

REVISING THE INTERNATIONAL CONVENTION ON THE REGULATION OF WHALING: A PROPOSAL TO END THE STALEMATE WITHIN THE INTERNATIONAL WHALING COMMISSION

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ABSTRACT

Due to the current stalemate between member countries within the International Whaling Commission (“ICW”), the organization has become an ineffective forum for discussion and decision-making regarding whaling regulation. This stalemate is predicated on tensions between anti-whaling and pro-whaling countries that have different visions of the IWC’s role and objectives. Although the problem has been recognized as a significant roadblock for the organization, little has been accomplished in addressing it, and the status quo remains intact. In order to overcome these tensions, and effectively regulate the hunting of whales, this paper proposes that the IWC 1) revisit and revise its stated purpose; 2) lift the ban on commercial whaling and develop a sustainable national quota system; 3) adopt non-compliance procedures and response mechanisms; and 4) create a formal mechanism to resolve disputes between member countries.

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INTRODUCTION

On May 31, 2010, Australia filed a suit against Japan in the International Court of Justice.¹ In its suit, Australia claimed that Japan's whaling activities are in violation of its obligations under the International Convention for the Regulation of Whaling ("ICRW").² In particular, Australia criticized Japan's scientific whaling program, and sought to stop Japanese whaling in the Antarctic, which the IWC declared a whale sanctuary in 1994.³ In explaining its course of action, Australia maintained that it could no longer depend on the IWC process to meet its enforcement demands.⁴ This recent turn of events illustrates the problems that have troubled the IWC for several years.⁵ The clash of whaling ideologies, coupled with the IWC's lack of enforcement authority, has resulted in the loss of member confidence in the organization, and the IWC's inability to further its policies.⁶ These challenges have long been felt by the IWC, and it has struggled to reconcile its original whaling purpose with the world's changing perception of whales. The recent Australian lawsuit indicates a breakdown within the IWC that must be addressed if the organization is to play a consequential role in the international community.

Since 1946, the International Whaling Commission has regulated the whaling activities of its member countries,⁷ but has proved itself to be a considerably ineffective international body.⁸ Its ineffectiveness is primarily attributable to tensions between member countries regarding

¹ Press Release, International Court of Justice, Australia Institutes Proceedings Against Japan for Alleged Breach of International Obligations Concerning Whales, at 1 (June 1, 2010), available at <http://www.icj-cij.org/docket/files/148/15953.pdf>.

² *Id.*

³ *Australia Accuses Japan of Commercial Whaling in World Court Lawsuit*, BBC WORLDWIDE MONITORING, June 1, 2010.

⁴ *Id.*

⁵ Howard S. Schiffman, *The International Whaling Commission: Challenges from Within and Without*, 10 ILSA J. INT'L & COMP. L. 367, 371 (2004) (noting that conflict between whaling and non-whaling members has been present since the 1980s).

⁶ See Mike Iliff, *Compromise in the IWC: Is it Possible or Desirable?*, 32 MARINE POL'Y 997, 997 (2008); see Mike Iliff, *Modernisation of the International Convention for the Regulation of Whaling*, 32 MARINE POL'Y 402, 402 (2008); Yui Nishi, *Dolphins, Whales, and the Future of the International Whaling Commission*, 33 HASTINGS INT'L & COMP. L. REV. 285, 293 (2010).

⁷ ELIZABETH R. DESOMBRE, THE GLOBAL ENVIRONMENT AND WORLD POLITICS 152 (2d ed. 2007).

⁸ Iliff, *Compromise in the IWC: Is it Possible or Desirable?*, *supra* note 6, at 997; Iliff, *Modernisation of the International Convention for the Regulation of Whaling*, *supra* note 6, at 402.

commercial whaling issues.⁹ The IWC has been described as “dysfunctional” in large part due to unproductive debate within the organization that amounts to nothing more than members’ repetition of their whaling positions, with little attempt to compromise.¹⁰ IWC policies and regulations seem to be ineffectual as member countries act in conformity with their own whaling positions and beliefs despite the organization’s regulations. For example, IWC anti-whaling member countries have succeeded in instituting a moratorium on commercial whaling, but many pro-whaling countries continue to whale.¹¹ The IWC lacks the ability to enforce its policies as members are given the opportunity to opt out of IWC regulations by giving notice, and the organization lacks enforcement mechanisms to compel member compliance.¹²

Pro-whaling discontent with the current moratorium on commercial whaling pervades IWC discussions,¹³ as well as accusations of member non-compliance.¹⁴ For example, scientific whaling is permitted under the whaling moratorium.¹⁵ However, many anti-whaling member countries believe that other members, such as Japan, use scientific whaling as an excuse to whale for commercial purposes.¹⁶ Thus far, the organization has not been able to resolve member disputes or concerns due to the stalemate between anti-whaling and pro-whaling members who refuse to compromise.¹⁷ This stalemate is recognized by those within the organization, and attempts have been made to resolve it, but with little success.¹⁸

⁹ Iliff, *Modernisation of the International Convention for the Regulation of Whaling*, *supra* note 6, at 403.

¹⁰ *See id.*

¹¹ *Id.* at 404.

¹² Nishi, *supra* note 6, at 293.

¹³ Schiffman, *supra* note 5, at 369, 371.

¹⁴ *See id.* at 371–72.

¹⁵ *Id.* at 371.

¹⁶ *See id.* at 371–72.

¹⁷ Iliff, *Modernisation of the International Convention for the Regulation of Whaling*, *supra* note 6, at 403; see Mike Iliff, *The Hogarth Initiative on the Future of the International Whaling Commission*, 34 MARINE POL’Y 360, 360 (2010) (discussing various proposals and initiatives that have attempted to reach a compromise between anti- and pro- whaling member countries, but have failed).

¹⁸ *See generally* Iliff, *The Hogarth Initiative on the Future of the International Whaling Commission*, *supra* note 17 (discussing various proposals and initiatives that have attempted to reach a compromise between anti- and pro- whaling member countries).

This paper proposes four changes the IWC should adopt in order to overcome the obstacles that impede the attainment of its goals and objectives. Those changes are: 1) revisiting and revising the official purpose and objectives of the IWC; 2) lifting the ban on commercial whaling and instituting sustainable national catch quotas for whaling countries; 3) adopting non-compliance procedures and response mechanisms; and 4) creating a means to resolve disputes between member countries. Part I of this article will give a brief history of the International Whaling Commission, an overview of its current state of affairs, and the challenges it faces. Part II will describe in detail the four elements of the proposal. This section will also demonstrate how other international environmental agreements and conventions have addressed issues of compliance and enforcement that may serve as a model for the IWC. Finally, this article will conclude with the assertion that if the IWC is to become an effective and useful organization, it must make considerable changes in order to effectively regulate whaling.

I. THE INTERNATIONAL WHALING COMMISSION: PAST AND PRESENT

A. BIRTH OF THE INTERNATIONAL WHALING COMMISSION

The IWC was created in 1946 through the International Convention for the Regulation of Whaling by whaling countries that sought to prevent unsustainable whaling practices in order to protect the whaling industry.¹⁹ This agreement was prompted by the depletion of many of the world's whale stocks due to overhunting by whaling nations,²⁰ and the failure of previous international whaling agreements.²¹ The ICRW states its purpose as "provid[ing] for the proper conservation of whale stocks and thus making possible the orderly development of the whaling industry."²² Fifteen countries with whaling interests signed the

¹⁹ Schiffman, *supra* note 5, at 368.

²⁰ *Id.*

²¹ Lisa Kobayashi, *Lifting the International Whaling Commission's Moratorium on Commercial Whaling as the Most Effective Global Regulation of Whaling*, 29 ENVTL. L. & POL'Y J. 177, 187 (2006).

²² International Convention for the Regulation of Whaling, Dec. 2, 1946, 161 U.N.T.S. 72, 338 U.N.T.S. 366, available at http://iwcoffice.org/_documents/commission/convention.pdf.

ICRW in 1946 including Australia, the United States, Norway, and Canada.²³

The ICRW created the IWC as a body to oversee and regulate member country whaling.²⁴ The IWC regulates through the “Schedule” that provides what types of whales may be caught, how many may be caught, and where member countries may hunt.²⁵ The Schedule is amended annually and must be approved by three-quarters of the IWC’s member countries.²⁶ Essentially, the IWC is charged with setting controls to regulate whaling activities, but leaves the implementation and enforcement of these regulations to the discretion of each member country. An important aspect of the ICRW is its “objection provisions” found in Article V §3.²⁷ These provisions state that a member country that has formally objected to an IWC regulation within ninety days of its adoption will not be bound by the regulation.²⁸

Prior to 1982, the IWC set general international whaling quotas annually through the Schedule to limit whale catches during the whaling season.²⁹ Countries participating in whale hunts were given the responsibility to report their catch numbers to the IWC, and whaling would cease once the reported numbers reached the quota limit.³⁰ Article V §2(c) of the ICRW explicitly prohibits the IWC from setting national quotas for member countries, nor can the IWC limit the number of ships used to whale.³¹ These international catch limits proved to be ineffective in both whale conservation and protecting the whaling industry.³² The international quota system created a free for all in which countries raced to hunting grounds to out hunt their competitors, and many countries provided inaccurate reports of their catches to the IWC.³³ This system resulted in an increase in the cost of whaling—whalers now had to invest

²³ International Convention for the Regulation of Whaling, Austl.-Arg.-Braz.-Can.-Chile-Fr.-Neth.-N.Z.-N. Ir-Nor.-Peru-S.Afr.-U.S.S.R.-U.K.-U.S., Dec. 2, 1946, available at http://iwcoffice.org/_documents/commission/convention_status.pdf.

²⁴ DESOMBRE, *supra* note 7, at 153.

²⁵ *Id.*

²⁶ *Id.*

²⁷ International Convention for the Regulation of Whaling, *supra* note 22, art. V § 3.

