983) (emphasis added). "Pelagic" refers to open-ocean whaling.

25. Int'l Whaling Regulation Convention, *supra* note 7, at 74. The interpretation of the term "optimum level" has changed over the years. Until the late 60's/early 70's

MSY [Maximum Sustainable Yield], equated with the principle of maintaining populations at the size which theoretically would yield the largest harvest indefinitely—at a level known as the "maximum sustainable yield" stock level—was, however, relied on, and even incorporated into many fishery agreements because it was thought to be a simple objective standard permanently protecting stocks from over-fishing and consequent depletion . . . As stocks declined and ecological considerations impinged more importantly on conservation of stocks, even MSY has been subjected to severe scientific criticism and other concepts, taking account of more ecological factors, have been pressed as a more appropriate interpretation of [optimum level]. The issue is still fraught with great scientific controversy.

P. BIRNIE, *supra* note 2, at 170.

26. See, e.g., Stumbo, *Modern-Day Pirates Fight the Whalers*, L.A. Times, June 13, 1986, at I1, col. 1; *Protesters Sink 2 Iceland Whaling Boats*, L.A. Times, Nov. 10, 1986, at I7, col. 4; Stewart, *supra* note 3, at I8, col. 1; Schoenberger, *Japan Tries New Tactics to Keep Whaling Industry*, L.A. Times, Feb. 22, 1988, at I1, col. 5.

the Commission will consider lifting the ban.²⁷ The absence of a specific end date suggests that if whale populations have failed to make a sufficient recovery by 1990 the moratorium could remain in effect indefinitely.²⁸

III. ENFORCEABILITY OF THE MORATORIUM BY THE IWC

The fact that a majority of the members of the IWC voted in favor of the moratorium²⁹ means little in determining its potential for success. The votes were divided along a definite line: non-whaling states voted for the moratorium, whaling states voted against it, with the exception of Spain, which voted for the moratorium.³⁰ Since the whaling states have expressed their aversion to the amendment through their votes, the ability of the IWC to enforce compliance with the moratorium is critical. Without effective enforcement, the moratorium is nothing more than an agreement between states to discontinue an activity they were not engaged in in the first place.

There are three provisions in the Convention which, taken together, effectively render the IWC impotent to enforce its own regulations. These provisions are the objections clause,³¹ the scientific permits provision,³² and the enforcement provision.³³

A. *The Objections Clause*

The objections clause is found in article V, paragraph 3 of the Convention³⁴ and the process can be summarized as follows:

27. See *supra* text accompanying note 24.

28. Effects of violations of such an open-ended moratorium on whaling states are greater than they would be with a fixed term. Here the possible effects of the violation, instead of merely decreasing the new catch limits at the end of four years, may result in the continuation of the zero catch limit beyond the initial period with a resulting loss in profits to whaling fleets adhering to the moratorium.

29. Twenty-five members voted for the moratorium, seven voted against and five abstained. 33 REP. INT'L WHAL. COMM'N 21 (1983).

30. Voting in favor of the moratorium were: Antigua, Argentina, Australia, Belize, Costa Rica, Denmark, Egypt, France, FRG, India, Kenya, Mexico, Monaco, the Netherlands, New Zealand, Oman, St. Lucia, St. Vincent, Senegal, Seychelles, Spain, Sweden, UK, USA and Uruguay. Voting against were: Brazil, Iceland, Japan, South Korea, Norway, Peru and USSR. Five countries abstained: Chile, People's Republic of China, Phillipines, South Africa and Switzerland. 33 REP. INT'L WHAL. COMM'N 21 (1983). See *infra* Appendix A for countries which registered non-aboriginal whale catches between 1981 and 1986.

31. Int'l Whaling Regulation Convention, *supra* note 7, at 80, art. V, para. 3.

32. *Id.* at 82, art. VIII, para. 1.

33. *Id.* at 84, art. IX.

34. *Id.* at 80-82.

Amendments . . . do not become effective:

- (i) until 90 days after their notification by the Commission to Contracting Governments;
- (ii) if any Government delivers an objection before the end of this period, such objection delays the entry into force for *all* governments for a further 90 days;
- (iii) during this second 90 day period any Government can still object;
- (iv) if any objection is received during this second 90 day period any Government can object within a period of 30 days from the date upon which the last objection of the second 90 day period was received, whichever of (iii) or (iv) is the later;
- (v) at the end of this period (which could be as long as 210 days, i.e. seven months) the amendment comes into force only for the Governments that have not objected.³⁵

The ultimate effect of this clause is that a member state may escape being bound by any new regulation which it does not like by lodging a formal objection within the requisite time (three to seven months from notification).³⁶ From that time on, the objecting state is exempt from the new rule until it chooses to revoke its objection.³⁷ It has been argued that objections clauses in fisheries agreements are necessary to protect state sovereignty³⁸ and to prevent states from withdrawing from a Convention as a whole.³⁹ The end result is often that the states, whose abusive practices are targeted by an amendment, may escape being bound by that amendment.

