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Dolphins, Whales, and the Future of the International Whaling Commission

By YUI NISHI*

I. Introduction

Whaling has become a global controversy over the past few decades. Every year as Japanese research whaling ships set sail, conservation and animal rights activists launch efforts to capture images of the hunts, and on occasion, attempt to intervene with what they see as a barbaric practice.¹ Many may be surprised to hear however, that small cetaceans such as dolphins, porpoises, and small whales are also hunted in countries including Japan, Peru, the Solomon Islands, and Taiwan.² Perhaps more surprising is the fact that “small cetaceans” do not fall under the protection of the International Whaling Commission (hereinafter “IWC”), and therefore the hunts are virtually unregulated.³ The IWC has repeatedly advised Japan to halt its dolphin-hunting practices, but to no avail.⁴

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1. See Michael McCarthy, *Pictures Reveal Truth about Japan's 'Scientific' Whaling*, THE INDEPENDENT, Feb. 8, 2008, available at <http://www.independent.co.uk/environment/nature/pictures-reveal-truth-about-japans-scientific-whaling-779802.html>. See also *Whale Wars*, Animal Planet Home Page, <http://animal.discovery.com/tv/whale-wars/about/> (last visited Jan. 26, 2009).

2. Jules Popp, *Top Facts about Dolphin Hunting*, ASSOCIATED CONTENT, Nov. 21, 2007, http://www.associatedcontent.com/article/449875/top_facts_about_dolphin_hunting.html.

3. See General Whaling Information, International Whaling Commission Home Page, <http://www.iwcoffice.org/commission/iwcmain.htm#dolphins> (last visited Jan. 26, 2009).

4. Press Release, Environmental Investigation Agency, IWC Calls for Halt to Japan's Mass Kill of Dall's Porpoises, (Jul. 27, 2001), <http://www.eia-international.org/cgi/news/news.cgi?t=template&a=5&source=>.

Many individuals may have an instinctive aversion to the idea of hunting dolphins. In many cultures today, dolphins are considered intelligent mammals to admire rather than hunt and consume. However, in certain coastal villages of Japan, dolphins have traditionally been hunted for their meat as well as to curb their population in order to reduce competition for other types of fish that humans consume. There appears to be a disconnect between cultures that see dolphins as intelligent mammals that deserve protection on the one hand, and the categorizing of dolphins as any other type of "fish" on the other. "Dolphin" in Japanese is termed *iruka*, a word that connotes a positive image. However the Chinese characters for the word translate to "sea pig,"⁵ portraying an entirely different image of the mammal.

Dolphin hunting and whaling have become an intensely emotional topic on both sides. Images of the drive hunts in the village of Taiji have led to an international outcry. Every year during the hunting season, foreign animal rights activists visit the village trying to obtain footage of the scene or score interviews with hunters and/or village officials. In the spring of 2008, a U.S. conservation group, the Oceanic Preservation Society ("OPS") filmed a documentary of the dolphin hunt; successfully taping images of the actual killings from their secret and underwater cameras.⁶

While the intensely emotional aspect is undoubtedly a significant part of the controversy, it is important to approach this topic from a more scientific reason-based perspective and consider what solutions may be beneficial to all countries involved. Rather than engage in heated arguments concerning the ethics of dolphin hunting, this paper proposes that nations through international cooperation: (1) conduct intensive scientific research in order to determine the actual numbers of and threats (or lack thereof) to the various cetaceans; (2) invent humane and efficient alternatives to the current hunting methods that are acceptable and more beneficial to the whaling countries; and (3) establish a more effective alternative to the IWC either within the United Nations ("U.N.") itself, or in the form of extending U.N. support to the IWC to strengthen the organization. To achieve this end, the paper

5. The Chinese characters are written as: 海豚, pronounced *iruka*.

6. Boyd Harnell, *Secret Film Will Show Slaughter to the World*, THE JAPAN TIMES, Mar. 30, 2008, available at <http://search.japantimes.co.jp/cgi-bin/fl20080330x1.html>.

proposes that the United Nations Convention on the Law of the Sea ("UNCLOS") either take over the role of the IWC going forward or, alternatively, work in conjunction with the IWC to act as the overarching authority and provide effective enforcement mechanisms.