²⁸ *Id.*

²⁹ DESOMBRE, *supra* note 7, at 154.

³⁰ *Id.*

³¹ International Convention for the Regulation of Whaling, *supra* note 22, art. V § 2(c).

³² See DESOMBRE, *supra* note 7, at 154—55.

³³ *Id.*

in speedy ships that could catch whales faster than other whalers.³⁴ It is estimated that the cost of building a whaling fleet doubled by 1960.³⁵ These problems were aggravated by the fact that the IWC lacked the ability to monitor and enforce its regulations resulting in overfishing and the depletion of whale stocks.³⁶ The ineffectiveness of this system, along with changes in some countries' valuation of whales, and pressure from other international organizations, pushed the IWC to adopt a moratorium on commercial whaling in 1982.³⁷

B. THE MORATORIUM ON COMMERCIAL WHALING

A significant milestone for the IWC was the moratorium on commercial whaling adopted in 1982, and made effective in 1986.³⁸ The moratorium prohibits member countries from catching whales for commercial purposes by setting a zero catch quota for commercial whaling.³⁹ However, some whaling is still permissible. Article VIII of the ICRW allows hunting of whales for scientific research purposes.⁴⁰ Under this Article, member countries have the authority to grant special permits for whaling that are subject to terms and conditions imposed by the permit-granting country.⁴¹ The IWC has very little control over its members' permit programs. While member countries must submit permit program proposals to the IWC for review, the IWC maintains that "in accordance with the Convention, it is the member nation that ultimately decides whether or not to issue a permit, and this right overrides any other Commission regulation including the moratorium and sanctuaries."⁴² The IWC Schedule also allows aboriginal subsistence whaling for select groups, and sets specific quotas for the number and

³⁴ *Id.*

³⁵ *Id.*

³⁶ Kobayashi, *supra* note 21, at 193.

³⁷ *Id.*; DAVID DAY, THE WHALE WAR 29 (1987).

³⁸ DESOMBRE, *supra* note 7, at 155.

³⁹ International Whaling Commission, *International Convention for the Regulation of Whaling Schedule*, § III, ¶ 10(e) (1946), available at http://www.iwcoffice.org/_documents/commission/schedule.pdf.

⁴⁰ International Convention for the Regulation of Whaling, *supra* note 22, art. VIII.

⁴¹ *Id.*

⁴² *Scientific Permit Whaling*, INT'L. WHALING COMM'N. (June 22, 2010), <http://iwcoffice.org/conservation/permits.htm>.

type of whales each recognized group may catch.⁴³ Another important exception to the moratorium is the ninety day objection rule that allows member countries to opt out of adhering to any IWC regulation, as long as they issue an objection within ninety days of the regulation's adoption.⁴⁴ Under this rule, a member country may decline to participate in the moratorium and continue its whaling activities.⁴⁵

C. PRESENT STATE OF AFFAIRS

Currently eighty-nine countries are members of the IWC.⁴⁶ The membership of the IWC has undergone a significant change since its creation in 1946, and it is no longer an organization composed solely of countries with whaling industry interests.⁴⁷ Membership to the IWC is open to any country willing to adopt or adhere to the ICRW,⁴⁸ and many member countries, particularly newer members, have historically not shown an interest in whaling issues.⁴⁹ Furthermore, several members who entered the IWC as whaling countries have since left the whaling industry, and shifted towards a more conservation or preservation view toward whales.⁵⁰ This change in the membership, from exclusively whaling countries to a mixture of whaling and non-whaling countries, has resulted in a divide between members on many issues.⁵¹ These issues include the purpose of the organization, the commercial whaling moratorium, the present status of whale populations, aboriginal

⁴³ The International Whaling Commission, *supra* note 39, § III, ¶ 13; *Catch Limits for Aboriginal Subsistence Whaling*, INT'L. WHALING COMM'N. (Nov. 17, 2010), <http://www.iwcoffice.org/conservation/catches.htm#aborig>.

⁴⁴ International Convention for the Regulation of Whaling, *supra* note 22, art. V, ¶ 3(c).

⁴⁵ See DESOMBRE, *supra* note 7, at 156.

⁴⁶ *IWC Members and Commissioners*, INT'L. WHALING COMM'N. (Jan. 7, 2011), <http://www.iwcoffice.org/commission/members.htm>.

⁴⁷ DESOMBRE, *supra* note 7, at 155, 165.

⁴⁸ *Id.* at 165.

⁴⁹ Schiffman, *supra* note 5, at 371; Membership of historically non-whaling countries has been attributed to recruitment or bribing by member countries to increase support of their whaling position, intent to provide support of current member allies, to fulfill stipulations for promises of aid, and an interest in protecting marine species and ecosystems. See DESOMBRE, *supra* note 7, at 165; Kobayashi, *supra* note 21, at 208. At the IWC's 63rd annual meeting held in July 2011 the IWC responded to allegations that Japan was paying the membership dues of developing nations to gain their support by instituting a change in the financing structure of the organization that would make the sources of incoming funds more apparent. *Whale Sanctuary Off after Japan Walkout*, THE NEW ZEALAND HERALD, July 15, 2011.

⁵⁰ DESOMBRE, *supra* note 7, at 155.

⁵¹ Kobayashi, *supra* note 21, at 194.

subsistence whaling, whale sanctuaries, and the current whaling activities of member countries.⁵²

The divide in the organization has created two groups: anti- and pro-whaling members. Pro-whaling members want whales to be recognized as a resource with consumptive value.⁵³ As such, like any other resource, sustainable catch limits should be set, making the moratorium unnecessary to protect whale populations.⁵⁴ Pro-whaling members feel that their position is justified by the original intent and purpose of the ICRW, provisions that have never been amended.⁵⁵ Alternatively, anti-whaling members want to treat the IWC more like a conservation organization,⁵⁶ and most demand a moratorium on all whaling.⁵⁷ Many anti-whaling nations would also like to eliminate scientific research permits that are not within the control of the IWC.⁵⁸ They feel their position is justified due to their belief that most of the international community has adopted an anti-whaling stance.⁵⁹

Some member countries continue to whale, even though the moratorium remains in place. Norway voiced its objection to the moratorium when it was adopted and is not bound to it.⁶⁰ The country restricts its whaling to minke whales and sets its own annual quotas.⁶¹ Both Iceland and Japan currently have scientific permit programs that have been reviewed by the IWC.⁶² Japan has indicated that the objective

⁵² See generally Iliff, *Compromise in the IWC*, *supra* note 6 (comparing and contrasting the positions of anti- and pro-whaling countries); see Schiffman, *supra* note 5, at 371–73.

⁵³ Iliff, *Compromise in the IWC: Is it Possible or Desirable?*, *supra* note 6, at 997.

⁵⁴ *Id.*

⁵⁵ *Id.* at 998; The preamble of the ICRW states its purpose to be “to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry.” International Convention for the Regulation of Whaling, *supra* note 22.

⁵⁶ Kobayashi, *supra* note 21, at 201.

⁵⁷ Iliff, *Compromise in the IWC: Is it Possible or Desirable?*, *supra* note 6, at 999; Kobayashi, *supra* note 21, at 201.

⁵⁸ Iliff, *Modernisation of the International Convention for the Regulation of Whaling*, *supra* note 6, at 404; Iliff, *Compromise in the IWC: Is it Possible or Desirable?*, *supra* note 6, at 999.

⁵⁹ Iliff, *Compromise in the IWC: Is it Possible or Desirable?*, *supra* note 6, at 999.

⁶⁰ DESOMBRE, *supra* note 7, at 156.

⁶¹ *Id.*; Minke whales are the smallest of the baleen whale family and their populations are considered to be stable throughout most of its range. *Minke Whale* (Balaenoptera acutorostrata), NATIONAL OCEANIC AND ATMOSPHERE ADMINISTRATION OFFICE OF PROTECTED RESOURCES, <http://www.nmfs.noaa.gov/pr/species/mammals/cetaceans/minkewhale.htm#population> (last visited Mar. 2, 2011).

⁶² International Convention for the Regulation of Whaling, *supra* note 42; It should be noted that Iceland has not caught any whales under its scientific program since 2007. *Catches Taken under Scientific Permit*, INT'L. WHALING COMM'N. (Jan. 26, 2010), www.iwcoffice.org/conservation/table_permit.htm.

of its scientific permit program is to determine the population structure and feeding habits of whales in order to better understand how to manage whale stocks.⁶³ Similarly, Iceland has stated the purpose of its program is to understand the biology and feeding ecology of whales in Icelandic waters, in order to better to manage them.⁶⁴ Japan's whaling activities in particular have been a source of contention within in the IWC.⁶⁵ Scientific permits are not monitored by the IWC, and other member countries have accused Japan of whaling for commercial purposes under the guise of science.⁶⁶ It has been argued that recent technologies make killing whales for research purposes unnecessary as the data needed can be obtained from live whales.⁶⁷ Furthermore, Japan's research has limited value to the international scientific community because little of it is published in international peer reviewed journals, and much of the research published through the IWC is in Japanese.⁶⁸ This conflict with Japan intensified in May 2010 when Australia filed a suit against Japan in the International Court of Justice.⁶⁹ This suit is currently pending.⁷⁰ In the suit, Australia alleges that Japan's scientific permit program breaches the ICRW.⁷¹

This deadlock within the organization over issues regarding the moratorium and the general purpose and role of the IWC, has made the organization an ineffectual forum for constructive discussion among member states. This stalemate has long been recognized and many have attempted to address it. In 1997, Ireland proposed a compromise between anti-and pro-whaling nations referred to as the "Irish

⁶³ Nichola Raihani & Tim Clutton-Brock, *Call This Science?*, NEW SCIENTIST, June 20, 2009, at 22–23.