In the case at hand, four of the seven whaling states which voted against the moratorium (Japan, USSR, Norway and Peru) filed timely objections and are now legally exempt from the ban on commercial whaling.⁴⁰ Because these countries have invoked their power to object, they can never be in violation of the moratorium regardless of their whaling practices.⁴¹

35. P. BIRNIE, *supra* note 2, at 194.

36. *Id.*

37. Int'l Whaling Regulation Convention, *supra* note 7, at 82.

38. P. BIRNIE, *supra* note 2, at 194.

39. *Id.* It is not always the case that countries file objections to amendments which they feel to be against their interests. In the present case only four of the seven states which voted against the moratorium lodged formal objections (Japan, Norway, Peru and the USSR). *Id.* at 614. The remaining three (Brazil, Iceland, and S. Korea) did not. *Id.* at 615. However, it is possible that they would have lodged an objection if the IWC had the power to enforce its rules.

40. 33 REP. INT'L WHAL. COMM'N 40 (1983).

41. See *supra* text accompanying note 37.

B. The Scientific Permits Provision

Two of the remaining four whaling countries which neither voted for the moratorium nor filed timely objections (Iceland and South Korea)⁴² have issued permits to their whaling fleets which allow them to continue their whaling operations for the stated purpose of "scientific research."⁴³ While the use of the objections procedure is legal,⁴⁴ much of the controversy surrounding the moratorium is over the legality of the Icelandic and South Korean scientific permits. The contention is that these permits have been issued primarily as a means of continuing commercial whaling during the moratorium and that any scientific value is secondary and insufficient to satisfy the applicable criteria for issuance.

These permits, when issued for legitimate research,⁴⁵ serve the vital purpose of helping the Commission determine the size and viability of whale stocks and setting future catch limits.⁴⁶ However, if misused the permits can thwart the goals of IWC regulations.

1. Purpose of and Criteria for Scientific Permits

The IWC, through the Scientific Committee (SC), relies on research carried on by independent research groups in order to effectively regulate whaling.⁴⁷ Article V, paragraph 2(b) requires that amendments to the schedule "shall be based on scientific findings."⁴⁸ The Scientific Committee is the branch of the IWC which is responsible for gathering the data that the Commission uses in making its determinations.⁴⁹ However, the SC does not conduct its own research.⁵⁰ Rather, its role with regard to data collection is to "review the current scientific and statistical information with respect to whales

42. See *infra* Appendix A.

43. 38 REP. INT'L WHAL. COMM'N, Chairman's Rep., at 39-40 (1987).

44. This objection procedure is specifically provided for in Article V, para. 3 of the Convention. Int'l Whaling Regulation Convention, *supra* note 7, at 74.

45. See, e.g., Australia. Progress Report on Cetacean Research, June 1985 to May 1986, 37 REP. INT'L WHAL. COMM'N 159-66 (1987); United States. Progress Report on Cetacean Research, June, 1985 to May, 1986, 37 REP. INT'L WHAL. COMM'N 183-90 (1987).

46. Most of the IWC annual report consists of research reports by various member states. Reports by member countries and papers by non-member organizations are presented at the meetings of the Scientific Committee and provide much of the data supporting the recommendations of the Scientific Committee.

47. IWC Rules of Procedure, § J(3), *reprinted in* P. BIRNIE, *supra* note 2, at 729, and SC Rules, *supra* note 23, at 735.

48. Int'l Whaling Regulation Convention, *supra* note 7, at 80.

49. See *supra* note 23.

50. *Id.*

and whaling . . . review current scientific research programmes of Governments, other international organisations or of private organisations . . . and [to] submit reports and recommendations to the Commission."⁵¹ Much of the data available to the SC each year comes from the cetacean research done by member countries.

Article VIII, paragraph 1 of the Convention provides *inter alia* that:

Notwithstanding anything contained in this convention, any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take, and treat whales *for purposes of scientific research* subject to such restrictions as to the number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking and treating of whales *in accordance with the provisions of this Article shall be exempt* from the operation of this Convention."⁵²

With the exception that there be a "scientific purpose," article VIII, paragraph 1 does not provide much in the way of criteria to be considered when issuing permits.⁵³ However, the Commission passed a resolution in 1986 which recommended certain supplemental criteria.⁵⁴

The Commission's 1986 resolution recommended that both the contracting government, prior to issuing a permit, and the SC in reviewing the research results of prior permits should consider whether:

- (1) the objectives of the research are not practically and scientifically feasible through non-lethal research techniques;
- (2) the proposed research is intended, and structured accordingly to contribute information essential for rational management of the stock;
- (3) the number, age and sex of whales to be taken are necessary to complete the research and will facilitate the conduct of the comprehensive assessment;
- (4) whales will be killed in a manner consistent with the provisions of Section III of the Schedule, due regard being had to whether there are compelling scientific reasons to the contrary.⁵⁵

The Commission further recommended that the contracting governments should take great care not to "further deplete" or "substan-

51. IWC Rules of Procedure, § J(3), *supra* note 47, at 729.

52. Int'l Whaling Regulation Convention, *supra* note 7, at 82 (emphasis added).

53. *Id.*

54. 37 REP. INT'L WHAL. COMM'N 25 (1987).

