

United States Policy and Norwegian Commercial Whaling: A Cooperative Approach

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“There go the ships: there is that leviathan, whom thou hast made to play therein.”¹

I. INTRODUCTION

Both the United States and Norway have a long history of commercial whaling, but the mantle of dominance in the whaling world passed from the United States to Norway in the mid-nineteenth century.² As demand for whale-based products declined in the United States over the past century, and environmentalism and conservationism became more popular public ideologies, the United States shifted from a pro-whaling nation to, effectively, an anti-whaling nation.³ Norway, however, has continued to be the only nation that openly engages in commercial whaling for profit,⁴ albeit on a smaller scale in comparison to historical prac-

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1. *Psalms* 104:26 (King James).

2. See J.N. TONNESSEN & A.O. JOHNSEN, *THE HISTORY OF MODERN WHALING* 11 (R.I. Christophersen trans., Univ. Cal. Press 1982).

3. See Gerry J. Nagtzaam, *The International Whaling Commission and the Elusive Great White Whale of Preservationism*, 33 WM. & MARY ENVTL. L. & POL’Y REV. 375, 404 (2009).

4. See Cliff M. Stein, Comment, *Whales Swim for Their Lives As Captain Ahab Returns in a Norwegian Uniform: An Analysis of Norway’s Decision to Resume Commercial Whaling*, 8 TEMP. INT’L & COMP. L.J. 155, 156 (1994).

tice.⁵ The United States' past efforts to pressure Norway to ban whaling have been largely unsuccessful.⁶ The best way for the United States to meet long-term conservation goals with respect to imposing international regulation on Norwegian commercial whaling is to change from its current policy—trying to get Norway to stop its formal objection to the International Whaling Commission's (IWC) moratorium on commercial whaling—to working cooperatively with Norway through international law by supporting a lift on the ban and finding a scientifically sustainable quota for the yearly catch.

Part II of this Note provides a brief history of commercial whaling, the events that led to the formation of the IWC, and the eventual ban on commercial whaling. Next, Part III discusses how previous attempts under international and domestic law to force Norway to sign on to the ban have been ineffective and may possibly contribute to the disintegration of the IWC as a functioning international body. Part IV argues that, as a major force in international law and policy, the United States has an opportunity to meet its own conservation goals while cooperatively working with Norway to agree to scientifically sustainable quotas in a way that will preserve the IWC as the international body governing whaling. Finally, Part V offers a brief conclusion.

II. HISTORY OF COMMERCIAL WHALING

A brief history of commercial whaling is required to understand why whaling is important to Norway as part of its cultural heritage, why international regulation of whaling is necessary, and the present difficulties in regulating whaling.

A. From Old to Modern Whaling

Whaling is an ancient practice because whales have many uses as a natural resource. Whales are massive aquatic mammals. The blue whale is “the largest mammal that has ever existed on this earth.”⁷ The minke whale is primarily hunted today because it is a viable alternative to tak-

5. See A.W. Harris, *The Best Scientific Evidence Available: The Whaling Moratorium and Divergent Interpretations of Science*, 29 WM. & MARY ENVTL. L. & POL'Y REV. 375, 400 (2005) (noting that the declining trend is subject to variance).

6. See Sonja Marta Halverson, Note, *Small State with a Big Tradition: Norway Continues Whaling at the Expense of Integration and Nordic Cooperation*, 31 SYRACUSE J. INT'L L. & COM. 121, 128–29 (2004).

7. TONNESSEN & JOHNSEN, *supra* note 2, at 3. The blue whale can weigh up to 150 tons and produce fifty-two tons of oil, weighing about as much as twenty-five elephants or 150 big oxen. *Id.* at 5.

ing larger protected species.⁸ Whales have a great variety of uses because almost every part has value, ranging from food, soap, and perfume, to margarine, paint, and industrial lubricants.⁹ As a result, it is unsurprising that they have been sought after as a commercial resource.¹⁰ Norway's primary interest has been commercial whaling for profit from the above-mentioned industrial uses.¹¹ Commercial whaling with the primary purpose of attaining whale meat for human consumption, however, occurs only in Japan¹²—a phenomenon that has led to an entirely different set of international legal issues, which is beyond the scope of this Note.

Whaling as a practice dates back to prehistoric eras¹³ but can be divided into two general periods: old and modern. Larger-scale, organized efforts under old whaling are attributed first to the Basques in the Bay of Biscay circa the eleventh century C.E.¹⁴ As the centuries passed, methods improved, boats grew in size, and the range of whaling had crossed the Atlantic, reaching the Arctic by the seventeenth century.¹⁵ Modern whaling began in the 1860s and is marked by changes in techniques, technologies, and the species of whales principally hunted.¹⁶

One of the major distinctions between old and modern whaling is that “right whales” were sought after in old whaling, whereas “rorqual whales” are prized in modern whaling.¹⁷ Right whales were easier to catch than rorqual whales because they were slow moving and their bodies continued to float after they were killed; it was not until more modern

8. *See id.* at 5. Whales are divided into two main groups: whalebone and toothed. Aside from sperm whales, which are toothed, most commercial whaling is based around whalebone whales, which are divided into three general families: right whales, gray whales, and rorqual whales; minke are rorquals. *Id.* at 3–5.

9. *See* Lisa Kobayashi, *Lifting the International Whaling Commission's Moratorium on Commercial Whaling As the Most Effective Global Regulation of Whaling*, 29 ENVIRONS: ENVTL. L. & POL'Y J. 177, 179 (2006).

10. *See id.*

11. *See generally* TONNESSEN & JOHNSEN, *supra* note 2.

12. *See id.* at 52–53.