II. Historical Background

A. *Whales (large cetaceans)*

Whaling is a practice that has been around for thousands of years.⁷ Some Japanese researchers have suggested that the Japanese have been whaling on a smaller scale since the Jomon period (14,000 - 400 B.C.).⁸ As communities grew and boats became larger, it is generally recognized that the Basques first began an "organized" form of whaling around 700 A.D.⁹ The Flemish, Normans, Dutch, and British followed suit, and occasionally Spain, France, and Norway joined as well.¹⁰ By the twelfth century, Japan and Russia joined in, with the Americans following their path by the sixteenth century.¹¹ Whaling proved to be a lucrative industry not only for the whales' meat (which only few countries consumed) but primarily for their oil.¹²

Unlike the early coastal communal whaling practices, modern technology boosted the scale of the hunts, and nations began to compete furiously to capture more whales and expand their hunts.¹³ As a result, by the nineteenth century some species of whales disappeared or became almost extinct.¹⁴ Private whaling companies in the early 1900s formed quota agreements to control oil prices, but the most organized form of agreement came in 1946 with the establishment of the IWC under the International Convention for

7. 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, 180-81 (2006).

8. MASAYUKI KOMATSU, KUJIRA SONO REKISHI TO KAGAKU 62-63 (Goma Publishing 2003).

9. Kobayashi, *supra* note 7, at 181.

10. *Id.*

11. *Id.*

12. KOMATSU, *supra* note 8, at 58.

13. *Id.* at 182.

14. *Id.* at 183.

the Regulation of Whaling ("ICRW").¹⁵

The Preamble of the ICRW makes clear that the initial goals of the IWC were to recognize the "interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks" and to "provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry."¹⁶ Thus, the initial goal of the IWC was to "ensure that whales were kept at sustainable levels to allow for the continuation of whaling in perpetuity."¹⁷ This voluntary arrangement made sense at the time period because member nations all had interests in getting fair quotas. Contrary to their goal of sustainability, however, the IWC gave in to the high quotas demanded by the member nations rather than listening to the advice of their Scientific Committee. As a result, more whale species were hunted to near extinction.¹⁸

The discovery of cheaper alternatives to whale oil during the early 1970s became a turning point for the whaling industry.¹⁹ Nations that hunted whales only for their oil stopped the no-longer lucrative business, while nations such as Japan, Norway, and Iceland, who consumed their meat as well, continued the practice.²⁰ Soon the IWC divided into "pro" and "anti" whaling nations. To put things into context, it was also around this time that nations began to recognize the global significance of environmental problems.²¹ In 1972 at the United Nations Conference on the Human Environment ("UNHE"), Secretary General Maurice Strong gave an influential speech warning nations that whales were on the verge of extinction.²² Member states such as the United States began to recruit non-whaling nations, and by 1982, the membership had

15. History and Purpose, International Whaling Commission Home Page, <http://www.iwcoffice.org/commission/iwcmain.htm> (last visited Jan. 30, 2009).

16. Preamble, International Convention for the Regulation of Whaling, International Whaling Commission Home Page, <http://www.iwcoffice.org/commission/convention.htm#convention> (last visited Jan. 30, 2009).

17. Alyson Decker, *Save the Whales – Save the Whalers – Wait, Just Save the International Whaling Commission: A Fresh Look at the Controversy Surrounding Cultural Claims to Whale*, 16 S. CAL. INTERDISC. L. J. 253, 256 (2006).

18. *Id.*

19. KOMATSU, *supra* note 8, at 58.

20. *Id.*

21. *Id.* at 59.