55. *Id.*

tially impede" the recovery of Protection Stock⁵⁶ and submit proposals for permits to the Scientific Committee for review.⁵⁷

2. The Icelandic and South Korean Scientific Permits

After the moratorium went into effect, both Iceland and South Korea issued scientific permits to their commercial fleets.⁵⁸ The Icelandic permit allowed the Hvalur Whaling Company to catch 200 whales per year during the moratorium.⁵⁹ The attacks on the Hvalur 6 and 7 were based on Sea Shepherd's contention that the Icelanders were "[p]rostituting science to protect their commercial whaling interests."⁶⁰ This statement, in essence if not in tone, accords with the Commission's findings that the permits were not issued for valid research purposes.

Using much milder language, the IWC, at its annual meeting in June of 1987, also came to the conclusion that both Iceland and South Korea were in violation of the Scientific Permit clause.⁶¹ This decision was based on the criteria enunciated in the 1986 resolution.

While the 1986 resolution is not technically binding on any member country, there are two factors that suggest that Iceland (and, to a lesser degree, South Korea) should be held accountable for these criteria. First, Iceland participated in the working group which developed and presented the resolution.⁶² Second, the Commission (which included both Iceland and South Korea) adopted the resolution by consensus.⁶³ Given this indication of support, it seems unlikely that either Iceland or South Korea could successfully argue that their scientific permits for the 1986-87 seasons were not subject to the new criteria.

Upon concluding that the Icelandic and South Korean permits did not satisfy the requirements of the 1986 resolution, the Commission passed a new series of resolutions requiring stricter review of proposed scientific permits⁶⁴ and recommending that Iceland and South

56. *Id.*

57. *Id.*

58. *See supra* note 43.

59. L.A. Times, Nov. 10, 1986, at I7, col. 4.

60. Stewart, *supra* note 3, at I8, col. 1.

61. 38 REP. INT'L WHAL. COMM'N, Chairman's Rep., at 39-40 (1987).

62. 37 REP INT'L WHAL. COMM'N, at 12 (1987).

63. *Id.*

64. *Id.* at 37-38. The resolutions clause which established four new criteria passed nineteen to six with seven abstentions. The clause establishing a commission review passed seventeen to seven with eight abstentions. *Id.* at 4-d (1987). WHALE NEWS is a publication of

Korea revoke the permits presently held by their whaling fleets.⁶⁵ The permit review resolution, which was proposed by the United States, has two distinct provisions. The first creates four new criteria for the scientific committee to use in determining the link between the scientific basis and methodology of a permit, on the one hand, and the stated aims of the comprehensive assessment, on the other.⁶⁶ The second provision calls for a full Commission review of the Scientific Committee's findings.⁶⁷ Under this resolution, the Commission Secretary can request that an issuing government either refuse to issue a new permit or revoke the existing permit whenever the four criteria are not satisfied.⁶⁸

However, Commission resolutions and recommendations are not part of the Convention or Schedule, and are not binding on the parties.⁶⁹ Furthermore, even if recommendations or resolutions were binding on governments, the Commission lacks the power to enforce them.

C. *The Enforcement Provision*

The IWC has resolved that neither the Icelandic nor the South Korean scientific permits are truly for "scientific purposes" within the meaning of article VIII of the Whaling Convention. Therefore, Iceland and South Korea cannot rely on article VIII to exempt their

the American Cetacean Society (ACS). 34 WHALE NEWS, Summer 1987, at 4-a. ACS has the status of International Non-Governmental Organization Observer. The 1987 IWC meeting was attended by a representative of ACS. 37 REP. INT'L WHAL. COMM'N 7 (1987).

65. 38 REP. INT'L WHAL. COMM'N, Chairman's Rep., at 39-40 (1987). The resolution approving the revocation of the Icelandic scientific permit passed nineteen to four with eight abstentions. The resolution approving the revocation of the South Korean permit passed nineteen to three with nine abstentions. 34 WHALE NEWS, Summer 1987, at 4-d.

66. 34 WHALE NEWS, Summer 1987, at 4-b. The new criteria are:

- (1) The research addresses a question or questions that should be answered in order to conduct the comprehensive assessment or to meet other critically important research needs;
- (2) The research can be conducted without adversely affecting the overall status and trends of the stock in question or the success of the comprehensive assessment of such stock;
- (3) The research addresses a question or questions that cannot be answered by analysis of existing data and/or use of non-lethal research techniques; and
- (4) The research is likely to yield results leading to reliable answers to the question or questions being addressed.

38 REP. INT'L WHAL. COMM'N, Chairman's Rep., at 37 (1987).

67. 34 WHALE NEWS, Summer 1987, at 4-b.

68. *Id.*

69. Only the Convention and amended Schedule are binding. Int'l Whaling Regulation Convention, *supra* note 7, at 76, art. I.

whaling operations from the moratorium.⁷⁰ However, even though the Commission has found that Iceland and South Korea are in violation of the Convention, it lacks the authority either to put an end to the illegal practices or to punish the offenders.⁷¹

Lack of enforcement power is the International Whaling Commission's single greatest weakness. If this weakness cannot be cured, then alternative methods of enforcement need to be found if there is to be any meaningful regulation of the whaling trade.