13. PATRICIA BIRNIE, INTERNATIONAL REGULATION OF WHALING: FROM CONSERVATION OF WHALING TO CONSERVATION OF WHALES AND REGULATION OF WHALE-WATCHING, VOL. 1, 65 (Oceana Pub. 1985). Whale drawings have been found in Norway dating back to nearly 2200 B.C.E., suggesting hunting may have occurred. *Id.*

14. Such early efforts were mostly confined to coastal areas and small watercraft. *See* Nagtzaam, *supra* note 3, at 389.

15. ELIZABETH DESOMBRE, THE GLOBAL ENVIRONMENT AND WORLD POLITICS 150 (Continuum Int'l Publishing Group, 2d ed. 2007). The English and Dutch were major whalers by this time, hunting primarily in Arctic waters. *See* Nagtzaam, *supra* note 3, at 389.

16. *See* TONNESSEN & JOHNSEN, *supra* note 2, at 3.

17. *See id.* at 6. Right whales were named as such because they were the “right” whale to catch. *Id.*

techniques and technology developed that the faster rorquals were able to be killed and caught before they sank.¹⁸

By the time Americans became involved in the whaling industry in the mid-eighteenth century, the British, French, and Germans had already hunted right whales in the Bay of Biscay and Greenland to near extinction.¹⁹ The Americans then led the way to new grounds in the Southern Hemisphere, but between the time of the United States' Civil War and the end of the nineteenth century, whaling had died out as an industry in the United States.²⁰ The near-extinction of right whales by the latter half of the nineteenth century made the catching of rorquals essentially imperative for the industry to continue.²¹

The solution to the rorqual problem would soon propel Norway to dominance in the whaling industry and give rise to the need for regulation. The father of modern whaling—who saved the industry from the crisis of the depletion of right whales and enabled the taking of rorquals—was a Norwegian named Svend Foyn, who began experimenting with new methods off the northern coasts of Finnmark in the 1860s.²² The Foyn method was novel in that it used steam-driven whaling boats and grenade-tipped harpoons fired from cannons with a line connecting the harpoon to the ship.²³ These technological innovations gave Norway an unparalleled advantage in the whaling industry, and as the industry spread globally through the 1920s, Norway quickly became the industry leader: first exhausting North Atlantic stocks, then declaring a moratorium in all Norwegian waters, and finally becoming the first nation to start operations in the Antarctic.²⁴ One of the important changes that kept the use of whale oil relevant in the twentieth century was the invention of

18. *See id.*

19. *See* Stein, *supra* note 4, at 158–59.

20. *See id.* As the Industrial Revolution spurred economic changes in the United States towards internal expansion and development of its vast land resources, skilled workers onshore could earn two to three times the wage of a whaler, and as a result, its whaling fleet lost its supply of workers. *See* TONNESSEN & JOHNSEN, *supra* note 2, at 12–13. At the same time, Norway experienced the second largest population growth in Europe (following Ireland) and pushed its development outwards, resulting in a stream of immigrants to the United States and a ready supply of young men to man the merchant and whaling fleets who could earn two to three times as much wages at sea as opposed to onshore. *Id.*

21. *See id.* at 6. Interestingly enough, no whaling was carried out from Norwegian shores in the middle of the nineteenth century. *Id.* There seems to be no special circumstances that made it inevitable that Norway would become the world leader in whaling. *Id.* at 11.

22. *See id.* at 6–7.

23. *See id.*

24. *See* Stein, *supra* note 4, at 160–61. Given the presence of Norwegian whalers in the Arctic and Antarctic, the prominence of Norwegian explorers in the same regions seems less surprising. *See* TONNESSEN & JOHNSEN, *supra* note 2, at 71.

hydrogenation, which meant that whale oil could be used in important products like margarine and industrial lubricants, and not only the traditional uses like lighting, lubrication, and soap.²⁵

Modern whaling had thus gone through two initial stages—the Finnmark Coast period (1864–1904) and the global expansion period (1883–1924)—and moved into the final “pelagic” stage (1925–present), which is characterized by whaling in the open ocean with floating factories, compared to shore-based whaling, where the carcasses would be dragged back to a shore facility for processing.²⁶ The newly effective methods of whaling would result in attempts by national governments and, eventually, international bodies to regulate the industry.

B. The Rise of International Regulation

Regulation in the whale industry likewise followed the development of modern whaling in three general stages: free whaling; local or national regulation; and international regulation.²⁷ The effects of free whaling were seen above with the near extinction of right whales, but when similar signs began to appear in rorqual stocks, history was not doomed to repeat itself. Depletion of stocks in the North Atlantic spurred the Scandinavian nations to national-level regulation of the whaling industry in the early twentieth century, with the purpose of preserving whale stocks as a valuable resource.²⁸ As management of global marine resources began to become a relevant state interest in the early twentieth century, the states with the greatest interest in collecting whales became the states that managed them.²⁹

National and international regulation of whales was largely ineffective because of the foundations of the legal status of whales as a form of resource. A state’s jurisdiction over coastal waters historically only extended three nautical miles from shore. Beyond that point, the waters were *aqua nullius*, meaning that the resources belonged to no one and were free for the taking in essentially an anarchic zone of the high sea.³⁰

25. See TONNESSEN & JOHNSEN, *supra* note 2, at 7.

26. *See id.*

27. *See id.* at 9.

28. *See* Nagtzaam, *supra* note 3, at 391–92. Measures included the first ever moratorium on whaling by Iceland for twenty years in 1915 and laws in Norway limiting the number of stations and catchers. *See id.*

29. *See id.* at 392. For example, the International Council for Exploration of the Sea created the Whaling Commission, which in 1927 tried to regulate the open slaughter approach to whaling unsuccessfully. *See id.* at 392–93.