⁶⁴ *Scientific Permit Whaling*, *supra* note 42 (scroll down to "Iceland" heading).

⁶⁵ Schiffman, *supra* note 5, at 371–72.

⁶⁶ DESOMBRE, *supra* note 7, at 156; Schiffman, *supra* note 5, at 371–72.

⁶⁷ Raihani & Clutton-Brock, *supra* note 63, at 22–23.

⁶⁸ *Id.*

⁶⁹ Press Release No. 2010/23, Int'l Court of Justice, Australia Institutes Proceedings Against Japan for Alleged Breach of International Obligations Concerning Whaling (June 1, 2010) available at <http://www.icj-cij.org/docket/files/148/15953.pdf>.

⁷⁰ Press Release, Int'l Court of Justice, Whaling in Antarctic (Australia v. Japan) Fixing of Time-Limits for the Filing of Intial Pleadings (July 20, 2010), available at <http://www.icj-cij.org/docket/files/148/15979.pdf> (indicating that the ICJ has given Australia until May 9, 2011 to file a Memorial to the ICJ, and has given Japan until March 9, 2012 to file a Counter-Memorial with the ICJ).

⁷¹ International Court of Justice, *supra* note 69.

Proposal.”⁷² The Irish Proposal suggested that commercial whaling be allowed only in waters under national jurisdiction, and that whaling under scientific permits be phased out.⁷³ In 2004, Denmark submitted “The Chair’s Proposal for a Way Forward on the RMS” (Revised Management Scheme) to the IWC, which suggested allowing commercial whaling in waters of national jurisdiction for five years, and creating a code of conduct for scientific whaling permits.⁷⁴ Neither of these proposals were accepted by member countries or adopted by the IWC as no agreement could be reached.⁷⁵

More recently, on April 22, 2010, the Chair and Vice Chair of the IWC submitted the “Proposed Consensus Decision to Improve the Conservation of Whales from the Chair and Vice Chair of the Commission.”⁷⁶ The proposal noted the many challenges and obstacles the organization currently faces explaining that:

Very different views exist among the members. . . .some seek to eliminate all whaling other than indigenous subsistence whaling, and some support whaling provided it is sustainable. This difference has come to dominate the time and resources of the Commission at the expense of effective whale conservation and management.⁷⁷

The Chair and Vice Chair suggested a series of changes that would suspend scientific whaling permits, eliminate provisions of the ICRW that allow members to opt out of compliance, set sustainable catch limits (essentially lifting the moratorium), and provide the IWC with more control over member country whaling.⁷⁸ This proposal was discussed at the IWC annual meeting in Agadir, Morocco in June 2010.⁷⁹ No decision was made during this meeting on whether or not to adopt the

⁷² Iliff, *The Hogarth Initiative on the Future of the International Whaling Commission*, *supra* note 17, at 360.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 360–61.

⁷⁶ See generally *Proposed Consensus Decision to Improve the Conservation of Whales from the Chair and Vice-Chair of the Commission*, INT’L. WHALING COMM’N. (Apr. 28, 2010), available at http://iwoffice.org/_documents/commission/IWC62docs/62-7rev.pdf.

⁷⁷ *Id.* at 4.

⁷⁸ *Id.* at 5.

⁷⁹ 2010 Meeting, INT’L. WHALING COMM’N. (Nov. 11, 2010), <http://www.iwoffice.org/meetings/meeting2010.htm> (scroll to heading “Press Release-Day 3”).

proposal's provisions⁸⁰ due to a failure to reach a compromise on the issue of commercial whaling.⁸¹ Instead, members decided to set aside the proposal, and resume discussion regarding its suggestions at the next meeting.⁸² At the following IWC annual meeting held in St. Helier, Jersey in July 2011, the IWC resumed talks regarding the future of the organization and the previous year's proposal.⁸³ The members made little progress, but agreed to "encourage continued dialogue amongst its members on the future of the IWC; co-ordinate proposals or initiatives as widely as possible prior to submission; continue to co-operate in taking forward the Commission's work, notwithstanding some fundamental differences in views."⁸⁴

These attempts to address concerns within the organization, and reach a compromise between pro- and anti-whaling members, indicate a recognition that change needs to occur within the IWC in order to ensure it functions as an effective and collaborative body. The IWC's acceptance of the status quo and failure to work towards a compromise between its member countries perpetuates the current stalemate between the factions within the organization. Addressing this stalemate requires a radical change in which the 1946 ICRW is amended to reflect the substantial changes and transformations that have occurred within the organization and the international community. The nature of whaling, and the world's perception and valuation of whales, has undergone significant changes since 1946,⁸⁵ and the ICRW should be updated to reflect those changes.

To begin this process of change and renovation within the IWC, macro level issues such as the moratorium on commercial whaling, member compliance, and the purpose of the organization, should be addressed to pave the way for productive discussions regarding other issues of contention within the organization.

⁸⁰ *Id.*

⁸¹ Andrew Darby, *Whaling Impasse Divides Nations*, THE AGE (Melbourne, Australia), June 24, 2010, at 3.

⁸² *Id.*

⁸³ *2011 Meeting: Details for the International Whaling Commission 63rd Annual Meeting in 2011*, INT'L. WHALING COMM'N. (July, 28, 2011), <http://iwcoffice.org/meetings/meeting2011.htm>.

⁸⁴ *Id.*

⁸⁵ Kobayashi, *supra* note 21, at 194–96 (indicating the decline in the whaling industry and the changing attitudes toward whales due to the environmental and animal rights movement).

II. THE PROPOSAL

A. REVISITING AND REVISING THE PURPOSE AND OBJECTIVES OF THE ICRW AND IWC

At the core of the dispute between pro- and anti-whaling member countries is the question of what the nature and purpose of the IWC is. In reading the actual text of the ICRW, the pro-whaling argument seems correct in maintaining that the organization is meant to facilitate the harvesting of whales.⁸⁶ When written in 1946, the ICRW stated its purpose as “provid[ing] for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry.”⁸⁷ This written purpose seems to support the pro-whaling camp’s agenda, particularly since the text of the ICRW has not been amended to provide for a different purpose since its creation. Anti-whaling members argue however, that no matter what the written purpose of the ICRW, the changing times and global participation in the whale conservation movement signifies that the objectives and goals of the organization have changed.⁸⁸ Perhaps this contention is most supported by the fact that the IWC is no longer composed solely of countries participating in the whaling industry, but includes countries with conservation and preservation interests, and countries that have never whaled.⁸⁹ Regardless of which argument has the most merit, the purpose of the IWC must be amended to eliminate the confusion over its objectives and mission.

This task may be difficult as both anti-and pro-whaling member states have seemingly conflicting visions for how the IWC should operate.⁹⁰ However, both sides of the debate have much to gain from a compromise, and it may not be an impossible endeavor. As mentioned before, anti-whaling members favor a policy of whale conservation or preservation.⁹¹ However, such a policy would alienate many whaling countries who are firm in their pro-whaling stance. The IWC has already experienced a loss of membership due to some of its anti-whaling

⁸⁶ See Iliff, *Compromise in the IWC: Is It Possible or Desirable?*, *supra* note 6, at 998.

⁸⁷ International Convention for the Regulation of Whaling, *supra* note 22, at 1.

⁸⁸ See Iliff, *Compromise in the IWC: Is It Possible or Desirable?*, *supra* note 6, at 999.

⁸⁹ *Id.*; see DESOMBRE, *supra* note 7, at 156, 165.

⁹⁰ See Iliff, *Compromise in the IWC: Is It Possible or Desirable?*, *supra* note 6, at 999; see DESOMBRE, *supra* note 7, at 156.

⁹¹ See Iliff, *Compromise in the IWC: Is It Possible or Desirable?*, *supra* note 6, at 999; see DESOMBRE, *supra* note 7, at 156, 165.

regulations,⁹² and, periodically, Japan and Norway threaten to leave the IWC to start their own international whaling organization.⁹³ Thus, it is in the best interest of countries concerned with the survival of whale populations to compromise in such a way as to ensure that whaling nations remain in the IWC. It is much easier for the IWC to affect or influence a country's whaling behavior if that country is a member of the organization.

Conversely, pro-whaling countries have an interest in compromising with anti-whaling countries for other political and economic reasons. For example, Japan may find its political relationship with Australia strained due to the current lawsuit regarding its whaling activities.⁹⁴ Some countries, like the United States, a stalwart anti-whaling country, have shown no qualms over implementing trade sanctions to impose their views on other countries.⁹⁵ Whaling countries have also found themselves subject to public boycotting of their export products, unrelated to whaling, due to public outrage at their whaling activities.⁹⁶ Compromise within the organization may be difficult to obtain as the public can have strong emotional responses to issues regarding wildlife;⁹⁷ however, it has been accomplished before.

⁹² Iceland left the IWC in 1992 to protect its right to whale but rejoined again in 2001. DESEMBRE, *supra* note 7, at 156.

⁹³ *Japan Threatens New Whaling Body*, THE PRESS (Christchurch, New Zealand), Oct. 10, 2003, at 5; Kelly Olsen, *We'll Quit: Defiant Japan*, THE ADVERTISER, June 23, 2005, at 7; Paul Brown, *Norway 'Will Quit Whaling Body Unless Minke Kill Is Allowed'*, THE GUARDIAN (London), Apr. 17, 1993 (The Guardian Foreign Page), at 12.

⁹⁴ Hideki Kawasaki & Tetsu Okazaki, *Whaling Dispute Threatens Japan's Relations with Australia*, THE DAILY YOMIURI (Tokyo), Mar. 6, 2010, at 10.

⁹⁵ See Kobayashi, *supra* note 21, at 199 (stating that Japan withdrew its objection to the whaling moratorium to avoid punitive actions from the United States); DESEMBRE, *supra* note 7, at 155 (indicating that the United States' willingness to use economic threats to further its whaling position played a role in converting whaling members to non-whaling countries with an interest in whale conservations).