22. *Id.*

increased from fourteen to thirty-nine.²³ Backed by strong environmental and animal rights advocates, the IWC adopted its "zero catch" moratorium banning commercial whaling in the same year.²⁴ After taking effect in 1988, the IWC has extended the moratorium every year.²⁵

The IWC is organized so as to allow member nations objecting to its decisions to file a formal "objection" within ninety days so they will not be bound by the decision.²⁶ Following the moratorium, Iceland withdrew from the IWC in 1992 (and rejoined in 2002²⁷), and Norway filed an objection and resumed commercial whaling in 1993.²⁸ As a pro-whaling nation, one would imagine that Japan could have followed either Norway's or Iceland's steps. Instead Japan signed onto the moratorium out of what some describe as pressure from the United States that it would otherwise deny Japan fishing rights for the Alaskan Pollack near the coast of Alaska.²⁹ However, signing onto the Moratorium has not stopped Japan from whaling altogether. Since 1987, Japan has engaged in "scientific whaling," harvesting whales for scientific purposes, a classification recognized by the IWC, and selling the remainder of the meat.³⁰ It is estimated that an average of 540 whales (including Byrde, Sperm and Minke whales) are harvested annually.³¹

23. Kobayashi, *supra* note 7, at 198.

24. *Id.*

25. David D. Caron, *Current Development: The International Whaling Commission and the North Atlantic Marine Mammal Commission: The Institutional Risks of Coercion in Consensual Structures*, 89 A.J.I.L. 154, 158 (1995).

26. The Objection Procedure, International Whaling Commission Home Page, <http://www.iwcoffice.org/commission/iwcmain.htm#objection> (last visited Jan. 30, 2009).

27. Iceland and Commercial Whaling, International Whaling Commission Home Page, <http://www.iwcoffice.org/conservation/iceland.htm> (last visited Jan. 30, 2009).

28. Caron, *supra* note 25, at 160-61.

29. KOMATSU, *supra* note 8, at 62-63.

30. Cinnamon Pinon Carlarne, *Saving the Whales in the New Millennium: International Institutions, Recent Developments and the Future of International Whaling Policies*, 24 VA. ENVTL. L.J. 1, 34 (2005).

31. *Id.*

B. Dolphins and Porpoises (*small cetaceans*)

The term "Order Cetacea" is used to describe nearly 78 types of whales, dolphins, and porpoises.³² Cetaceans are categorized as either *Mysteceti* (baleen whales) or *Odontocedi* (toothed whales), the latter including dolphins and porpoises.³³ The IWC regulates large cetaceans only, which excludes dolphins, porpoises and small whales.³⁴ Japan has hunted dolphins along their coastal villages for centuries. The Environmental Investigation Agency ("EIA") estimates that approximately 22,000 small cetaceans are caught in Japan annually.³⁵ Specifically, the major types of small cetaceans hunted include Striped Dolphins³⁶ (*Stenella coeruleoalba*), Pantropical Spotted Dolphins³⁷ (*Stenella attenuata*), Bottlenose Dolphins³⁸

32. Office of Protected Resources, National Oceanic and Atmospheric Administration Fisheries Home Page, <http://www.nmfs.noaa.gov/pr/species/mammals/cetaceans/> (last visited Jan. 30, 2009).

33. *Id.*

34. Latest Editorial: Small Cetaceans, International Whaling Commission, <http://www.iwcoffice.org/publications/editorialnew.htm#small> (last visited Jan. 30, 2009).

35. Clare Perry & Allan Thornton, *Towards Extinction: The Exploitation of Small Cetaceans in Japan*, ENVTL. INVESTIGATION AGENCY 2 (2000), available at <http://www.eia-international.org/files/reports18-1.pdf>.

36. Striped Dolphins have been exploited heavily in the dolphin hunts, and as a result they are considered highly endangered. *Id.* at 18. Their population is estimated to have declined significantly after World War II, and the Scientific Committee has urged the Japanese government to stop the hunts until their numbers can be accurately assessed. *Id.* In response to international pressure, the Japanese government set national quotas that are rarely met. *Id.* at 19.