30. *See* TONNESSEN & JOHNSEN, *supra* note 2, at 8–9. States applied the doctrine *mare liberum* (freedom of access to the seas), which had been formulated by Grotius in 1608 in order to justify the right of the Dutch to sail freely to the East Indies, but had been misinterpreted to apply to fishing

Because no state could regulate the high seas and whales were viewed as a common resource from which no one could be excluded, the resource was prone to overexploitation. Under these circumstances, the short-term incentive was to maximize profits from the resource before others depleted it, rather than to manage it for long-term benefit.³¹ Given the lack of short-term incentives to cooperate, it is no surprise that national and private attempts at self-regulation were doomed to fail. Indeed, even most attempts at international regulation have failed miserably.

The whaling industry has not been able to limit takings of whales very well for a variety of reasons: inadequate scope of the regulations, lack of adequate scientific knowledge, important whaling states not cooperating, lack of enforcement, no international observers, and a general lack of interest by the international community.³² The whaling industry and various nations were stirred to action in the 1930s when the catch of blue whales had increased so much that it depressed global oil prices, spurring the whaling industry to realize that the existing various national-level controls were ineffective and that whales needed to be kept from extinction in order to maintain profits.³³ In response, in 1931, the League of Nations created the first international body to regulate whaling: the first Convention for the Regulation of Whaling (Convention).³⁴ This Convention applied to all waters of the member states, enforced vessel licensing requirements, and also exempted aboriginal takings.³⁵ Even though the Convention was an achievement in that it was the first time conservation was applied to whaling on a global scale, it failed because unlike the older, established industry leaders, such as Norway and the United States, the newer, large whaling powers of Japan, Germany, and the USSR all refused to sign on because it was not in their economic interest.³⁶

Frustrated by the Convention's inability to effectively regulate, the industry created a cartel-like private organization known as the Interna-

rights that Grotius recognized as exhaustible and, therefore, subject to control. See BIRNIE, *supra* note 13, at 88; see also generally HUGO GROTIUS, THE FREEDOM OF THE SEAS OR THE RIGHT WHICH BELONGS TO THE DUTCH TO TAKE PART IN THE EAST INDIAN TRADE (Ralph Van Deman Magoffin trans., Oxford Univ. Press 1916) (1608). The result of this state of international law gave rise to such quintessential phenomena as the golden age of piracy in the Caribbean and privateering contracts, both of which are beyond the scope of this Note.

31. See Nagtzaam, *supra* note 3, at 390–91. The fight to secure relative gains of a scarce resource led to a classic instance of the “tragedy of the commons.” *Id.*

32. See BIRNIE, *supra* note 13, at 129–30.

33. See Nagtzaam, *supra* note 3, at 393.

34. Convention for the Regulation of Whaling, Sept. 24, 1931, 155 L.N.T.S. 349.

35. *Id.* at arts. 1, 3, 8, 9.

36. See Nagtzaam, *supra* note 3, at 393–94.

tional Association of Whaling Companies, which attempted to limit global production of whale oil in order to keep prices in check.³⁷ The first attempt by the major Antarctic whaling companies at self-regulation was defeated in the 1933–1934 season due to defections by two British companies and one Norwegian company; so naturally, all restraint was lost the next season and the total number of takings increased.³⁸ The plans of mice and men, it seems.

In 1937, another attempt was made at international regulation: the International Agreement for the Regulation of Whaling, along with a single protocol to it amended a year later.³⁹ Once again, these were largely ineffective because they were not ratified by all the major whaling states.⁴⁰ In the wake of an additional failed attempt at regulation, the catch in the 1937–1938 season reached yet another all-time high.⁴¹

By the mid-1930s, Norway's dominance in the whaling industry was uncontested.⁴² Norway was responsible for nearly half of the takings and oil production, and most men employed in the industry—even at companies not controlled by Norwegians—were Norwegian.⁴³ Not even World War II put a complete stop to Norwegian whaling efforts, but the post-war years would see Japan and the USSR overtake Norway's leading position.⁴⁴

C. Formation of the International Whaling Commission

The realization that diminishing stocks would mean not only the extinction of whales but also the extinction of the whaling industry spurred all sides to come together to treat whales not as resources of individual states, but as a shared global resource.⁴⁵ The general respite granted to whales by the onset of World War II may have kept some major whale species from extinction as the catch level fell to ten percent of pre-war levels.⁴⁶ Before the end of the war, the whaling nations agreed to limit the size of the catch by using a “standardized” measure: the Blue Whale Unit (BWU), which was a measure of the amount of oil that could be

37. *See id.* at 394.

38. *See id.*

39. International Agreement for the Regulation of Whaling, June 8, 1937, 190 L.N.T.S. 79; Protocol Amending the International Agreement of June 8th, 1937, for the Regulation of Whaling, June 24, 1938, 196 L.N.T.S. 131.

40. *See* SIMON LYSTER, INTERNATIONAL WILDLIFE LAW 18 (1985).

41. *See* BIRNIE, *supra* note 13, at 129.

42. *See* Stein, *supra* note 4, at 162.

43. *See id.*

44. *See id.* at 162–63.

45. *See* Nagtzaam, *supra* note 3, at 397.