According to article IX of the Convention, which deals with the punishment of infractions, the power to punish nationals belongs strictly to the Contracting Government possessing jurisdiction.⁷² For example, only the Icelandic government would have jurisdiction to prosecute violations by the Hvalur Company. Furthermore, the Convention does not provide for punishment where the violator is not a national, but a Contracting Government.⁷³ Therefore, the Convention does not give the Commission *any* power to enforce its rules and regulations.

IV. ALTERNATIVES TO ENFORCEMENT BY THE IWC AS PRESENTLY CONSTITUTED

As the Convention is presently written the IWC is powerless to enforce the moratorium. There are three possible ways for the moratorium to be enforced. Two of these ways presently exist, but have serious flaws. The first is bringing suit before the International Court of Justice (ICJ or World Court), and the second is continuing extralegal enforcement by the Sea Shepherd Society. A third possibility which is not in effect, but which is most promising, is the revision of the Convention itself.

A. Legal Enforcement through the International Court of Justice

The IWC cannot take direct action against either Iceland or

70. *Id.*

71. *Id.* at 84, art. IX. In pertinent part, article IX provides:

1. Each Contracting Government shall take appropriate measures to ensure the application of the provisions of this Convention and the punishment of infractions against the said provisions in operations carried out by persons or by vessels under its jurisdiction . . .

3. Prosecution for infractions against or contraventions of this Convention shall be instituted by the Government having jurisdiction over the offense.

Id.

72. *Id.*

73. *Id.*

South Korea. However, if these countries refuse to revoke their permits, there may still be a legal remedy.

When the U.S. resolution was proposed at the 1987 IWC meeting, Mr. H. Asgrimsson, the Icelandic Commissioner,⁷⁴ threatened to take the issue to the International Court of Justice in the event the resolution passed.⁷⁵ The implication of Asgrimsson's threat is that he has bound himself on the record to accept as final the decision of the court—even if that decision is unfavorable. The members of the IWC abiding by the moratorium should call Asgrimsson's bluff (if it is a bluff) and bring their own suit against Iceland for violation of the Whaling Convention.

The initial question is whether the ICJ would have jurisdiction over a case between Iceland or South Korea and another member of the IWC. However, even if the court would have jurisdiction over such a case (and despite Mr. Asgrimsson's statements at the 1987 meeting), the circumstances surrounding the 1974 *Fisheries Jurisdiction* case⁷⁶ suggest that Iceland would not accept the court's jurisdiction. Therefore, Iceland might not consider itself bound by any judgment. Finally, there are potential problems with the enforcement of an ICJ judgment.

1. The Jurisdiction of the International Court of Justice

While the ICJ's jurisdiction is severely limited,⁷⁷ it does have the jurisdiction to hear a case between Iceland and any contracting government of the IWC which is a member of the United Nations. The relevant jurisdictional provisions of the Statute of the International Court of Justice provide the court with jurisdiction over any case brought by one country against another country.⁷⁸ This automatically extends to all countries which are members of the United Nations.⁷⁹ Parties can declare that they recognize the jurisdiction of the court as compulsory in one of two ways: either completely or with reservations.⁸⁰ Most of the European community has acceded without exception to the compulsory jurisdiction of the court.⁸¹ Iceland,

74. 37 REP. INT'L WHAL. COMM'N 6 (1987).

75. 34 WHALE NEWS, Summer 1987, at 4-b.

76. ICJ Reports (1974).

77. Statute of the International Court of Justice, art. 35.

78. *Id.*

79. *Id.*

80. *Id.* art. 36, para. 2.

81. 1982-1983 I.C.J.Y.B., at 56-89 (1983).

however, has never formally filed a declaration of any sort.⁸² Focusing on Iceland's violation of the scientific permit provision for purposes of illustration, the court, therefore, would have jurisdiction over the parties in a case between Iceland and any of the other contracting governments.⁸³

Where the court has jurisdiction over the parties, it may hear cases relating to: "(a) the interpretation of treaties; (b) questions of international law; (c) existence of any fact which, if established, would constitute a breach of international obligation; and (d) the nature or extent of the reparation to be made for the breach of an international obligation."⁸⁴ The case against Iceland would involve: (1) the interpretation of Article VIII of the Whaling Convention (a multilateral treaty), (2) whether Iceland's issuance of a scientific permit was in violation of Article VIII; and (3) if so, what damages (if any) flow from the violation. Therefore, the court would have jurisdiction over the case as well as the parties.

Assuming that the ICJ has jurisdiction to hear a suit against Iceland and that a decision is rendered against Iceland, the question remains whether that decision would be any more effective than the resolution passed by the IWC. Legally, Iceland is not bound by the U.S. resolution or the recommendations of the IWC.⁸⁵ Therefore, the conflict between the IWC and Iceland will technically remain only a difference of interpretation until a decision is rendered by a court whose jurisdiction Iceland recognizes. However, according to the Statute of the ICJ, an interpretation by the ICJ of Article VIII would be legally binding on all the parties⁸⁶ as a final determination of the issue.⁸⁷

2. The Fisheries Jurisdiction Case

In 1961, the United Kingdom and Iceland signed a compromise agreement attempting to resolve a ten year dispute over fishing limits.⁸⁸ In the agreement, the United Kingdom agreed to recognize a

82. *Id.*

83. The members of the IWC are also members of the U.N. *Id.* at 37-41. *See supra* note 15 for a list of the present members of the IWC.