37. The status of pantropical spotted dolphins is unknown for the population inhabiting Japanese waters. *Id.* at 22. Spotted Dolphins were hunted in the thousands during the early 1980s, and as a result some speculate that the populations off the coast of Japan have significantly dwindled, as reflected by the fact that the number of catches had drastically declined in recent years. *Id.*

38. Bottlenose Dolphins are found in all Japanese waters, and the number hunted has increased since the implementation of the drive hunts in Taiji from around 1980. *Id.* The quota for Taiji alone is 890, but the actual catches have been much lower. *Id.* While the Scientific Committee reported that they were unable to assess the status of the species because of a lack of information, in 1997 the Japanese Red Data Committee listed bottlenose dolphin populations migrating in Japanese waters as threatened. Rachele Adam, *The Japanese Dolphin Hunts: In Quest of International Legal Protection for Small Cetaceans*, 14 ANIMAL L. 133, 151 (2008). Bottlenose dolphins are also perhaps the most well-known species, often captured as performers in amusement parks and aquariums around the world. Bottlenose Dolphins- Fact Sheet, American Cetacean Society Home Page, <http://www.acsonline.org/factpack/btlnose.htm> (last visited Jan. 30, 2009). The famous TV series and subsequent film series "Flipper" starred bottlenose dolphins as well.

(*Tursiops truncatus*), Risso's Dolphins³⁹ (*Grampus griseus*), Short-finned Pilot Whale⁴⁰ (*Globicephala macrorhynchus*), the False Killer Whale⁴¹ (*Pseudorca crassidens*), Dall's Porpoise⁴² (*Phocoenoides Dalli*), and the Baird's Beaked Whale⁴³ (*Berardius Bairdii*). As with other

Id. Due to its extreme popularity combined with the reality that dolphins often die in captivity, there is a constant high demand for bottlenose dolphins for live capture. Perry & Thornton, *supra* note 35, at 23.

39. The status of Risso's Dolphins is unknown. Perry & Thornton, *supra* note 35, at 23. The national catch quota is set at 1,300; however, it is not entirely clear how the prefectures divide the quota, and what the actual number of catches has been. *Id.* at 23-24. Risso's dolphins, like the bottlenose dolphins, are also often killed by fishermen out of fear of competition for other fish consumed by humans. Adam, *supra* note 38, at 151.

40. The short-finned pilot whale is classified as rare, and the Scientific Committee has "recommended that exploitation should not be intensified because of the low gross productivity of the species" because pilot whales have one of the longest lifespans, but also one of the lowest pregnancy rates. Perry & Thornton, *supra* note 35, at 24-25. The pilot whale is a member of the dolphin family, but does not have the long nose that is typically associated with dolphins. They are considered very intelligent, and are also a favorite as performers in aquariums. Pilot Whale- Fact Sheet, American Cetacean Society, <http://www.acsonline.org/factpack/PilotWhale.htm> (last visited Jan. 30, 2009). The average annual catch has been around 300 animals, although the numbers have greatly fluctuated over the years. Perry & Thornton, *supra* note 35, at 25.

41. The false killer whales, like the pilot whales, are part of the dolphin family, but on the larger end of the spectrum. *Pseudorca Crassidens*, Convention on Migratory Species Home Page, http://www.cms.int/reports/nsmall_cetaceans/data/P_crassidens/p_crassidens.htm (last visited Jan. 30, 2009). They resemble the killer whale (orca), but are darker in color. *Id.* False killer whales have been observed removing bait from fishing gear, and are often culled for "competing" with humans. Adam, *supra* note 38, at 153. They are listed as threatened by the Red List, but the Scientific Committee has been unable to determine the exact status of the false killer whale due to lack of available information. Perry & Thornton, *supra* note 35, at 26. The national catch quota for this species is 50, but given their likely small population, some researchers have suggested that the quota is still too high. *Id.*

42. The Japanese began to hunt Dall's Porpoise after the IWC moratorium as an alternative to whale meat. Adam, *supra* note 38, at 148. It is estimated that between 1986 and 1998, over 250,000 Dall's Porpoises were killed. Perry & Thornton, *supra* note 35, at 2. The IWC has called upon the Japanese government to reduce the annual catch multiple times, but to no avail. See IWC Resolution from the 1999 Annual Meeting, *available at* http://www.iwcoffice.org/meetings/resolutions/IWCRES51_1999.pdf; IWC Resolution from the 2001 Annual Meeting, *available at* http://www.iwcoffice.org/meetings/resolutions/IWCRES53_2001.pdf.