⁹⁶ Kobayashi, *supra* note 21, at 197.

⁹⁷ See Peter Mitchell, *Sheep Stouh Spills onto the Sidewalk*, THE COURIER-MAIL (Queensland, Australia), Dec. 17, 2004, at 15; see, e.g., *Protestors Get Down to Bare Essentials*, THE DOMINION POST (Wellington, New Zealand), Nov. 6, 2010, at 3.

1. THE CONVENTION ON INTERNATIONAL TRADE FOR ENDANGERED SPECIES OF WILD FLORA AND FAUNA AS AN EXAMPLE OF COMPROMISE

The Convention on International Trade for Endangered Species of Wild Flora and Fauna (“CITES”) provides an example of the compromise that is possible when parties agree to regulate wildlife they individually value and perceive differently. CITES is an international agreement meant to safeguard certain species from endangerment due to international trade.⁹⁸ It is one of the largest conservation agreements, and is currently comprised of 175 member countries.⁹⁹ CITES implements a licensing system for the import and export of selected species of wildlife.¹⁰⁰ Species that are covered by the agreement are included in three appendices.¹⁰¹ Appendix I covers all species that have been determined to be threatened with extinction, and licenses for the import or export of these species are rarely allowed.¹⁰² Appendix II covers species that are not necessarily threatened, but require trade regulation for protection.¹⁰³ Finally, Appendix III covers species that are protected by the national laws of at least one country that has requested that other parties assist and cooperate in controlling trade in that species.¹⁰⁴

⁹⁸ What is CITES?, CONVENTION ON INT'L TRADE FOR ENDANGERED SPECIES OF WILD FLORA AND FAUNA, <http://www.cites.org/eng/disc/what.php> (last visited Feb. 23, 2012).

⁹⁹ *Id.*

¹⁰⁰ How CITES Works, CONVENTION ON INT'L TRADE FOR ENDANGERED SPECIES OF WILD FLORA & FAUNA, <http://www.cites.org/eng/disc/how.php> (last visited Jan. 16, 2011).

¹⁰¹ *Id.*

¹⁰² *Id.*; Examples of Appendix I species include the Asiatic Lion (*Panthera leo persica*), Giant Panda (*Ailuropoda melanoleuca*), and Great Green Macaw (*Ara ambiguus*). CONVENTION ON INT'L TRADE FOR ENDANGERED SPECIES OF WILD FLORA & FAUNA, APPENDICES I, II, & III VALID FROM 14 OCT. 2010, at 6, 8, 21, available at www.cites.org/eng/resources/pub/checklist11/Appendices.pdf.

¹⁰³ CONVENTION ON INT'L TRADE FOR ENDANGERED SPECIES OF WILD FLORA & FAUNA, *supra* note 101; Examples of Appendix II species include the Hippopotamus (*Hippopotamus amphibious*), Hummingbird (Trochilidae), and Flamingo (Phoenicopteridae). CONVENTION ON INT'L TRADE FOR ENDANGERED SPECIES OF WILD FLORA AND FAUNA, APPENDICES I, II, AND III VALID FROM 14 OCTOBER 2010, *supra* note 103, at 5, 15, 16.

¹⁰⁴ CONVENTION ON INT'L TRADE FOR ENDANGERED SPECIES OF WILD FLORA & FAUNA, *supra* note 101. Examples of Appendix III species include the Snapping Turtle (*Macrochelys temminckii*)(requested for listing by the United States), Red-Breasted Toucan (*Ramphastos dicolorus*)(requested for listing by Argentina), and Gekos (*Hoplodactylus*) (requested for listing by New Zealand). CONVENTION ON INT'L TRADE FOR ENDANGERED SPECIES OF WILD FLORA & FAUNA, APPENDICES I, II, & III VALID FROM 14 OCTOBER 2010, *supra* note 103, at 25, 20, 23.

Under CITES, parties agree that there are some species of wildlife that require protection to prevent their *over* exploitation;¹⁰⁵ however, the agreement does not prohibit countries from the commercial use and trade of all listed species.¹⁰⁶ Trade in Appendix II and III species in particular is not absolutely banned by CITES.¹⁰⁷ Under this international agreement, there can be a situation in which international trade in a particular species is permitted under the agreement, but prohibited in the jurisdiction of certain parties who assign non-use value to the species. For example, all European Union countries are parties to CITES,¹⁰⁸ and are governed by the European Union Habitat Directive (formally known as Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora), which requires EU countries to implement protections for certain species and their habitats.¹⁰⁹ Under this legislation, several species of dolphin are protected from capture and killing.¹¹⁰ Under CITES, most species of dolphin are listed under Appendix II.¹¹¹ As CITES does not prohibit the commercial use or international trade of Appendix II species, some parties to the agreement engage in dolphin hunting and trade.¹¹² CITES parties, such as Japan and the Solomon Islands, continue to hunt and export dolphins and dolphin products, which are prohibited activities in the jurisdictions of

¹⁰⁵ CONVENTION ON INT'L TRADE FOR ENDANGERED SPECIES OF WILD FLORA & FAUNA, TEXT OF THE CONVENTION 1 (1979), available at www.cites.org/eng/disc/E-Text.pdf.

¹⁰⁶ See CONVENTION ON INT'L TRADE FOR ENDANGERED SPECIES OF WILD FLORA & FAUNA, *supra* note 101.

¹⁰⁷ *See id.*

¹⁰⁸ Compare List of Contracting Parties, CONVENTION ON INT'L TRADE FOR ENDANGERED SPECIES OF WILD FLORA & FAUNA, <http://www.cites.org/eng/disc/parties/alphabet.php> (last visited Feb. 23, 2012), with Countries, EUROPEAN UNION, http://europa.eu/about-eu/member-countries/index_en.htm (last visited Mar. 2, 2011) (showing that all EU countries are members of CITES).

¹⁰⁹ *The Habitats Directive*, EUROPEAN COMMISSION, http://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm (last visited Mar. 9, 2012).

¹¹⁰ Species Assessments, JOINT NATURE CONSERVATION COMMITTEE, <http://www.jncc.gov.uk/page-4063> (last visited Mar. 2, 2011); Council Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora, at 12, 39, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1992:206:0007:0050:EN:PDF>.

¹¹¹ Convention on Int'l Trade for Endangered Species of Wild Flora & Fauna, Appendices I, II, & III Valid from 14 Oct. 2010, *supra* note 103.

¹¹² International trade in Appendix-II species may be authorized by the granting of an export permit or re-export certificate. See The CITES Appendices, CONVENTION ON THE INT'L TRADE IN ENDANGERED SPECIES OF WILD FLORA & FAUNA, <http://www.cites.org/eng/app/index.php> (last visited Feb. 28, 2012).

other CITES parties.¹¹³ Thus, under this convention, parties that value dolphins differently have entered into an agreement that takes certain steps to protect the animal without imposing a particular ideology on any party. The EU, which gives dolphins non-consumptive value, may impose regulations within its jurisdiction to prohibit dolphin hunting, import, and export. Countries, such as Japan, that give dolphins consumptive value, may participate in the capture and international trade of dolphins and dolphin products while adhering to certain limitations imposed on them by CITES.

Though the parties to CITES may treat and value certain species of wildlife differently, they have still been able to participate in an international agreement with the common goal of protecting vulnerable wildlife. If IWC member countries can similarly find a common goal and refrain from the impossible task of forcing their whaling beliefs on other members, revising the purpose of the ICRW is possible.

2. DRAFTING A NEW ICRW PURPOSE TO ENCOMPASSES ASPECTS OF BOTH WHALING POSITIONS

Given the diverse membership of the IWC, amending the written purpose of the ICRW to create a completely conservation-minded organization or an organization focused entirely on promoting the whaling industry, is probably neither reasonable nor realistic. However, a compromise could produce an IWC purpose that includes the protection of whale populations from endangerment while providing for sustainable hunting. Currently, the preamble of the ICRW reads: “[T]he Governments whose duly authorized representatives have subscribed hereto... Having decided to conclude a convention for the proper conservation of whales stocks and thus make possible the orderly development of the whaling industry; Have agreed as follows....”¹¹⁴ In order to reflect a compromise between pro- and anti-whaling nations, the preamble of the ICRW should remove the reference to whaling industry development, and instead recognize a range of the use values that includes whaling but is not limited to it. For example, a new preamble might read: “[T]he Governments whose duly authorized representatives

¹¹³ It is estimated that Japan catches 22,000 small cetaceans per year, including several types of dolphins. Nishi, *supra* note 6, at 285, 290. See Minoru Matsutani, *Dolphins from Taiji Sold to Egypt, Saudi Arabia*, JAPAN TIMES, Oct. 9, 2010; see Grace Chua, *Animal Activists Decry Need to Import Wild Dolphins*, STRAIT TIMES (Singapore), Dec. 27, 2008.

¹¹⁴ International Convention for the Regulation of Whaling, *supra* note 22.

have subscribed hereto. . . Having decided to conclude a convention for the proper conservation of whale stocks and thus make possible the social, cultural, consumptive, and non-consumptive use of whales. . .”

Such a purpose demonstrates a compromise as it blends aspects of the pro-and anti-whaling positions, while at the same time neither position monopolizes the purpose. Coming to this compromise, and creating a purpose all member countries can agree on would undoubtedly be a difficult task. Amending the purpose may be further complicated by the fact that the ICRW contains no provisions for a procedure or process in which to amend its Articles.¹¹⁵ Due to the agreement’s silence regarding amendment procedures, modification of the convention can only be achieved by a consensus of member countries through a diplomatic conference.¹¹⁶ Questions and potential problems still remain with this solution. Obtaining a consensus among IWC member countries has proved to be difficult on many occasions,¹¹⁷ and amending the ICRW may present a considerable challenge. These are matters that must be addressed before the IWC can take steps to amend its purpose to create a compromise between pro- and anti- whaling member countries.