84. Statute of the International Court of Justice, art. 36, para. 2.

85. *See supra* note 69.

86. Statute of the International Court of Justice, art. 59.

87. *Id.* art. 60.

88. Reese, *The Making of a Case for the International Court of Justice—Icelandic Fishing Rights*, 6 COMP. & INT'L L.J. S. AFR. 394, 399 (1973).

twelve-mile limit for Icelandic territorial waters.⁸⁹ Ten years later, in 1971, the Icelandic government unilaterally extended their fishing limit from twelve to fifty miles.⁹⁰ The United Kingdom responded in 1972 by bringing an action against Iceland before the ICJ.⁹¹ However, Iceland refused to comply with the ICJ interim order on the basis that the ICJ lacked jurisdiction over the matter.⁹²

For Iceland, the refusal was justified because "the matter involved was one of national economic survival."⁹³ However, the court did not accept this reasoning and held that there was jurisdiction.⁹⁴

Iceland would likely view a case involving the whaling moratorium in the same light as the *Fisheries Jurisdiction* case. Iceland's economy is primarily dependent on the fishing industry.⁹⁵ Like whales, the Icelandic cod, which was the subject of the 1972 dispute, was an overfished species facing extinction.⁹⁶ In order to maintain their catch the Icelandic fleets needed a larger territory in which to operate.⁹⁷ Iceland felt that economic necessity justified the extension of the fishing limits in violation of its previous agreement.

In the case at hand, the only way for Iceland to maintain its whale catches during the moratorium is to evade the regulation. It follows that Iceland would also classify this action as necessary to preserve the fishing industry. It would then be necessary to their national economic survival and, therefore, beyond the reach of the ICJ. However, since this argument was rejected by the court in the *Fisheries Jurisdiction* case, it seems most likely that it would be rejected if raised again.

Even if the court overruled any objections to its jurisdiction and ultimately issued a judgment against Iceland, the question of enforceability of such judgment remains.

3. Enforcement of an ICJ Judgment

In reality, being bound by a World Court decision may mean very little. The ICJ has no enforcement arm—no army exists which

89. *Id.*

90. *Id.* at 400.

91. *Id.*

92. *Id.*

93. *Id.* at 401.

94. *Id.*

95. *Id.* at 394-95.

96. *Id.* at 396.

97. *Id.*

can go into a country and force compliance with an ICJ judgment. However, Iceland is a small country which must deal economically with the powerful European Economic Community (EEC). The members of the EEC have accepted without reservation the jurisdiction of the Court.⁹⁸ Furthermore, several of the EEC member states are also members of the IWC⁹⁹ and voted for the moratorium.¹⁰⁰ It seems unlikely that Iceland can afford to lose its credibility with the major economic powers of Western Europe. One serious drawback of this alternative is that while a country such as Iceland might be forced to comply for economic reasons, another country, in a different case, might not feel so compelled.¹⁰¹

Another drawback of legal enforcement in this case is that a judgment entered against Iceland might be too little, too late. The amount of time consumed in reaching a decision and achieving compliance, if in fact any compliance could be achieved, could be devastating to existing whale stocks if illegal whaling continued unchecked during that time.

B. *Continued Extralegal Enforcement by the Sea Shepherd Society*

This section deals with the possibility of continued extralegal enforcement by Sea Shepherd. It is appropriate to give some background into the history and makeup of this particular group.

The Sea Shepherd Conservation Society, nicknamed the "Whale Navy," was founded in 1977 by Canadian Paul Watson as a radical offshoot of the environmental group Greenpeace.¹⁰² In general, Sea Shepherd's actions are aimed at preventing the slaughter of marine mammals. The organization operates under the principle that life is more important than property.¹⁰³ The members of Sea Shepherd follow this principle in their actions as well as in theory. They hold that "[o]ur respect for *all* life demands that we cannot harm one life even

98. 1982-1983 I.C.J.Y.B., at 56-89 (1983).

99. Denmark, France, the Netherlands and the United Kingdom. Koers, *The European Economic Community and International Fisheries Organizations*, 1 LEGAL ISS. EUR. INTEGRATION 113, 127 (1984).

100. P. BIRNIE, *supra* note 2, at 614.

101. See, e.g., *Nicar. v. U.S.*, 1986 I.C.J. 70 (Judgment on the Merits of June 27) (United States failure to acknowledge the judgment of the ICJ).

102. Stewart, *supra* note 3, at I8, col. 1. Watson was ousted from Greenpeace in 1977 for taking a club away from a hunter during the 1977 Newfoundland baby seal hunt and tossing it into the sea. Stumbo, *supra* note 26, at I1, col. 1.