43. The Baird's Beaked Whale has been considered a "small cetacean," despite the fact that its size exceeds that of Minke Whales, a species within the family of large cetaceans. KOMATSU, *supra* note 8, at 21-22. While the species was hunted off the coasts of Japan since the Edo period (1603-1867), western nations were not familiar with the species at the time the IWC established the cetacean categories. *Id.*

marine mammals, there is great difficulty in accurately estimating cetacean populations. Unlike land mammals, they are difficult to track because they migrate thousands of miles over the course of the year and cross different boundaries. As a result, while many species of small cetaceans are considered endangered, the reality is that for some species their status is simply unknown.

There are three types of dolphin-hunting methods used in Japan: (1) drive hunts ("*oikomi*"), (2) hand harpoon hunts, and (3) small type coastal whaling.⁴⁴ The drive hunts are perhaps the most well-known, particularly because of their gruesome nature, which has attracted global media attention. The village of Taiji in Wakayama prefecture has become notorious for this practice, which takes place every year from September through March. In this type of hunt, a number of speed boats chase a group of dolphins and trap them into a "cove" in the waters, after which many of the animals are caught and slaughtered, some are captured and sold to aquariums, and others are later released.⁴⁵ Researchers suggest that the death rate of the dolphins is likely much higher than actually recorded because dolphins have poor survival rate in captivity due to "their susceptibility to stress during the drive hunts."⁴⁶ Therefore, animal rights organizations suggest many dolphins die in the waters subsequent to their release.⁴⁷ Moreover, due to the high mortality rate of captured dolphins, the demand for performing dolphins continues to be high.

Another type of hunting method employed is the hand harpoon hunts; where boats chase down the dolphins. Under this method they are simply chased until they are exhausted and the fishermen kill the mammals with harpooner spears.⁴⁸ Lastly, while on a smaller scale, small type coastal whaling still takes place as well. Under this method, the boats are smaller than those used in

Consequently, Japan has used this "loophole" to assert that the Baird's Beaked Whales are small cetaceans and therefore not regulated by the moratorium. Adam, *supra* note 38, at 154. The Red List has noted the species as "rare," but the specific numbers are unknown. *Id.*

44. KOMATSU, *supra* note 8, at 4.

45. Boyd Harnell, *Eyewitness to Slaughter in Taiji's Killing Coves*, THE JAPAN TIMES, Feb. 14, 2007, available at <http://search.japantimes.co.jp/cgi-bin/fe20070214a1.html>.

46. *Id.* at 18-19.

47. *Id.*

48. Perry & Thornton, *supra* note 35, at 4.

commercial whaling, and the dolphins are killed by bow mounted harpoon guns.⁴⁹

Although some may argue that all three hunting methods are inhumane, a practical problem with hunting large marine mammals lies with their sheer size. Marine mammals cannot be captured by fishing nets, nor can they be captured by traditional land hunting methods. Not only are there no regulations concerning hunting methods for these mammals, but there are also no known, employed alternative methods that are more humane and efficient.

The IWC conducts research and passes resolutions concerning the status of small cetaceans, but merely on an advisory level.⁵⁰ Aside from scientific research, the IWC has “encouraged countries to seek scientific advice on small cetaceans from the IWC and also invited IWC member nations to provide technical or financial assistance to countries with threatened small cetaceans stocks.”⁵¹ While such efforts are laudable, the practical issue still remains: the hunting of small cetaceans is not regulated.

1. Problems of Non-regulation

To be sure, the IWC is not without problems. For example, the organization lacks “teeth” because it is a purely voluntary organization where member states can simply opt out of a decision to which they object by filing a notice.⁵² Further, the IWC lacks any formal enforcement mechanisms.⁵³ Further, the small number of member nations and the departure from the IWC’s initial goals have hurt the organization’s legitimacy.