46. *Id.* at 396.

taken regardless of which species it came from, with one BWU being the amount of oil that would come from one blue whale.⁴⁷ Shortages of edible fats prompted the victorious Allies to prepare for orderly post-war takings, agreeing to limit the catch to 16,000 BWUs for the 1945–1946 season; however, due to sharp demand, the BWU limit quickly increased to 43,378 BWUs by the following two seasons.⁴⁸

As the United States emerged from the ashes of World War II as a new world leader intent on creating a new world political order in its own image, it took charge in looking at the issues surrounding commercial whaling by calling for a new international conference in Washington, D.C.⁴⁹ Following the United States' leadership, fifteen whaling nations signed on to the International Convention for the Regulation of Whaling (ICRW) in 1946, including, for the first time, a major whaling state that had previously refused to sign international agreements: the USSR.⁵⁰ Norway was a founding member and has remained a member since 1946.⁵¹

The purpose of the ICRW, as was stated in the preamble, was to “provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry.”⁵² Although the preamble mostly contains language couched in terms of the industry's interests,⁵³ the preamble also included for the first time some important conservationist language: “Recognizing the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks.”⁵⁴ This signaled a change in the approach the world community would take to whaling regulation; the reasons for regulating were no longer simply to control competition and maintain profits.

The ICRW created the International Whaling Commission (IWC)⁵⁵ to implement the economic and environmental goals of the ICRW.⁵⁶ The

47. *Id.* The problems inherent in such a measure are easily imagined when one considers the variance in size of any species of whale.

48. *Id.* at 397.

49. *Id.* at 397–98.

50. See Stein, *supra* note 4, at 164. The fifteen member states were: Argentina, Australia, Brazil, Canada, Chile, Denmark, France, the Netherlands, New Zealand, Norway, Peru, South Africa, the former Soviet Union, the United Kingdom, and the United States. International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72 [hereinafter ICRW].

51. See Stein, *supra* note 4, at 164.

52. ICRW, *supra* note 50.

53. *E.g., id.* (“Recognizing that the whale stocks are susceptible of natural increases if whaling is properly regulated, and that increases in the size of whale stocks will permit increases in the numbers of whales which may be captured without endangering these natural resources.”).

54. *Id.*

55. See *id.* at art. III.

IWC Schedule, which was created under the ICRW, set limits on catches but was not directly enforceable by the IWC.⁵⁷ Rather, the ICRW provided that each contracting government would take appropriate enforcement measures against persons and vessels under its own maritime jurisdiction.⁵⁸ An important provision was that any nation could join the IWC if it agreed to abide by the ICRW,⁵⁹ which reflects a view that whales are the property of the entire world and not just whaling nations.⁶⁰ While the members of the IWC may amend the Schedule, they may not amend the Convention itself.⁶¹ The binding regulations are made in the Schedule, which can only be amended by a three-fourths vote.⁶² Such amendments must be “necessary to carry out the objectives and purposes of this Convention and to provide for the conservation, development, and optimum utilization of the whale resources.”⁶³ The Schedule regulates five general categories: (1) quota limitations based on size and species; (2) open and closed areas; (3) seasonal and regional limitations for pelagic hunting; (4) treatment after killing; and (5) supervision and control.⁶⁴ Amendments are supposed to be based on scientific findings, so in theory, both the United States and Norway agree that the findings of the Scientific Committee of the IWC should be the foundation of all regulation.⁶⁵

Another important provision is that member states can “opt out” of any provision if they file a timely objection to an amendment.⁶⁶ The IWC can also make non-binding recommendations to member states on matters that relate to whales, whaling, and the object and purpose of the ICRW.⁶⁷ Armed with such tools, the IWC thus set out to regulate commercial whaling, which would not initially prove to be any more successful than previous attempts.

56. See Halverson, *supra* note 6, at 124.

57. ICRW, *supra* note 50, at art. I.

58. *Id.* at art. IX.

59. *Id.* at art. X(4).

60. See Nagtzaam, *supra* note 3, at 399.

61. See Kobayashi, *supra* note 9, at 189.

62. ICRW, *supra* note 50, at arts. I, III(2), V(1).

63. *Id.* at art. V(2).

64. Kobayashi, *supra* note 9, at 190.

65. ICRW, *supra* note 50, at art. V(2). However, actual disagreement over what constitutes scientific findings in the IWC suggests that the language of the Convention is somewhat hortatory on this point. See *infra* Part IV.

66. ICRW, *supra* note 50, at art. V(3).

67. *Id.* at art. VI.

D. Moratorium to Present

Regulation of the whaling industry in the post-war years generally failed because the quota system was inaccurate, it was difficult to divide between the whaling states, and the states loathed giving up their pre-existing allocations; therefore, whale populations continued to diminish, raising concerns in the larger global community.⁶⁸ As the industrial needs for whale oil were replaced by petroleum products, attitudes towards whaling shifted in many nations that did not have a history of consuming whale meat.⁶⁹

Starting in the 1970s, environmentalism grew as a movement and soon turned its attention to whaling.⁷⁰ Various environmental groups were largely effective in destroying the market for whaling products by the use of various organized efforts, including international conventions, boycotts, and propaganda against whale products.⁷¹ Such efforts at bringing public sympathies worldwide to the side of anti-whaling nations, coupled with recruiting efforts in the IWC, shifted the makeup of the IWC. By the early 1980s, anti-whaling forces in the IWC constituted a three-quarters majority, and under United States' leadership, it imposed a total moratorium on commercial whaling in 1982.⁷²

The moratorium affected the nations opposed to it in various ways. Japan initially filed a formal objection, but withdrew its objections after caving into pressure from the United States, which promised not to use punitive trade sanctions under its domestic law that it had designed as an enforcement mechanism of the IWC.⁷³ Japan currently whales, but ostensibly for "research purposes."⁷⁴ The former USSR (now the Russian Federation) also objected to the moratorium, and while it never officially withdrew its objection, it nevertheless ceased all operations in 1987 and generally shifted its policies towards conservation.⁷⁵ Norway filed a timely objection and continued to object to measures such as an IWC decision to protect minke whales on the basis that the decision was not