103. SEA SHEPHERD LOG, Feb. 1987, at 3.

while protecting another.”¹⁰⁴ As a result, all campaigns are governed by the following strict guidelines:¹⁰⁵ (1) Sea Shepherd teams may not use either explosives or weapons; (2) no possibility of injury to anyone is permitted; (3) the team may not resist arrest; and (4) both the team and the Society must accept full responsibility for their actions and any consequences.¹⁰⁶ Long before its scuttling of the Icelandic whaling boats, the Sea Shepherd had made a reputation for itself in a series of confrontations with “pirate whalers.” In the years 1979 and 1980, Sea Shepherd took credit for sinking five pirate whalers in the North Atlantic and for forcing a sixth boat out of the whaling business.¹⁰⁷ At least three of the boats that sunk, the *Sierra*, the *Susan* and the *Theresa* had previously been identified to the IWC by the government of the Seychelles as “whalers of convenience” (or pirate whalers).¹⁰⁸ There is concern over the operation of “whalers of convenience” because:

- a) unlike most commercial whalers, they are totally indiscriminate; taking whales of any species without regard for size, sex or scientific status; and
- b) they do so wherever they please; violating Commission Areas and Divisions, and national jurisdictions, at will.¹⁰⁹

Sea Shepherd claims that its campaign against the pirate whalers has “wip[ed] out all illegal whaling in the North Atlantic by enforcing the laws of the International Whaling Commission.”¹¹⁰

Sea Shepherd has done much toward enforcing the IWC regulations. However, it is unlikely that their tactics will ever be considered legitimate. Much of the long term effectiveness of Sea Shepherd’s

104. *Id.* at 1.

105. *Id.*

106. These guidelines also governed the attack on the Icelandic whalers. *Id.*

107. The *Sierra*, the *Susan*, the *Theresa*, the *Isba I*, and the *Isba II*. The *Astrid* has been converted into a fishing vessel. SEA SHEPHERD LOG, Feb. 1987, at 3.

108. Whaling Under Flags of Convenience: The Government of Seychelles Urges the International Whaling Commission to Consider Action Against a Growing Threat to the Commission’s New Management Procedure and the Rights and Reputation of its Member Nations, reprinted in P. BIRNIE, *supra* note 2, at 846 (hereinafter Whaling Under Flags of Convenience). See also (1979) Report by South African Commissioner on Steps Taken to Implement the 1977 Resolution Concerning the Transfer of Whaling Equipment, etc. to Non-Member Nations. “Whalers of convenience” are defined as “vessels which belong neither to member nations [of the IWC], nor to fleets of recognized non-member whaling nations. They operate under Flags of Convenience and have no direct connection with their Ports of Registry or with any recognized whaling nation.” Whaling Under Flags of Convenience, at 840.

109. Whaling Under Flags of Convenience, *supra* note 108, at 840.

110. SEA SHEPHERD LOG, Feb. 1987, at 3.

campaigns results from the destruction of property that makes it impossible for whalers to continue illegal operations.¹¹¹ While the Sea Shepherd team which sank the Icelandic whaling boats was careful that no harm would come to any people, their objective, according to Watson, "was to cause as much economic damage to the whaling industry as they possibly could."¹¹² Since this is a tactic which is not condoned by the majority of environmental activists,¹¹³ it is doubtful that it would be officially endorsed by even the most strident anti-whaling members of the IWC. Furthermore, even though Sea Shepherd's choice of targets has thus far been consistent with IWC efforts (for example, the Seychelles¹¹⁴ and South African reports on pirate whalers¹¹⁵ and the IWC resolution regarding Icelandic and South Korean scientific permits¹¹⁶), the two organizations have philosophies which are ultimately irreconcilable. The IWC is premised on the preservation and development of the whaling industry and views conservation only in that light.¹¹⁷ Sea Shepherd, on the other hand, is working toward a permanent end to *all* whaling.¹¹⁸ It seems only a matter of time before Sea Shepherd takes action, such as the sinking of the Icelandic whalers, against an operation either sanctioned or directly supported by the IWC. Therefore, while Sea Shepherd is presently helping to conserve whale stocks, it can never really take the place of direct IWC enforcement of its own regulations.

C. Revision of the Convention

In the absence of enforcement by the International Whaling Commission, legal actions before the ICJ as well as the extralegal campaigns of Sea Shepherd Society, provide for at least limited enforcement of IWC regulations. However, these alternatives are far from complete and each has serious drawbacks.¹¹⁹ What is needed are changes in the Whaling Convention itself which gives the IWC the ability to enforce its own rules. Two changes in particular are necessary to improve the effectiveness of the IWC: the insertion of an

111. See *supra* note 109 and accompanying text. See also text accompanying *supra* note 4.

112. Stewart, *supra* note 3, at I8, col. 1.

113. See *supra* note 102.

114. See *supra* notes 108-109 and accompanying text.

115. See *supra* note 108.

116. 38 REP. INT'L WHAL. COMM'N, Chairman's Rep., at 39-40 (1987).