However, the IWC is a starting point when dealing with the

49. *Id.*

50. Dolphins and Porpoises, International Whaling Commission Home Page, <http://www.iwcoffice.org/commission/iwcmain.htm#dolphins> (last visited Jan. 30, 2009).

51. Small Cetaceans, International Whaling Commission Home Page, <http://www.iwcoffice.org/conservation/smallcetacean.htm> (last visited Jan. 30, 2009).

52. The Objection Procedure, International Whaling Commission Home Page, <http://www.iwcoffice.org/commission/iwcmain.htm#objection> (last visited Jan. 30, 2009).

53. For a more detailed explanation of the IWC history and framework, see generally Kobayashi, *supra* note 7; Carlarne, *supra* note 30; Decker, *supra* note 17; Anthony Matera, *Whale Quotas: A Market-Based Solution to the Whaling Controversy*, 13 GEO. INT’L ENVTL. L. REV. 23 (2000); Caron, *supra* note 25.

difficult issues surrounding the whaling controversy as a whole. That small cetaceans are not protected under any real form of regulation poses practical problems not only to the member nations, but potentially also to the rest of the world. Unlike land mammals, marine mammals migrate long distances and are difficult to monitor. Over-exploitation of dolphin stock in one part of the world could very well affect the entire ecosystem and alter the makeup of marine life. Taking advantage of this apparent loophole in the IWC, Japan has increased the number of dolphins being hunted since the moratorium took effect. Going forward, this loophole could prove to be detrimental if the hunting of small cetaceans continues to be unregulated.

2. Mercury Problem

In addition to the environmental concerns of dolphin hunting, there is a rising concern for the high levels of mercury found in cetacean meat. "Due to their position at the top of the food chain, toothed cetaceans tend to accumulate higher pollutant loads than baleen whales."⁵⁴ In other words, while whales also absorb mercury, only some species are carnivorous; dolphins are toothed and therefore are more likely to consume fish that are themselves contaminated with mercury. After suffering from the great tragedy of the Minamata Disaster in the 1950s,⁵⁵ the Japanese government should be painfully aware that mercury, if taken in high doses, could pose life-threatening risks to humans, causing "irreversible neurological damage."⁵⁶ Symptoms include "impaired vision, speech and hearing, loss of coordination, reproductive disorders, paralysis and cerebral palsy."⁵⁷

Responding to global concerns by foreign organizations and researchers, the United Nations Environment Programme ("UNEP"), jointly with the Inter-Organisation Programme for the Sound Management of Chemicals ("IOMC"), undertook a Global

54. Clare Perry et al., *Mercury Rising, the Sale of Polluted Whale, Dolphin and Porpoise Meat in Japan* ENV'T'L INVESTIGATION AGENCY, 3 (2003), available at <http://www.eia-international.org/files/reports55-1.pdf>.

55. MINISTRY OF THE ENV'T, THE GOV'T OF JAPAN, MINAMATA DISEASE THE HISTORY AND MEASURES, <http://www.env.go.jp/en/chemi/hs/minamata2002/ch2.html> (last visited Jan. 30, 2009).

56. Perry, *supra* note 54, at 3.

57. *Id.*

Mercury Assessment in 2001 and confirmed their fears that mercury does in fact cause "significant adverse impact on human health and the environment throughout the world."⁵⁸ Japan, as a member of the Governing Council, expressed its support in taking global action to reduce the adverse risk of mercury both to humans and to the environment.⁵⁹

Surprisingly, and perhaps disturbingly so, there have been very few public warnings concerning risks associated with whale and dolphin meat by the Japanese government. The Japanese Ministry of Health, Labour and Welfare ("JMHW") has set a 0.4ppm and 0.3ppm regulations for mercury and methylmercury respectively, in the Food Sanitation Law.⁶⁰ The Food Sanitation Law of Japan states in Article 6:

No person shall sell, or handle, manufacture, import, process, use, prepare, store or display with intent to sell any food or additive given below:

...