3. AMENDING THE VOTING PROCESS TO FACILITATE COMPROMISE BETWEEN PRO- AND ANTI- WHALING FACTIONS

Reaching a compromise or consensus regarding the purpose of the ICRW may be especially difficult with the current IWC voting methods used in the organization’s decision- making process. Article III of the ICRW states that decisions made by the IWC require a majority vote, however Article V actions, which involve making amendments to the Schedule, require a three-quarters majority vote.¹¹⁸ These voting methods do not facilitate compromise because they give the controlling faction within the organization more influence over decision- making. For example, if there are more anti-whaling countries within the IWC, under the current voting method, decisions will reflect the anti-whaling position. To achieve a compromise between member whaling ideologies,

¹¹⁵ Iliff, *Modernisation of the International Convention for the Regulation of Whaling*, *supra* note 6, at 403.

¹¹⁶ *Id.*

¹¹⁷ *Supra* Section I.C., pp. 12—14.

¹¹⁸ International Convention for the Regulation of Whaling, *supra* note 22, art. III, art. V.

changes to the voting process are imperative to ensuring that both factions are represented in decision-making.

A possible solution to this issue of voting is the implementation of a multicameral process that would create three or more decision-making chambers within the IWC. A 2003 study of multicameral systems in international organizations determined that multicameralism can result in more effective policy making than unicameralism when the chambers are divided into key groups with different interests.¹¹⁹ In particular, multicameralism was found to produce policies that were supported by enough members to ensure actual implementation and member adherence.¹²⁰

An example of a multicameral decision-making process is the quadricameral voting system of the International Seabed Authority (“ISA”).¹²¹ The ISA is an international body composed of over 150 member countries and works to monitor and regulate the deep-sea floor activities of its members that occur outside of national jurisdictions.¹²² Decisions within the organization are primarily made by a council composed of thirty-six members, and that council is divided into four chambers that represent particular member interests.¹²³ Member countries designated as the largest consumers of sea-bed minerals elect four representatives to represent them in one chamber. The second chamber contains four members that were elected by member countries with the most investment in deep-sea mining. The third chamber has four members that were elected by the largest mineral producing member countries. Lastly, the fourth chamber is composed of six members elected by developing member countries, and eighteen members that are included to ensure geographical representation.¹²⁴ Council decisions require a two-thirds majority of council members as long as a decision is not opposed by a majority in any one of the four chambers.¹²⁵

Like the ISA, there are distinct interest groups within the IWC, and a multicameral system could be helpful in ensuring that each group

¹¹⁹ Thomas Bräuninger, *When Simple Voting Doesn't Work: Multicameral Systems for the Representation and Aggregation of Interests in International Organizations*, 33 BRIT. J. POL. SCI. 681, 701 (2003).

¹²⁰ See *id.*

¹²¹ *Id.* at 688.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 688–89.

¹²⁵ *Id.* at 689.

is represented in the decision making process. Using the ISA as a model, the IWC could create its own three-chambered council that would receive primary decision making authority for the organization. The first chamber could contain members representing pro-whaling interests, the second chamber anti-whaling interests, and the third chamber could consist of developing nations and member countries that would provide geographical diversity. IWC members would be identified as belonging to a particular interest group and would be able to vote for countries within their group to represent them in one of the chambers. Given the proportion of council members to ISA member countries (thirty-six members on the council represent 161 member countries),¹²⁶ the IWC could use a similar proportion and elect twenty-one council members to represent the IWC's eighty-nine member countries. The anti- and pro-whaling chambers should be equal in number with the largest chamber being the third that is composed of developing nations and countries that would provide geographical diversity. This voting scheme could require a simple majority in each chamber, or it could implement a system more like the ISA which requires a two-thirds majority unless the decision is opposed by a majority in any one chamber.¹²⁷

Such a voting system would ensure that the different whaling interests are represented in a way that the current unicameral process currently used by the IWC cannot.¹²⁸ The creation of a tricameral process within the IWC is likely to facilitate the compromise needed to create a new IWC purpose, but should also be incorporated in the ICRW to be used in all IWC decision-making. If multicameralism can produce policies that are more likely to be implemented and accepted by member countries,¹²⁹ it may help eliminate the stalemate within the IWC.

¹²⁶ Bräuninger, *supra* note 119, at 688; *Member States*, INTERNATIONAL SEABED AUTHORITY, <http://www.isa.org.jm/en/about/members/states> (last visited Mar. 2, 2011).

¹²⁷ Bräuninger, *supra* note 119, at 689.

¹²⁸ See *id.* at 697.

¹²⁹ See *id.* at 701.

B. LIFTING THE BAN ON COMMERCIAL WHALING AND CREATING A WHALING POLICY THAT REPRESENTS AND RESPECTS BOTH THE ANTI- AND PRO- POSITIONS

The whaling issue often translates to issues of culture and society. The differences in countries' geography and characteristics may explain why whaling is abhorrent to some countries and accepted in others.¹³⁰ Most whaling countries, such as Japan, Norway, and Iceland rely on their fishing industries both for feeding their populations and as a source of income through exports.¹³¹ Whales have served as a form of sustenance and income for these whaling countries in the past, and are seen as a potential solution to possible future food shortages.¹³² Conversely, countries that oppose whaling tend to be those that rely on red meat as a major source of protein.¹³³ These countries, such as the United States, Great Britain, and Australia, whaled in the past primarily for oil, but as technological advances produced cheaper alternatives to whale oil, they ceased whaling.¹³⁴ Therefore, for many non-whaling countries, whales do not have the consumptive value they do for other countries.¹³⁵ History suggests that anti-and pro-whaling member countries' whaling positions are attributable to the consumptive value whales have historically held in their respective countries.

1. LIFTING THE MORATORIUM TO RECOGNIZE THE DIVERSE SET OF VALUES WITHIN THE IWC

The IWC recognizes that whaling has cultural and social significance. While whaling for commercial purposes has been banned, aboriginal subsistence whaling is allowed for certain recognized groups who are given whaling quotas.¹³⁶ Whaling countries such as Japan, Iceland, and Norway argue that whaling is embedded in their culture as much as it is for the Inuits or Makah who are allowed to hunt whales as

¹³⁰ Kobayashi, *supra* note 21, at 195; Iliff, *Compromise in the IWC: Is it possible or desirable?*, *supra* note 6, at 997.

¹³¹ Iliff, *Compromise in the IWC: Is it Possible or Desirable?*, *supra* note 6, at 997.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ See Nishi, *supra* note 6, at 288; Kobayashi, *supra* note 21, at 194.

¹³⁵ See Iliff, *Compromise in the IWC: Is it Possible or Desirable?*, *supra* note 6, at 997.

¹³⁶ Kobayashi, *supra* note 21, at 199.

aboriginal subsistence whalers.¹³⁷ They argue that the moratorium discriminates against their culture and customs. On the other hand, it should be acknowledged that many anti-whaling countries have developed a cultural norm that values the preservation of certain species of wildlife, such as whales, that is just as valid. Thus, it is evident that the IWC is an organization composed of members who have a common purpose of regulating an entity they all perceive differently. The source of many of the IWC's problems is that members are not willing to recognize other points of view.¹³⁸ As Mike Iliff, a scholar who has written extensively on the IWC, indicates:

The pro-whalers appear to be incapable of grasping that the anti-whaling case rests as much on animal rights issues as it does on stock sustainability, while the anti-whalers refuse to acknowledge the pro-whaling concern for the principle of food security. Until these issues are acknowledged and discussed, the IWC will remain a battle ground, and largely ineffective for either position.¹³⁹

The current moratorium reflects and supports the anti-whaling position and agenda. It is a policy that alienates pro-whaling member countries who perceive it as a declaration that anti-whaling beliefs are more valid than pro-whaling beliefs.¹⁴⁰ Consequently, pro-whaling members feel compelled to fervently defend their position, while anti-whaling members strive to convince their counterparts that the moratorium is necessary, with no one working towards a compromise. In order to create an environment within the organization that can contribute to more productive discussion between IWC members, the ban on commercial whaling should be lifted. Eliminating the moratorium would signify an acceptance that the organization is composed of member countries with diverse sets of beliefs and values in regards to whaling.

¹³⁷ Diana Wagner, *Competing Cultural Interests in the Whaling Debate: An Exception to the Universality of the Right to Culture*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 831, 846 (2004).

¹³⁸ Iliff, *Modernisation of the International Convention for the Regulation of Whaling*, *supra* note 6, at 402.

¹³⁹ *Id.* at 403.

¹⁴⁰ Wagner, *supra* note 137, at 846.

2. DEVELOPING A NATIONAL CATCH QUOTA SYSTEM AS A POLICY THAT EFFECTIVELY REGULATES WHALING AND RESPECTS CULTURAL NORMS

There is one point on which all member countries agree: all members want to protect whales from endangerment and extinction.¹⁴¹ Therefore, the IWC should start by lifting the ban on commercial whaling, and develop a policy that reflects this common goal. Whaling activity could be limited by allotting national sustainable catch quotas to member countries. Such a system would reflect the agreed upon goal of protecting whale populations from endangerment, respect the varying cultural norms and beliefs that exist within the organization, and begin restoring trust between member countries. This is not an easy solution, as a proposal of national quotas is sure to spark debate on how quota limits should be determined, and what “sustainable” means. It is, however, a system that is employed by other international organizations such as the International Commission for the Conservation of Atlantic Tuna (“ICCAT”) and the Commission for the Conservation of Southern Bluefin Tuna (“CCSBT”), both of which set catch limits for their member countries.¹⁴² These organizations do face obstacles in regards to their national quota systems, and are often criticized as setting ineffective catch limits that contribute to overfishing.¹⁴³

The IWC may be in a better position to create an effective quota system than other international organizations, due to the internal conflict between pro- and anti- whaling positions. In organizations such as ICCAT and CCSBT, the member countries all have similar consumption uses and values for the regulated fish.¹⁴⁴ This makes it easy for the organizations to set high catch limits, as Atlantic and Southern Bluefin Tuna are very valuable and members want to maximize their share of the

¹⁴¹ See Iliff, *Compromise in the IWC: Is it Possible or Desirable?*, *supra* note 6, at 999 (indicating anti-whaling members want to preserve whales and pro-whaling members want to conserve whales for consumptive use, neither of these goals can be met if whales endangered or extinct).