117. Int'l Whaling Regulation Convention, *supra* note 7, at 74.

118. SEA SHEPHERD LOG, Feb. 1987, at 2.

119. See *supra* notes 101, 118 and accompanying text.

"arrest or seize" clause,¹²⁰ and the removal of the objections loophole.¹²¹ However, to be effective, both changes must be made. Either revision alone would do little to strengthen the Commission.

1. Strengthening the IWC's Enforcement Power through an "Arrest or Seize" Clause

Whaling law will never be adequately enforced until there is an enforcement body which responds directly to the determinations of the IWC. With respect to enforcement power, the weaknesses in the Whaling Convention are shared by most other fisheries agreements.¹²² At present, no international fishery body has the power to enforce compliance on its own.¹²³ However, most of the "Pacific Ocean Conventions" of the 1950's contain provisions allowing for a different type of enforcement power: the "arrest or seize" clause.¹²⁴ For example, article X, paragraph 1(b) of the 1952 North Pacific Ocean Convention (NPOC) provides that:

[I]f a person or a fishing vessel is "actually engaged in operations in violation of the provisions of this Convention, or [if] there is reasonable ground to believe [the person or vessel] was obviously so engaged immediately prior to boarding of such vessel by any such official, the latter may arrest or seize such person or vessel."¹²⁵

This type of provision allows "duly authorized officials of any member state [to] board, search and seize vessels of other member states which violate or are suspected of violating the convention or binding conservation measures applicable to them. The vessels must then be handed over to the member state having jurisdiction over them"¹²⁶ Since the Whaling Convention was the first document of its kind, it is not certain why such a provision was not included. Possibly the drafters feared that the fledgling Commission could not

120. See *infra* text accompanying note 125.

121. Int'l Whaling Regulation Convention, *supra* note 7, at 80, art. V, para. 3.

122. Koers, *The Enforcement of International Fisheries Agreements*, NETH. Y.B. INT'L L. 1, 12 (1973).

123. Carroz & Roche, *The Proposed International Commission For The Conservation of Atlantic Tunas*, 61 AM. J. INT'L L. 673, 691 (1967). See also Koers, *supra* note 122, at 10.

124. Koers, *supra* note 122, at 10. Conventions with such provisions include: The North Pacific Ocean Convention (1952); the Halibut Preservation Convention (1953); the North Pacific Fur Seals Convention (1957); the Shrimp Convention (1958); and the Northwest Pacific Ocean Convention (1959). *Id.* at 10 n.45.

125. International Convention (with annex and protocol) for the High Seas Fisheries of the North Pacific Ocean, May 9, 1952, 205 U.N.T.S. 65, 92 (1952).

126. Carroz & Roche, *supra* note 123, at 691.

withstand the exercise of such a power.¹²⁷ It is also possible that the provision was simply never considered.

The power to arrest or seize a vessel would be useful in stopping individual violations as they occur. For example, suppose the Whaling Convention contained a provision such as the one in the NPOC.¹²⁸ A determination by the Commission that the Icelandic scientific research permit was invalid could slow Icelandic whaling operations. Each time the Icelandic whalers set up operations outside Iceland's territorial waters which violated the moratorium, they could be seized by officials of any other member state and returned to Iceland. While Iceland would probably never prosecute its nationals for whaling violations,¹²⁹ the provision would have precluded the whalers in that instance from further interference with the moratorium.

2. Removal of the Objections Clause

As discussed above, the objections clause allows a state to choose not to be bound by any amendment to the Schedule by filing a timely objection.¹³⁰ The objections procedure was originally included in the Whaling Convention out of a fear that, otherwise, states would withdraw from the Convention rather than bind themselves to unfavorable amendments and that as a result the Commission's would collapse.¹³¹ This has not been the case. Several times in the past, major whaling states have withdrawn from the Convention, despite the objections loophole; yet the Commission has survived.¹³² Three of these states later returned to the Commission.¹³³

Furthermore, many countries probably would not withdraw from the Convention permanently in the absence of an objections clause. Withdrawal is a much more drastic step than objection. Objection allows a state to retain the benefits of membership in the IWC without bearing the burden of an unfavorable regulation. Withdrawal, on the other hand, removes the benefits as well as the bur-

127. Cf. *infra* note 131 and accompanying text.

128. *Id.*

129. Iceland claims that there have been no violations to prosecute. Stewart, *supra* note 3, at 18, col. 1.

130. See *supra* text accompanying note 35.

131. P. BIRNIE, *supra* note 2, at 194.

132. Japan, the Netherlands, Norway and Canada have at various times all withdrawn from the Convention. *Id.* at 602.

133. As of the 1987 meeting of the IWC Japan, the Netherlands and Norway were all voting members. Canada was not. 37 REP. INT'L WHAL. COMM'N 6 (1987).

dens.¹³⁴ It seems unlikely that in the long run, these burdens would so outweigh the benefits of membership that withdrawal would become attractive to most states.