(2) Those which contain or bear toxic or injurious substances; provided, however that this provision does not apply to cases which are prescribed by the Minister of Health, Labour and Welfare as not injurious to human health.⁶¹

However, such regulatory levels of mercury do not apply to certain types of fish such as tuna and swordfish, and the government has not clarified whether the regulations apply to cetaceans.⁶² Despite Japan's asserted commitment to reducing mercury levels, the government has made no real effort to warn its public about the increasingly dangerous levels of mercury in cetacean meat. Studies show that many of the whale and dolphin meat sold in Japan contain mercury levels more than ten times the allowed level under Japanese Sanitation Law.⁶³

58. U.N. ENV'T PROGRAMME [UNEP], *MERCURY ASSESSMENT* (2002), available at <http://www.chem.unep.ch/MERCURY/Report/Final%20report/final-assessment-report-25nov02.pdf>.

59. Perry, *supra* note 54, at 5.

60. *Id.* at 6.

61. Shokuhin Eiseihō [Food Sanitation Law], Law No. 233 of 1947, art. 2, last amend. Dec. 2002, available at <http://www.jetro.go.jp/en/reports/regulations/pdf/food-e.pdf>.

62. Perry, *supra* note 54, at 6.

63. *Id.* at 8.

Breaking the government's silence, in 2007 local Japanese officials in Taiji condemned the consumption of dolphin meat due to its dangerous levels of mercury.⁶⁴ Junichiro Yamashita and Hisato Ryondo, members of the Taiji Municipal Assembly,⁶⁵ first spoke out about this issue after extremely high levels of mercury were found in samples from local supermarkets.⁶⁶ As local elementary schools regularly provide dolphin meat as part of their lunch menus, the assemblymen were eager to share their results with local government officials, who were less than thrilled.⁶⁷ In fact, such extremely important findings have received little media attention in Japan. While *The Japan Times*, a leading English-language newspaper in Japan, has continued to cover this issue, very few Japanese-language articles are available.⁶⁸ Mr. Yamashita criticized the media in an interview, noting that dolphin meat is still regularly served at school lunches in the village, and expressed anger that the Mayor of Taiji is "proposing to construct a new dolphin and whale slaughterhouse" despite the shocking findings.⁶⁹

This apparent disconnect is seen not only in the health issues surrounding cetaceans, but it exists as a general matter in issues concerning whaling and dolphin hunting in Japan. For example, partly due to the global whaling controversy and the foreign media attention, many, if not most people in Japan are aware of the practice of whaling. In fact, individuals who grew up in the post-World War II period will likely recall having whale meat on the menu at school. While most people in the larger cities no longer consume whale meat, there is a general awareness that the practice still exists. However, many are shocked to hear that dolphins and porpoises are also hunted and consumed in the country. To confuse

64. Boyd Harnell, *Taiji Officials: Dolphin meat 'toxic waste,'* THE JAPAN TIMES, Aug. 1, 2007, available at <http://search.japantimes.co.jp/print/fe20070801a1.html> (last visited Jan. 30, 2009).

65. *Id.*

66. Jun Hongo, *Media Ignoring Mercury-tainted Dolphin Meat: Assemblyman,* THE JAPAN TIMES, Sept. 4, 2007, available at <http://search.japantimes.co.jp/print/nn20070904a3.html> (last visited Jan. 30, 2009).

67. *Id.*

68. For example, an article concerning this issue was found in Japanese, however, not from a leading newspaper or source, but from a relatively local newspaper website. *Harenai "Osen Kujiraniku wo Kyushoku ni Shiyō" no Giwaku*, <http://www.news.janjan.jp/living/0709/0709040788/1.php> (last visited Jan. 30, 2009).

69. Hongo, *supra* note 66.

things further, dolphin meat, even if sold in major supermarkets, is often mislabeled as "whale meat."⁷⁰ The Japanese government has not undertaken any enforcement measures to resolve this problem, and the fraudulent labeling practice still continues.⁷¹

For the most part, the media has managed to stay quiet and keep the controversy out of the spotlight. As a result, the public is rarely exposed to cetacean hunting practices except when the media report on foreign organizations such as Greenpeace or the Sea Shepherd's intervening in the hunts and "creating problems."⁷² Due to the virtually unregulated status of dolphins, there are similarly no protective measures for ordinary consumers, many of whom are simply unaware of potential environmental and health risks.