¹⁴² D.G. Webster, *The Irony and Exclusivity of Atlantic Bluefin Tuna Management*, 35 MARINE POL'Y 249, 250 (2011); Commission for the Conservation of Southern Bluefin Tuna, *Management of SBT*, <http://www.ccsbt.org/docs/management.html> (last visited Mar. 2, 2011).

¹⁴³ Webster, *supra* note 142, at 251; Anjali Nayar, *Bluefin Tuna Regulators Under Pressure*, NATURE NEWS (Nov. 10, 2010), <http://www.nature.com/news/2010/101110/full/news.2010.600.html>; *Overfishing to ‘Wipe out Bluefin Tuna in 3 Years’*, ABC NEWS (Apr. 14, 2009), <http://www.abc.net.au/news/stories/2009/04/14/2542359.htm>.

¹⁴⁴ See David Suzuki & Dr. Faisal Moola, *Is There a Cure for the World’s Endangered Bluefin Tuna?*, THE TIMES & TRANSCRIPT (NEW BRUNSWICK), Jan. 22, 2011, at D7 (indicating the Bluefin tuna is a popular commodity all over the world).

resource.¹⁴⁵ This is not the case for the IWC whose members have various and conflicting values and uses for whales. These conflicting perspectives have been the source of much contention, but may work in the organization's favor in this regard.

Where other organizations have failed to implement sustainable catch limits,¹⁴⁶ the IWC's internal struggle to create a balance between consumptive and conservation/preservation goals may result in conservative catch limits that effectively protect whale populations. Anti-whaling members are sure to serve as a check on quota setting, and their presence in the organization will safeguard the IWC from setting catch limits that would result in overfishing.

Another challenge a national quota system presents is the monitoring of member catches, and compelling member compliance. When quotas were used in the past, members reported their own catches, and this self-reporting system was often abused.¹⁴⁷ Other methods of monitoring have been tried, but were also subject to abuse and were abandoned.¹⁴⁸ Reporting and compliance challenges are valid concerns, but are not so insurmountable as to rule out a national quota system. Potential solutions to monitoring and compliance challenges are discussed later on.

Lifting the ban on commercial whaling, and instituting a national quota system, would indicate to IWC members that the organization is aware and tolerant of the varying social and cultural relationships to whales. It may also prove to be a more effective system. The moratorium has not ended whaling, and much of the whaling activity among IWC members is not directly regulated by the organization.¹⁴⁹ A system that mandates sustainable quotas could effectively limit whaling activity by giving the IWC more control over whaling activities. Moreover, a new

¹⁴⁵ *Id.*

¹⁴⁶ See Webster, *supra* note 142, at 251; Nayar, *supra* note 143.

¹⁴⁷ UNITED NATIONS ENV'T. PROGRAMME, COMPLIANCE MECHANISMS UNDER SELECTED MULTILATERAL ENVIRONMENTAL AGREEMENTS 87 (2010), available at <http://www.unep.org/dec/docs/Compliance%20mechanisms%20under%20selected%20MEAs.pdf>.

¹⁴⁸ *Id.*

¹⁴⁹ Japan is whaling under its scientific permit program that is subject to the conditions that Japan decides on, not the IWC. Under the 90 day objection provision of the ICRW, Norway has opted out of the moratorium and continues to whale under self-imposed regulations. DESOMBRE, *supra* note 7, at 156.

policy that allows commercial whaling could attract new membership from whaling countries that do not currently belong to the IWC.¹⁵⁰

3. SHIFTING THE DISCUSSION FROM WHALING TO OTHER ISSUES OF WHALE CONSERVATION THAT IWC MEMBERS CAN AGREE ON

This issue of whaling has been the central focus of the IWC and its members, and a topic of much contention.¹⁵¹ During this hot debate over commercial whaling, other factors that influence the livelihood of whales have received little attention.¹⁵² Factors such as pollution, underwater noise, bycatch mortality,¹⁵³ ship strikes, and climate change all affect whale species and could probably be addressed by IWC members with more ease and agreement than the commercial whaling issue.¹⁵⁴

Nothing in the ICRW, as it is currently written, suggests that the IWC can *only* protect whale populations through the regulation of whaling. The preamble of the ICRW states that the purpose of the convention is to conserve whale stocks,¹⁵⁵ a goal that can be accomplished by addressing other issues that affect whales. It may in fact be more productive if IWC members recognize they cannot agree on the whaling issue but can agree that there are other dangers to the stability of whale populations. The organization can then focus its efforts on creating policies that address pollution, climate change, or whale deaths due to ship collisions. To facilitate this sort of discussion within the IWC, the ICRW should be amended to create provisions that explicitly mandate that the organization address issues that go beyond whaling.

¹⁵⁰ Canada left the IWC in 1982 when the moratorium on commercial whaling was instituted. Mark Derr, *To Whale or Not to Whale*, THE ATLANTIC MONTHLY–DIGITAL EDITION (Oct. 1997), available at <http://www.theatlantic.com/past/docs/issues/97oct/whale.htm>. Indonesia, the Philippines, and Tonga are all countries that hunt whales but are not members of the IWC. Nishi, *supra* note 6, at 299.

¹⁵¹ See *supra* Part I.C.

¹⁵² Iliff, *Compromise in the IWC: Is it Possible or Desirable?*, *supra* note 6, at 1001.

¹⁵³ The term “bycatch” refers to the unintended capture of a species that occurs when attempting to harvest another different species. See *What is Bycatch?*, NATIONAL OCEAN & ATMOSPHERIC ADMIN., http://www.nmfs.noaa.gov/by_catch/bycatch_what.htm (last visited Sept. 9, 2011). For example, dolphins who are captured and killed in nets used to harvest tuna are considered to be bycatch.

¹⁵⁴ Iliff, *Compromise in the IWC: Is it Possible or Desirable?*, *supra* note 6, at 1001.

¹⁵⁵ The preamble states that the ICRW is meant to provide for the conservation of whale stocks, a goal that can be accomplished by addressing other. International Convention for the Regulation of Whaling, *supra* note 22.

Eliminating the moratorium and implementing a national catch quota regime would reflect the reality that members cannot agree as to whether banning whaling is necessary for protecting whale populations. The IWC would then be able to address other marine issues that affect whales, but are less controversial than the whaling debate.

C. ADOPTING NON-COMPLIANCE PROCEDURES AND MECHANISMS

Non-compliance procedures within an international agreement provide a non-adversarial method to identify the compliance difficulties of member countries, and supply the assistance needed to achieve better compliance.¹⁵⁶ Non-compliance response mechanisms can provide member countries with incentives and assistance to promote compliance, or penalties to punish violations of an agreement.¹⁵⁷ Currently the ICRW does not have any non-compliance procedures or response mechanisms in its provisions.¹⁵⁸ However, some member countries take independent action by exerting political pressure on other members they perceive as being non-compliant.¹⁵⁹

A system that makes an agreement's members accountable for failing to comply with its provisions could be paramount in making an organization like the IWC more effective. Such a system may be particularly important if the IWC lifts the ban on commercial whaling and implements a national catch quota scheme. IWC members have a history of abusing quotas and reporting mechanisms,¹⁶⁰ and there is currently no formal system that ensures members conform to the organization's policies.¹⁶¹ The absence of procedures that specifically address IWC violations likely contributes to the divide in the organization, and fuels distrust among member countries. This is apparent in the ongoing debate over the compliance of certain member countries, which is present in much of the organization's discussions.¹⁶² Clear and specific non-compliance procedures and mechanisms could address compliance concerns in a manner that does not contribute to

¹⁵⁶ UNITED NATIONS ENV'T. PROGRAMME, *supra* note 147, at 10–11.

¹⁵⁷ *Id.* at 11.

¹⁵⁸ *Id.* at 87.

¹⁵⁹ *Id.* at 86–87.

¹⁶⁰ *Id.* at 87.

¹⁶¹ See *id.*

¹⁶² Schiffman, *supra* note 5, at 371—72 (indicating the organization's concerns over Japan's scientific whaling activities).

lengthy and unproductive discussions that amount to nothing more than finger-pointing. Creating a system to address compliance issues would also be an important step to molding the IWC into an organization with the ability to effectively influence its members' whaling activities.

1. LOOKING TO OTHER INTERNATIONAL ENVIRONMENTAL AGREEMENTS AS MODELS FOR ADDRESSING IWC MEMBER NON- COMPLIANCE

The Montreal Protocol on Substances that Deplete the Ozone Layer ("Montreal Protocol") is described as one of the most successful international environmental agreements,¹⁶³ and may serve as a good model for the implementation of non-compliance procedures and mechanisms. The agreement phases out the production and consumption of substances that affect the ozone layer.¹⁶⁴ The Montreal Protocol provides a system in which any member may report Protocol violations to the organization's Implementation Committee.¹⁶⁵ The Implementation Committee provides the accused member country with notice of the allegation, allows that member country to respond, considers the alleged violation, and makes a recommendation at the annual Meeting of the Parties.¹⁶⁶ The Meeting of the Parties may then authorize non-compliance response mechanisms to impose on the offending party.¹⁶⁷

As discussed previously, non-compliance response mechanisms can provide incentives to comply with the terms of an international agreement.¹⁶⁸ International agreements and organizations, such as the Montreal Protocol, and the Kyoto Protocol to the United Nations Framework Convention on Climate Change ("Kyoto Protocol"),¹⁶⁹ provide technical and financial assistance as a non-compliance response

¹⁶³ Anne Lucia Plein, *A Story Between Success and Challenge—20th Anniversary of the Montreal Protocol*, 11 N.Z. J. ENVT'L. L. 67, 96 (2007).