68. See Kobayashi, *supra* note 9, at 193.

69. See *id.* at 194–95.

70. These movements can be drawn into three general groups: conservationists, preservationists, and animal welfare activists. See *id.* at 196. Conservationists are concerned with sustainable practices of exploiting natural resources, preservationists reject any scientific evidence of sustainable use and reject any killing of whales—based on their own moral reasons—and animal welfare activists are concerned with the human treatment of the whales. *Id.*

71. See *id.* at 197.

72. See *id.* at 198–99. Membership had more than doubled from the original 15 to 39. *Id.*

73. See *id.* at 199. For more on the United States' domestic enforcement of the IWC, see *infra* Part III.

74. See Stein, *supra* note 4, at 169; see also Kobayashi, *supra* note 9, at 199.

75. See Kobayashi, *supra* note 9, at 199.

supported by scientific evidence.⁷⁶ In 1991, Norway announced that it would not hunt any minke whales after it failed to lift the ban on minkes, and for the first time since the seventeenth century, Norway did not kill any whales that year.⁷⁷ In 1992, however, due to the importance Norway placed on whaling, Norway reversed and announced that it would resume commercial whaling in 1993.⁷⁸ The United States led a fifteen-nation group in making a formal statement urging Norway to reconsider, but Norway refused because it was legally within its rights.⁷⁹ Since then, Norway has continued to hunt whales annually, and a variety of attempts by the United States to bring Norway back under the moratorium have been largely unsuccessful, as will be discussed in the next Part of this Note.

III. ANTAGONISTIC PAST AND PRESENT MECHANISMS

This Part discusses why previous attempts to bring Norway into “compliance” with international law (in the form of the ICRW ban on whaling) have been ultimately unsuccessful. These previous attempts are characterized in this Note as “antagonistic” because they did little to seek compromise. Three general categories of approaches have been attempted so far. First, applying pressure through formal diplomatic channels has technically worked with Japan⁸⁰ but has not been successful with Norway.⁸¹ Second, the United States made attempts to domestically enforce what it viewed as breaches of the purpose of the ICRW, but the United States Supreme Court effectively shot down that approach.⁸² Finally, due to problems with the two methods above, the more recent and controversial approach suggests that effective enforcement of conservationist values can come from private activist parties, ranging from bans on goods to acts of interference that may rise close to the level of piracy.⁸³ Each of these approaches will be examined in turn.

76. *Norwegians Reject Decision to Protect the Minke Whale*, N.Y. TIMES, Oct. 22, 1985, <http://www.nytimes.com/1985/10/22/world/norwegians-reject-decision-to-protect-the-minke-whale.html>.

77. See Stein, *supra* note 4, at 169.

78. See *id.* at 170.

79. See *id.*

80. See *id.* at 168–69. Albeit with arguably disastrous results in terms of effectiveness because Japan simply used the moratorium’s scientific research exception to continue whaling. *Id.*

81. See, e.g., Halverson, *supra* note 6, at 147 (“Norway continues to prove it will withstand threats and criticism in order to maintain Norwegian cultural identity and sovereignty.”).

82. See *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 222 (1986).

83. Anthony L.I. Moffa, Comment, *Two Competing Models of Activism, One Goal: A Case Study of Anti-Whaling Campaigns in the Southern Ocean*, 37 YALE J. INT’L L. 201 (2012). Acts of violence at sea against Japanese whalers by the private organization Sea Shepherd may constitute

A. Formal Pressure

The reasons for the United States' change in policy in the years between the creation of the IWC and the moratorium in 1982—from being at most a passive bystander to a staunch advocate of a newly emerging norm—is not entirely clear at first glance. One view is that the United States saw gains in terms of a “reputational advantage” because simply opposing the taking of whales was essentially a no-cost means of appearing as a “good environmental citizen” or having “green credentials.”⁸⁴ There was, however, a cost in pursuing that path in the form of damaged trade relations, so some argue that the reputation benefit alone does not account for the normative change in United States policy.⁸⁵ To some extent, it appears that the shift in the IWC and in the normative policies of important previous whaling nations, such as the United States and Australia, was due to the work of environmental non-governmental organizations. These organizations influenced the public and world leaders by pushing concepts, such as the immorality of whaling and the intelligence of whales, as normative reasons to oppose the practice entirely, instead of viewing it in terms of utilitarian conservationism.⁸⁶ This signals that instead of being merely a strategic choice by the United States, a symptomatic change of identity occurred in the United States.⁸⁷ Such a change in identity, this Note posits, helps explain why the United States used its power as a leader, both in a global sense and within the context of the IWC, to formally pressure the moratorium dissenters to accept the ban on whaling. With a majority of the votes in the IWC—and an underlying impossibility of compromise between preservationist states and environmental non-governmental organizations and conservationist whaling states and industry⁸⁸—the United States had little reason to work with the dissenters. Instead, it formally pressured them against the backdrop of unrelenting global public opinion against the dissenting whaling states.

The United States applied formal pressure against Japan by certifying Japan under the Pelly Amendment to the Fisherman's Protection Act of 1967.⁸⁹ However, because Japan made statements that it was going to

piracy. See *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc'y*, 725 F.3d 940, 944 (9th Cir. 2013) (holding the district court erred in dismissing Cetacean's piracy claims).