The other argument which has been made in support of the objections clause is that it is necessary for the protection of state sovereignty.¹³⁵ One suggested answer to this argument is that all rights to whales as a property resource should be vested in a single agency.¹³⁶ However, the Whaling Convention, under present international law, does not and could not vest those rights in the IWC.¹³⁷ Furthermore, even if it were possible to give the IWC exclusive rights to the whales, it might not be wise, from a purely conservationist standpoint, to do so. Over the years, decreased profitability, rather than ecological concerns, has been the major factor in at least some of the decline of commercial whaling.¹³⁸ There is no guarantee that non-whaling states would not resume whaling operations despite conservation concerns if whaling were again to become sufficiently profitable. While the Preamble to the Convention discusses conservation, it does so only in relation to the preservation and development of the whaling industry.¹³⁹ Additionally, the Convention does not prevent the short-term interests of the industry from overriding its long-term interests (for example, the preservation of whales).¹⁴⁰ The Preamble supports conservation only so long as it does not cause "economic or nutritional distress."¹⁴¹

A second response to the sovereignty argument is that in the absence of an objections clause, a state which feels its sovereignty is seriously threatened by an amendment would still retain its ability to withdraw from the Convention. While this may seem a harsh alternative, it is equally harsh to allow the retention of a clause which effectively cripples an entire international regulatory body.

V. CONCLUSION

When the Whaling Convention was drafted it was a pioneer doc-

134. For example, new technology and techniques are shared with other members but not with non-members.

135. P. BIRNIE, *supra* note 2, at 194.

136. *Id.* at 79.

137. *Id.* at 171.

138. *See supra* note 11.

139. Int'l Whaling Regulation Convention, *supra* note 3, at 74.

140. P. BIRNIE, *supra* note 2, at 172.

141. Int'l Whaling Regulation Convention, *supra* note 3, at 74.

ument in its field. As such it has performed well. However, the past forty years have pointed out the flaws in its design. Weaknesses written into the Convention in order to protect the fledgling Commission are no longer necessary. What is necessary now is a revised Whaling Convention.

There is no single solution which will satisfy everyone. At one extreme are the whaling states whose primary concern is economic. These states are unlikely to support any revision which would force them to adhere unconditionally to the regulations imposed by the non-whaling majority. At the other extreme is the Sea Shepherd Society whose primary goal is ecological. Sea Shepherd would likely not be satisfied with anything short of a permanent ban on all whaling and the creation of a body to enforce it. In the middle are the non-whaling states and the more traditional environmental organizations. To be adopted and successfully implemented, any solution will have to fall somewhere in this middle ground.

Furthermore, any solution will have to address certain issues. First, the IWC must have the power to bind all of its members to all of its rules and regulations. In general, this can be accomplished by removing the objections clause. In the immediate case of the moratorium, a second step is necessary. The schedule needs to be amended to include the requirements for the issuance of scientific permits. Such an amendment would give these requirements binding effect.

Finally, the Convention needs to be revised to include a stronger form of enforcement power. An "arrest or seize" clause allowing enforcement by individual member states would strengthen the Commission without requiring member states to completely abdicate control to the IWC.

As the Convention is presently constructed, the IWC is essentially an impotent anachronism. Revising the Convention by both removing the objections clause and adding an "arrest or seize" clause would give the International Whaling Commission a degree of credibility which it presently lacks.

Elizabeth A. Wehrmeister

Appendix A

Non-Aboriginal whale catches registered with the IWC.¹

Country ² :	Type:	81/82	82/83	83/84	84/85	85/86
Brazil	Minke	749	854	625	600	598
Chile	Sperm	64	ni ⁸	—	ni	—
	Bryde's	—	ni	3	ni	—
Iceland	Fin	254	194	144	167	161
	Sei	100	71	100	95	38
	Minke	201	212	204	178	145
	Sperm	43	87	—	—	—
Japan*	Bryde's	485	482	536	481	317
	Minke (SH) ⁹	3577	3224	3027	1941	1941
	Minke (NH) ¹⁰	374	324	290	410	320
	Sperm	869	439	393	400	400
Norway*	Minke	1877	1963	1869	804	771
Peru*	Bryde's	250	320	149	ni	—
	Sperm	264	—	—	—	—
S. Korea	Bryde's	1	—	—	—	—
	Minke	760	898	485	378	122
Spain**	Fin	146	150	120	102	48
USA**	Minke	1	3	—	—	—
USSR	Minke	3577	3223	3028	3027	3028

1. Aboriginal whale catches are not included in the moratorium so they will not be dealt with in this Note. Year headings refer to both the coastal and pelagic (referred to in the reports as "Antarctic") seasons. For example "81/82" refers to both the 1981/82 pelagic season and the 1982 coastal season.

2. "*" denotes countries which filed objections to the moratorium. 33 Rep. Int'l Whal. Comm'n at 40 (1983). "***" denotes countries which voted for the moratorium. 33 Rep. Int'l Whal. Comm'n at — (1983).

3. 33 Rep Int'l Whal. Comm'n (1983).

4. 34 Rep Int'l Whal. Comm'n at 1 (1984).

5. 35 Rep Int'l Whal. Comm'n at 1 (1985).

6. 36 Rep Int'l Whal. Comm'n at 1 (1986).

7. 37 Rep Int'l Whal. Comm'n at 1 (1987).

8. No information available to the Commission.

9. Southern Hemisphere.

10. Northern Hemisphere.