¹⁶⁴ UNITED NATIONS ENV'T. PROGRAMME OZONE SECRETARIAT, *Montreal Protocol*, http://unep.org/ozone/Treaties_and_Ratification/2B_montreal_protocol.asp (last visited Feb. 18, 2012).

¹⁶⁵ UNITED NATIONS ENV'T. PROGRAMME, *supra* note 147, at 75.

¹⁶⁶ *Id.*

¹⁶⁷ UNITED NATIONS ENV'T PROGRAMME, *supra* note 147, at 75.

¹⁶⁸ *Id.* at 11.

¹⁶⁹ The Kyoto Protocol is an international agreement that was adopted on December 11, 1997 and became effective February 16, 2005. The Protocol sets binding greenhouse gas emission targets for its member countries. These targets amount to a 5 percent reduction in emissions from 1990 levels. *Kyoto Protocol*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/kyoto_protocol/items/2830.php (last visited Jan. 16, 2011).

mechanism to help parties who have failed to reach the goals or mandates of the international agreement, achieve compliance.¹⁷⁰ The use of technical and financial assistance may not be as useful to the IWC as it is to the Montreal and Kyoto Protocols. These organizations limit their members' emissions of certain pollutants,¹⁷¹ and the reduction of these emissions can be both costly and highly technical. The nature of the IWC is different in that it does not impose regulations on its members that require these types of financial and technical resources.

International agreements also make use of penalties as non-compliance response mechanisms. Under the Montreal Protocol, a violation of the Protocol's terms could result in the suspension of the offending party's rights and privileges under the agreement.¹⁷² Similarly, under the Kyoto Protocol, parties who exceed their allotted emissions amount may find themselves subject to a reduced emission allotment, and the suspension of certain privileges.¹⁷³ Additionally, though they were never approved, parties to CITES (Convention in International Trade for Endangered Species of Wild Flora and Fauna) considered responding to non-compliance through "public notification of non-compliance," suspension of legal rights and privileges, "voting restrictions," ineligibility of committee memberships or participation in committees or working groups, "ineligibility to receive documents for meetings, and financial penalties."¹⁷⁴

¹⁷⁰ UNITED NATIONS ENV'T PROGRAMME, *supra* note 147, at 75–76, 85.

¹⁷¹ United Nations Framework Convention on Climate Change, *supra* note 1; OZONE SECRETARIAT UNITED NATIONS ENV'T PROGRAMME, The Montreal Protocol on Substances that Deplete the Ozone Layer, art. II, ¶ 5 (2000), available at <http://www.unep.org/ozone/pdf/Montreal-Protocol2000.pdf>.

¹⁷² UNITED NATIONS ENV'T PROGRAMME, *supra* note 147, at 76.

¹⁷³ *An Introduction to the Kyoto Protocol Compliance Mechanisms*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/kyoto_protocol/compliance/items/3024.php (last visited Sept. 9, 2011). If the Kyoto Protocol's Enforcement Branch finds that a party has exceeded its allotted emissions amount it will require that party to make up the difference between its actual emissions and its assigned amount as well as an additional emission deduction of 30 percent. Furthermore, that party's ability to participate in emissions trading with other parities may be suspended. *Id.*

¹⁷⁴ UNITED NATIONS ENV'T PROGRAMME, *supra* note 147, at 42.

2. NON-COMPLIANCE RECOMMENDATIONS MADE BY IWC CHAIR AND VICE CHAIR

In addition to the measures used and adopted by other international environmental conventions and agreements, the IWC's recent 2010 proposal, "Proposed Consensus Decision to Improve the Conservation of Whales from the Chair and Vice Chair of the Commission," addresses compliance issues and should also be considered.¹⁷⁵ The proposal suggests the creation of a "Management and Compliance Committee" ("Committee") to oversee IWC monitoring, control, and surveillance.¹⁷⁶ Proposed surveillance mechanisms include the requirement of a national inspection scheme for each member country,¹⁷⁷ the presence of observers appointed by the IWC on whaling vessels,¹⁷⁸ the placement of satellite monitoring systems on whaling ships,¹⁷⁹ and "a DNA registry and market sampling scheme."¹⁸⁰ The DNA sampling plan would require that DNA samples be taken from whales harvested for the commercial market.¹⁸¹ Those samples, along with data about the time and place the whale was caught, would be sent to the IWC for entry in a registry.¹⁸² Whale products that appear on the market could then be sampled and tested to determine if they are products of reported and registered whale catches, or are products of illegal unreported whaling.¹⁸³

The IWC proposal primarily addresses compliance monitoring, but does not include specifics on addressing non-compliance, or the penalties to impose on violating members. The proposal does stipulate that each member country should create its own enforcement measures to impose on specific vessels that are found violating the ICRW in their jurisdiction.¹⁸⁴ It also briefly states that the proposed Management and Compliance Committee will "[r]eport on infractions and the seriousness of those infractions to the Commission and advise the Commission what

¹⁷⁵ INT'L WHALING COMM'N, *supra* note 76, at 7.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 12

¹⁷⁸ *Id.* at 18

¹⁷⁹ *Id.* at 12

¹⁸⁰ *Id.* at 7.

¹⁸¹ *Id.* at 12.

¹⁸² *Id.* at 13, 26.

¹⁸³ *Id.* at 7.

¹⁸⁴ *Id.* at 17.

actions, if any, should be taken.”¹⁸⁵ However, the proposal does not create a specific procedure for how the Committee will accomplish this. Relying on each member country to sanction individual offending vessels in its jurisdiction may not be enough to compel compliance, particularly if a member country is a repeat offender or allows violations in its own jurisdiction.

3. CREATING A MANAGEMENT AND COMPLIANCE COMMITTEE TO ADDRESS MEMBER VIOLATIONS THROUGH NON-COMPLIANCE PROCEDURES AND MECHANISMS

With these models in mind, this paper proposes the following for non-compliance procedures and mechanisms for the IWC: 1) The creation of the Management and Compliance Committee proposed in the Chair and Vice Chair’s recent proposal that would deal exclusively with issues of non-compliance;¹⁸⁶ 2) the adoption of the proposed monitoring and surveillance mechanisms also set forth in the Chair and Vice Chair’s proposal;¹⁸⁷ 3) the development of a formal procedure in which the IWC can address member non-compliance and; 4) the adoption of specific non-compliance response mechanisms that sanction non-compliant behavior.

Creating the Committee to address non-compliance and ICRW violations would serve as a means to make member countries accountable for their obligations under the ICRW. It could also serve to remove provocative and confrontational discussions regarding member non-compliance from member group meetings on other matters. Perhaps most importantly, the Committee could provide the IWC with teeth to make it a more effective body as members would be compelled to conform to IWC regulations, and would face consequences for any failure to do so.

Monitoring is essential to addressing non-compliance issues. Effective monitoring of members’ whaling activities is a valid concern, particularly in regards to the success of a national catch quota system. To overcome the possibility of abuse in reporting mechanisms, a rigorous monitoring system, such as that proposed by the Chair and Vice Chair, may be necessary. The use of technologies like DNA sampling and

¹⁸⁵ *Id.* at 39.

¹⁸⁶ *Id.* at 7.

¹⁸⁷ *Id.* at 7,12,18.

satellite monitoring have not been used by the IWC before, and when combined with more conventional monitoring methods, such as the use of ship inspectors and IWC appointed observers, the system could prove to be very effective in thwarting illegal whaling, and determining the identity of violators.

Once violators have been identified, a formal procedure should exist within the organization to address ICRW violations. An official system addressing violations gives an impression of fairness, as a clear and specific procedure would ensure all member countries are treated equally. This is important for the IWC as members are sensitive to the fact that their positions on whaling are not accepted by other members. The IWC and its Committee could adopt a procedure similar to that used by the Montreal Protocol. Such a procedure would allow members to report ICRW violations and complaints to the Committee, and answer reports against them. The Committee would then investigate reported violations, determine their validity, and decide what, if any, non-compliance response mechanisms or sanctions are appropriate. To incorporate the ideas from the IWC Chair and Vice Chair's proposal, the IWC could allow member countries to sanction violating vessels they observe in their own jurisdiction, for example, by imposing fines on offending vessels and/or removing whales obtained illegally from their possession.¹⁸⁸ However, member countries could still seek recourse through the IWC by reporting the behavior to the Committee. The Committee could from there decide if further action is warranted. In this way, member countries are empowered with the authority to stop and sanction individual infractions that are observed in their jurisdictions, but the IWC is still able to address larger scale compliance problems that go beyond individual vessel violations.

In addition to a non-compliance procedure, the IWC should adopt a range of sanctions to create disincentives for violating the ICRW. Under a national catch quota system, the organization could provide sanctions for those members that exceed catch limits. Similar to the Kyoto Protocol, members that exceed their allotted quota would be given a smaller quota for the next hunting season, with an additional punitive reduction.¹⁸⁹ Other sanctions could include warnings before members of

¹⁸⁸ *Id.* at 17.

¹⁸⁹ UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, *supra* note 173. If the Kyoto Protocol's Enforcement Branch finds that a party has exceeded its allotted emissions amount it will require that party to make up the difference between its actual emissions and its

the IWC or ineligibility for IWC funds, while more serious infractions could subject a violator to the loss of voting privileges or the ability to participate in IWC working groups. IWC members are determined to assert their influence on the organization and further their own whaling positions. The loss of member privileges, such as voting, would limit a member's ability to assert itself in support of its whaling position, and therefore may serve as an effective disincentive for violating the ICRW.