84. See Nagtzaam, *supra* note 3, at 412.

85. See *id.*

86. See *id.* at 414–15.

87. See *id.* at 415.

88. See *id.*

89. See Ted L. McDorman, *The GATT Consistency of U.S. Fish Import Embargoes to Stop Driftnet Fishing and Save the Whales, Dolphins and Turtles*, 24 GEO. WASH. J. INT'L L. & ECON. 477, 484 (1991). The USSR was also certified at the same time. *Id.*

improve conservation efforts, President Ford used his power of discretion in the Amendment to decline to impose actual economic sanctions.⁹⁰ The pressure was still technically successful in that Japan did officially withdraw its objection to the 1982 moratorium.⁹¹ In terms of practical success, however, it was at best temporary and at worst detrimental because Japan continues to whale to this day under the guise of “research,” which is permitted by the ICRW requirement because the carcass is fully utilized after the “research.”⁹²

Norway, on the other hand, was less receptive to formal pressures from the United States. Although Norway did cease whaling operations from 1991 to 1993, possibly as the result of United States-led pressure in the IWC,⁹³ the mere fact that Norway resumed and continues whaling to the present day demonstrates that any further formal pressure by the United States is not likely to produce any results that are positive for the United States’ presumptively long-term goals of preservation. Therefore, such tactics should be abandoned as they will at best do little but damage relations with a trading partner and at worst encourage Norway to take the Japanese approach and begin “researching” whales, which circumvents the spirit of regulation and would only further weaken the IWC.

B. Domestic Enforcement

In conjunction with the United States’ newfound normative approach to whaling, the United States noticed the conspicuous lack of any enforcement power within the IWC, such that even if Norway were blatantly violating international law by whaling despite the moratorium, there were no penalties under the IWC scheme.⁹⁴ As a leader in the international community, the United States Congress took it upon itself to gift the Executive Branch of the United States with a domestic enforcement mechanism to threaten dissenters of the moratorium, which came in the form of the Pelly⁹⁵ and Packwood-Magnuson⁹⁶ Amendments. The two amendments give the Secretary of Commerce the ability to determine if foreign nations are “diminish[ing] the effectiveness” of the ICRW. If so,

90. PRESIDENT’S MESSAGE TO CONGRESS REPORTING ON INTERNATIONAL WHALING OPERATIONS AND CONSERVATION PROGRAMS, PUB. PAPERS 47, 47–48 (Jan. 16, 1975).

91. See Kobayashi, *supra* note 9, at 199.

92. See *id.*

93. See Stein, *supra* note 4, at 170.

94. See *id.* at 171.

95. Pelly Amendment to the Fisherman’s Protective Act of 1971, 22 U.S.C. § 1978 (Supp. 1988).

96. Packwood-Magnuson Amendment to the Magnuson Fishery Conservation and Management Act of 1979, 16 U.S.C. § 1821(e)(2) (1985).

the Secretary is to certify that fact to the President of the United States, who may apply sanctions according to the two amendments.⁹⁷ The Pelly Amendment gives the President the discretion of banning imports of fish products from nations that are “reducing the effectiveness” of any international fishery conservation agreement, which would include the ICRW.⁹⁸ The Packwood-Magnuson Amendment imposes economic sanctions in the form of reducing the offending nation’s share of fishing in U.S. waters, but the Secretary may also certify a nation when it specifically violates the ICRW—thus making Congress’s intent to enforce it directly clear.⁹⁹

Two major problems have surfaced in application of the amendments. First, even if a nation is certified, it is within the discretion of the President to apply Pelly sanctions. Second, the United States Supreme Court held in *Japan Whaling Association v. American Cetacean Society* that even though the Secretary had the authority to determine whether a nation’s whaling in excess of quotas diminished the effectiveness of the IWC, this determination did not impose a mandatory obligation on the Secretary to certify that every quota violation necessarily failed that standard.¹⁰⁰ Perhaps as a result of *Japan Whaling*, the United States has used the amendments more as negotiating tools to apply formal pressure than as a direct enforcement mechanism; in fact, the United States only applied sanctions twice—both times under Packwood-Magnuson, and never under Pelly.¹⁰¹ Norway itself was certified several times, but neither President George H.W. Bush nor President Bill Clinton ever applied sanctions, possibly because they did not want to injure trade relations with Norway.¹⁰²

Furthermore, some argue that if the United States actually applied sanctions, it would violate international law by contravening the General Agreement on Tariffs and Trade (GATT) as a unilateral trade restriction and possibly violate the United Nations Convention on the Law of the Sea (UNCLOS).¹⁰³ Therefore, domestic enforcement through the Pelly

97. See Stein, *supra* note 4, at 171.

98. 22 U.S.C. § 1978 (1988).

99. See Halverson, *supra* note 6, at 128–29.

100. *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 231–32 (1986).

101. See Stein, *supra* note 4, at 172. The first sanction was against the former Soviet Union in 1985, but President Reagan refused to apply Pelly sanctions because he did not think that sanctions against fish products would encourage the Soviets to change their whaling policy. The second time was against Japan in 1988, but once again Reagan refused Pelly sanctions because he thought the 100% reduction in fishing allocations in U.S. waters was enough to encourage Japan. *Id.* at 172–73.

102. See Halverson, *supra* note 6, at 129.

103. See *id.* at 129–30. Although UNCLOS does not directly regulate trade, it does preclude the use of unilateral trade barriers as an aspect of the law of the sea. *Id.*

and Packwood-Magnuson Amendments holds little promise in pressuring Norway to accept the ban, especially since the more stringent trade sanctions are at the discretion of the President, who is often mindful of other political concerns regarding relations with Norway. Given the inability of environmental non-governmental organizations (ENGOS) to file suit under the Pelly and Packwood-Magnuson Amendments to force the Secretary to certify every quota as a violation, these organizations began to look for other methods to accomplish their agendas.

C. Private Activism

Due in part to the failure of the above methods to attain preservationist goals, ENGOS have taken a more recognizable role both in shaping the development of international law and in enforcing it through the use of “activism.”¹⁰⁴ ENGOS have taken two general approaches in their activism: “protest” activism and “interventionist” activism.¹⁰⁵ Protest activism is an approach favored by ENGOS such as Greenpeace in recent years and represents a more law-promoting approach through the use of legal activities—such as consumer boycotts, protests, and awareness-raising campaigns—in order to put indirect pressure on states and international legal organs to effectuate desired policy changes.¹⁰⁶ The other approach, interventionist activism, represents a more vigilante approach favored by groups such as Sea Shepherd—who has been popularized by television programming of its activities against Japanese whalers in the Antarctic—through the use of nearly, if not patently, illegal applications of direct force to enforce the private views of ENGOS on the content of international law.¹⁰⁷

Protest activism is not very controversial and should even be encouraged because it supports the rule of law in the international regulation of commercial whaling. In comparison to the formal mechanisms of pressure described above, protest activism arguably has been more successful in effecting change in the whaling industry, at least in Japan.¹⁰⁸

104. See Moffa, *supra* note 83, at 201–02.

105. See *id.* at 202.

106. See *id.* at 202–03.

107. See *id.* at 201–02. Moffa characterizes the Sea Shepherd’s actions as the “direct application of force to implement existing laws and policies.” *Id.* But it is an exaggeration to claim that the Sea Shepherds are enforcing anything other than their own misguided beliefs about what constitutes international law. *Cf. Inst. of Cetacean Research v. Sea Shepherd Conservation Soc’y*, 725 F.3d 940, 944 (9th Cir. 2013) (“That the perpetrators believe themselves to be serving the public good does not render their ends public.”).

108. See Moffa, *supra* note 83, at 207. Greenpeace was able to reduce financing available to the Japanese whaling industry through boycotts on products imported to the United States because of

Consumer boycotts and protests are generally protected forms of behavior in the states where they occur. Thus, this form of activism operates within a legal framework and should be encouraged and accepted under international law.¹⁰⁹

Conversely, interventionist activism is a much more pernicious threat to the rule of law. Interventionist activism consists of the use of active harassment of whaling fleets. The effectiveness of this strategy is demonstrated by the efforts of Sea Shepherd in contributing to an early close to the 2011 Japanese whaling season in the Southern Ocean.¹¹⁰ Yet, effectiveness alone should not be the benchmark by which actions are evaluated, for surely war is a more directly effective means of accomplishing state objectives than diplomatic compromise, yet the international prohibition of aggressive war is well-established.¹¹¹ Even those who support interventionist activism should be aware that it comes with the price of threatening international rule of law.¹¹² Favored methods of interventionists include ramming whaling vessels, throwing butyric acid, disabling propellers, and boarding vessels.¹¹³ Such acts were only once held to constitute piracy as violations of UNCLOS in a Belgian case,¹¹⁴ so there is little precedent to prosecute Sea Shepherd for piracy.¹¹⁵ Furthermore, one of the gravest dangers of interventionists is that they believe they are “enforcing” existing international law by relying on non-binding declaratory resolutions, such as the World Charter for Nature, and giving it undue weight as some sort of binding instrument enforceable by private parties—apparently by any means necessary.¹¹⁶ Even assuming that interventionist activism is the most effective means to compel nations like Norway to comply with the ban on commercial whaling and that there is “global acquiescence towards the Sea Shepherds’ campaign”¹¹⁷ and other similar interventionist actions, the facial illegality of such approaches is diametrically opposed to the efforts of civilization to

Gorton’s parent company’s ownership stake in a Japanese company that had one of Japan’s infamous “research permits.” *Id.* at 208–09.

109. *See id.* at 208.

110. *See id.* at 209.

111. *See, e.g.*, U.N. Charter, arts. 2(4), 39, 41, 42.

112. *See* Moffa, *supra* note 83, at 209.

113. *See id.*

114. *Castle John and Nederlandse Stichting Sirius v. NV Mabeco and NV Parfin*, 77 I.L.R. 537, 537–41 (Belg. Ct. Cas. 1986).

115. *See* Moffa, *supra* note 83, at 210. Whether the United States should reexamine the issue and exercise universal jurisdiction to hold the Sea Shepherds accountable for acts of piracy in violation of the most ancient of international laws is beyond the scope of this Note.

116. *See id.*; *see also* World Charter for Nature, G.A. Res. 37/7, at 21–24, U.N. Doc. A/RES/37/7 (Oct. 28, 1982) (declaring the United Nations’ position on the importance of nature).

117. *See* Moffa, *supra* note 83, at 209.

be ruled by laws and not violence. The United States, as a world leader, should reject any argument to outsource its IWC compliance efforts to private ENGOs. Because there are no currently effective legal means available to the United States to compel Norway to end its commercial whaling, a new approach is needed where both the long-term environmental goals of the United States and the cultural values of Norway can both be respected.

IV. A PROPOSED SHIFT TO COOPERATIVE MECHANISMS

The best way for the United States to achieve its own long-term environmental and diplomatic policy goals is to work cooperatively with Norway to persuade the other members of the IWC to abandon the moratorium in favor of a quota standard that is culturally inclusive and supported by contemporary scientific data. The United States Congress seems completely opposed to commercial whaling, based on a recent resolution in which the U.S. House of Representatives proclaimed that the United States should “use all appropriate measures to end commercial whaling in all of its forms, including scientific and other special permit whaling”¹¹⁸ Such statements that refute even scientific purposes strongly indicate an unyielding preservationist attitude. Moreover, when the United States demands that Norway cease all whaling without giving anything in return, the preservationist attitude appears merely antagonistic and makes no gains for U.S. policy. The far better choice is for the United States to work cooperatively to achieve accountable international regulation for Norwegian whaling under the IWC.