Implementing non-compliance procedures and response mechanisms may increase member compliance with the ICRW. It could also mitigate unproductive discussion over whether or not a member is compliant. With methods to effectively monitor whaling activity, the question of which countries are compliant may no longer be unclear. Having a system to respond to non-compliance not only holds members to their obligations under the ICRW, but also enhances member confidence in the IWC.

D. PROVIDING AN OFFICIAL FORUM FOR DISPUTE RESOLUTION

Currently the IWC provides no means for resolving conflicts between member countries.¹⁹⁰ Most conflicts are addressed or resolved informally at the discretion of member countries through political pressure.¹⁹¹ Creating a method of dealing with disputes between member countries is necessary for an organization like the IWC whose members have different views and perspectives on whaling. Even with the creation of a new purpose for the IWC, and the implementation of a system to deal with non-compliance, there may still be disputes within the organization due to differences in the interpretation of IWC policies and the understanding of what compliance entails. There has been some dispute within the IWC regarding Japan's scientific whaling permit program.¹⁹² This dispute could be characterized as a difference in member opinion as to whether Japan's whaling activities are permitted under the ICRW. Japan contends that its scientific whaling is allowed under Article VIII whose provisions supersede other IWC regulations

assigned amount as well as an additional emission deduction of 30 percent. Furthermore, that party's ability to participate in emissions trading with other parities may be suspended. *Id.*

¹⁹⁰ UNITED NATIONS ENV'T PROGRAMME, *supra* note 147, at 87–88.

¹⁹¹ See *id.* at 87–88.

¹⁹² Schiffman, *supra* note 5, at 371–72.

and policies.¹⁹³ On the other hand, many other member countries view the program as a violation of IWC regulation.¹⁹⁴ Disputes such as these cannot be addressed simply through the proposed non-compliance procedures, but require a formal forum and procedures to address these conflicts.

1. LOOKING TO OTHER INTERNATIONAL ENVIRONMENTAL AGREEMENTS AS MODELS FOR IWC DISPUTE RESOLUTION

There are several methods of dispute resolution that international conventions and agreements employ. Conventions such as CITES and the Convention on the Conservation of Migratory Species of Wild Animals,¹⁹⁵ allow member countries to resolve disputes regarding the interpretation or application of their respective conventions through negotiation or arbitration with the Permanent Court of Arbitration.¹⁹⁶ The Permanent Court of Arbitration is an intergovernmental organization that serves to provide arbitration, conciliation, and fact-finding services to resolve disputes between countries.¹⁹⁷ Other international conventions, such as the Convention on Biological Diversity,¹⁹⁸ direct their members to the International Court of Justice,¹⁹⁹ a segment of the United Nations

¹⁹³ Article VIII of the International Convention for the Regulation of Whaling allows any member country to grant permits to its nationals for the killing or taking of whales for scientific research purposes. International Convention for the Regulation of Whaling, *supra* note 22, art. VIII, ¶ 1. The IWC has stated that a member's right to grant permits trumps any IWC regulation including the moratorium and the creation of sanctuaries. INT'L WHALING COMM'N, *supra* note 42.

¹⁹⁴ See Schiffman, *supra* note 5, at 371–72 (stating that some members believe scientific whaling is used for commercial whaling purposes).

¹⁹⁵ Parties to the Convention on the Conservation of Migratory Species of Wild Animals work to safeguard certain migratory species that have been identified as endangered or threatened with extinction by protecting the listed wildlife, their habitats, and lifting obstacles to migration. *Introduction to the Convention on Migratory Species*, CONVENTION ON MIGRATORY SPECIES, <http://www.cms.int/about/intro.htm> (last visited Sept. 9, 2011).

¹⁹⁶ UNITED NATIONS ENV'T PROGRAMME, *supra* note 147, at 43, 46.

¹⁹⁷ *About Us*, PERMANENT COURT OF ARBITRATION, http://www.pca-cpa.org/showpage.asp?pag_id=1027 (last visited Sept. 9, 2011); *PCA Services*, PERMANENT COURT OF ARBITRATION, http://www.pca-cpa.org/showpage.asp?pag_id=1028 (last visited Sept. 9, 2011).

¹⁹⁸ Parties to the Convention on Biological Diversity create national strategies and plans for the conservation and sustainable use of biodiversity. *National Biodiversity Strategies and Action Plans (NBSAPs)*, CONVENTION ON BIOLOGICAL DIVERSITY, <http://www.cbd.int/nbsap/> (last visited Feb. 15, 2012).

¹⁹⁹ UNITED NATIONS ENV'T PROGRAMME, *supra* note 148, at 49.

that settles legal disputes between countries according to international law.²⁰⁰

The United Nations Convention on the Law of the Sea (“UNCLOS”) has an extensive dispute resolution process that provides members with very specific procedures and a variety of options and forums to resolve their disputes within or without the organization. Member countries may resolve disputes between themselves using methods described in the United Nations Charter Article 33(1).²⁰¹ They may also choose to participate in a UNCLOS conciliation procedure that allows each party to choose conciliators to review the dispute and provide recommendations.²⁰² Alternatively, members are provided with compulsory dispute resolution options that provide binding decisions. These methods allow parties to bring their dispute to the International Tribunal for the Law of the Sea that is made up of twenty-one members elected by UNCLOS parties, the International Court of Justice, or two different arbitral tribunals created by the Articles of UNCLOS.²⁰³

2. PROVIDING THE IWC WITH A NEUTRAL SETTING FOR RESOLVING DISPUTES

The methods used by these different environmental agreements and conventions demonstrate two approaches to dispute resolution: 1) providing a system that allows resolution of disputes to occur within the organization; or 2) providing a system that removes the dispute from the organization’s involvement, and directs member countries to a forum that is separate from the organization. Given the history of the IWC, and the conflicting whale ideologies of its members,²⁰⁴ it may be best for the IWC to create a method of dispute resolution that directs the dispute to a forum outside the organization. In this way, dispute resolutions are less

²⁰⁰ *The Court, INT'L COURT OF JUSTICE,* <http://www.icj-cij.org/court/index.php?p1=1&PHPSESSID=492b45df3f5bff6113f63de44ab41b21> (last visited Sept. 9, 2011).

²⁰¹ UNITED NATIONS ENV’T PROGRAMME, *supra* note 147, at 92. U.N. Charter Article 33(1) states that the “parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.” U.N. Charter art. 33. para. 1.

²⁰² UNITED NATIONS ENV’T PROGRAMME, *supra* note 147, at 93.

²⁰³ *Id.* at 93–94.

²⁰⁴ See *supra* Section I.C.

likely to be influenced by the controlling faction's whaling position, and more likely to be addressed in a more neutral setting by unbiased parties.

Given these considerations, the IWC should create a procedure in which member countries may submit their disputes to the IWC. The IWC could then decide if the dispute can be addressed easily within the organization, or if it is a more complicated issue related to the interpretation or applications of the ICRW or IWC policies. If it is decided that the dispute is a matter of interpretation or application, the IWC may inform the parties involved in the dispute that they may resolve the disagreement through voluntary negotiation facilitated between themselves, or submit the dispute to the International Court of Justice or some other forum the IWC and its members agree on. Whatever the method or procedure decided upon, it is important that members agree to incorporate it into the ICRW and commit themselves to the procedure so that disputes are resolved in a timely and productive manner.

Revising the ICRW to include a process for resolving disputes between member countries would have considerable value as debate and disagreement pervade the organization's decision making process. A system of resolving disputes could improve the relations between member countries. Moreover, the ICRW has been criticized for its vague provisions,²⁰⁵ and encouraging members to resolve their dispute in an official setting would provide the IWC and its member countries with a better understanding of how the convention should be interpreted and applied.

CONCLUSION

In its current state the IWC is not particularly useful for countries on either side of the whaling debate. Anti-whaling countries were successful in their campaign for a moratorium on whaling, but in practice the moratorium is not accepted by all members.²⁰⁶ The pro-whaling position is supported by the written intent of the ICRW, but whaling nations are nonetheless condemned for their whaling

²⁰⁵ MICHAEL HEAZLE, IWC AND SCIENTIFIC UNCERTAINTY AND THE POLITICS OF WHALING 45 (2006).

²⁰⁶ See DESOMBRE, *supra* note 7, at 156 (indicating Iceland continues to whale); INT'L WHALING COMM'N, *supra* note 42 (indicating that Japan and Iceland whale under scientific whaling permits).

activities.²⁰⁷ For the IWC to become effective and relevant to contemporary international affairs, the provisions of the ICRW must be revised in a manner that makes the document applicable to modern whaling issues, and recognizes and accommodates the diverse interests and positions of its members.

Revising the written purpose of the ICRW is paramount to achieving these goals. Creating a new purpose that includes both anti- and pro- whaling positions would be representative of the current composition of the IWC. It would also bring members together to work towards a common goal. To further an atmosphere of tolerance and compromise within the IWC, the ban on commercial whaling should be lifted and replaced with a national catch quota regime. The use of a quota system may be more effective in influencing member behavior as those countries who wish to whale may be willing to limit their whaling activities when they feel that their own position is recognized by the IWC. The IWC should also be prepared to address member non-compliance to ensure that the organization can enforce its policies. Finally, member disputes within the IWC are inevitable due to the various and sometimes conflicting whaling views of its members. Anticipating these disputes and providing a specific process to address and resolve them is necessary in order to maintain feelings of goodwill between members and encourage useful debate. These recommendations do not address all the challenges within the IWC, but are meant to lay a foundation so that the organization may become a useful forum for the discussion and resolution of whaling issues.

²⁰⁷ See *A Bloody War*, THE ECONOMIST, Jan. 3, 2004, at 57–58.