As has been discussed so far, the methods used to insist on a total ban are ineffective and cause tension within the IWC.¹¹⁹ The Scientific Committee of the IWC caused great tension by reporting that some species are no longer in need of complete protection, which has prompted pro-whaling members to argue that the complete moratorium is contravening the basic principles of the ICRW.¹²⁰ Because the IWC is a voluntary international body with little or no enforcement power, continued insistence on the moratorium could lead to the dissolution of the IWC or withdrawal of pro-whaling members, some of whom have already begun to form other organizations.¹²¹

118. H.R. Con. Res. 350, 110th Cong. (2008).

119. See Kobayashi, *supra* note 9, at 200–01.

120. See *id.*

121. See Halverson, *supra* note 6, at 143–44. Iceland withdrew from the IWC in 1992 and formed the North Atlantic Marine Mammal Commission (NAMMCO); however, Norway did not contribute to its legitimacy, and Iceland subsequently reapplied for IWC membership in 2001. *Id.*

In addition, certain considerations make an agreement on a quota with Norway particularly appealing.¹²² First, cooperation is the only way to achieve compliance in a non-binding international legal scheme such as the IWC, as there simply is no enforcement mechanism, and straining pressure on sovereign states can result in their non-compliance or abandonment of the organization. Also, there are strong indications that the whaling industry in Norway is naturally declining,¹²³ so in the long-term the United States would have little to lose from supporting a lift of a ban in terms of environmental policy (assuming that the United States has the long-term goal of reducing catches to zero). Based on the failure to make Norway conform to preservationist values, a preservationist-focused strategy is not the best policy for the United States to pursue if it wants to bring Norway into “compliance” with the IWC. The United States must realize that whaling is a source of national pride for Norway—one that it views as a symbol of its identity and culture, even its sovereignty.¹²⁴ Norway has withstood threats and critics in the international community for three decades, so further attempts at coercion by the United States will likely be futile.

In 2006, another author of a law review article on this subject had “no doubt” that the momentum in the IWC had been shifting towards a lift on the moratorium in the near future,¹²⁵ yet seven years later, the moratorium remains in place. Change will not likely occur without the support of the United States, who is a key leader in the international community and within the IWC. Therefore, the United States should shift its policy from what seems like an antagonistic and preservationist mindset to a cooperative conservation mindset. As long as Norway objects to the moratorium, it is within its legal rights to continue to hunt whales, limited only by what its own scientists say is a sustainable quota amount. To be sure, Norway vigorously contends that its scientists do not lack integrity,¹²⁶ which implies that Norway believes it is able to self-regulate under safe scientific principles, even if the international community is

122. Whether to lift the ban on whaling will be an equally effective option in terms of getting compliance from Japan is beyond the scope of this Note because Japan has a different cultural background and interest in whaling than Norway.

123. The Norwegian government is subsidizing the whaling industry because it is becoming unprofitable due to rising costs and declining demand. *Whaling Unprofitable*, SOUTHLAND TIMES (NEW ZEALAND), June 20, 2009, at 3.

124. See Halverson, *supra* note 6, at 146–47.

125. See Kobayashi, *supra* note 9, at 219.

126. Press Release, Ministry of Foreign Affairs (Norway), Norway Protests Against Unfounded Attack (May 16, 2006), available at <http://www.regjeringen.no/en/archive/Stoltenbergs-2nd-Government/Ministry-of-Foreign-Affairs/Nyheter-ogpressemeldinger/pressemeldinger/2006/norway-protests-against-unfounded-attack.html?id=419934>.

unwilling to consider such an approach. Even assuming that Norway's research is unbiased, it is still wiser policy for the international regulation of whaling to be observed by neutral international observers because whales are a shared global resource. Thus, it is more prudent for the United States and Norway to compromise on a sustainable quota that can be governed by an international body.

V. CONCLUSION

Whaling is an ancient practice that has developed in modern times largely from efforts by Norwegians. Whaling continues today due to commercial uses and long-held Norwegian cultural values. After nearly driving whales to extinction, there was a need for regulation of commercial whaling. The failed attempts of industry and domestic regulations necessitated international regulation, culminating in the ICRW, which promulgated the IWC to regulate modern whaling. Under the United States' leadership, the IWC instituted a ban on all commercial whaling in 1982. Norway objected and stopped whaling for a time, but resumed in 1992 despite international criticism. Norway continues to whale today, in part, because it views whaling as an important aspect of its cultural identity. Unfortunately, efforts by the United States to urge Norway to accept the moratorium have failed. The failure of formal pressures with Japan—which ceased its objection but now whales more controversially by claiming the research permit exception—indicates that insisting Norway accept the moratorium will likewise be ineffective. Similarly, attempts by the United States to enforce its view of the IWC failed domestically because it relied in large part on the willingness of the United States to risk relations with an important trade partner by imposing economic sanctions, which may in itself violate international law regarding free trade and the seas. Finally, the more effective methods used by ENGOs and private interest groups, such as Sea Shepherd, are controversial, contrary to the rule of law, and may even amount to piracy. Because all of these methods have failed, the best option for the United States is to adopt a cooperative approach with Norway that is centered on reaching an agreeable quota that is scientifically sustainable. For in this way, the United States and the international community can hold Norway accountable to ensure that whales—a shared, valuable, and global resource—are not threatened.