III. Analysis

A. *The Changing Role of the IWC*

When first established, the IWC had a purpose and goals which were conducive to the needs of the member nations. Today, the organization has morphed into a tool for both the "pro" and "anti" whalers to promote their political agendas. For example, because the IWC lacks any punitive enforcement mechanisms, any criticism the organization has against the pro-whaling nations "has often taken the form of financial coercion by the United States in an effort to further the IWC's majority policy."⁷³ Strictly speaking, Norway's resumption of commercial whaling after filing an objection, Iceland's withdrawal from the organization, and Japan's research whaling, are all lawful. Nevertheless, economic threats were often made against those countries, and more recently, the threats have turned non-economic, such as powerful nations' use of Japan's desire to gain a seat in the U.N. Security Council as leverage.⁷⁴

On the other hand, Japan has been repeatedly criticized for "bribing 'poor' countries to join the IWC for the sole purpose of

70. Perry, *supra* note 54, at 11.

71. *Id.*

72. *Mata Nihon Hogeisen ni Bougai Koui, Kondo wa Greenpeace*, SANKEI NEWS, Jan. 22, 2008, available at <http://sankei.jp.msn.com/affairs/crime/080122/crm0801221723028-n1.htm>.

73. Decker, *supra* note 17, at 260.

74. *Id.* at 261

voting against the moratorium.”⁷⁵ Japan has been accused of approaching some African and Asian government officials and offering to provide financial aid for their fishing industries if they agree to vote against the moratorium.⁷⁶ Japan has also been criticized for using its economic power over other nations to “induce” an understanding that they should vote against the moratorium.⁷⁷ Japan has denied its involvement in such economic bribing schemes, and, to be fair, it should be recognized that anti-whalers were accused of employing similar tactics prior to the moratorium.⁷⁸

Separate from, but closely connected to the political controversy is the on-going “war” between environmental and animal rights groups and the pro-whaling nations. For the past several years, Japanese scientific research vessels and the Sea Shepherd have been involved in somewhat violent confrontations. In February 2007, Sea Shepherd members in boats physically tried to block a Japanese vessel from reaching whales,⁷⁹ and in January 2008, two members of the Sea Shepherd physically boarded a Japanese vessel in protest, after throwing acid and attempting to damage the ship’s propellers.⁸⁰ Perhaps the most dramatic of these global confrontations was the Sea Shepherd’s attack in Iceland in 1986, “which resulted in the sinking of two whaling ships moored in Reykjavik Harbor and the destruction of expensive technical equipment in the whale processing station at Hvalfjordur.”⁸¹ Although the IWC neither promotes nor fosters these confrontations between anti-whaling activists and pro-whaling countries, on a practical level, the global campaigning by the anti-whaling governments and the IWC have perhaps helped boost a false sense of “legitimacy” for the illegal conduct undertaken by these groups.

Lastly, the IWC currently has 84 member nations, an impressive

75. *Id.*

76. *Id.*; See also Justin McCurry, *Japan Accused of Vote-buying Ahead of Whaling Meeting*, GUARDIAN, Mar. 6, 2008, available at <http://www.guardian.co.uk/environment/2008/mar/06/whaling.japan>.

77. Decker, *supra* note 17, at 261.

78. *Id.*

79. BBC, *Japan Whale Ship in Protest Clash*, Feb. 12, 2007, available at <http://news.bbc.co.uk/2/hi/asia-pacific/6353415.stm>.

80. BBC, *Whaling Pair ‘Leave Japan Ship’*, Jan. 17, 2008, available at <http://news.bbc.co.uk/2/hi/asia-pacific/7193212.stm>.

81. Decker, *supra* note 17, at 262.

number considering its narrow purpose and scope (whaling).⁸² However, not all nations involved in whaling or nations that consume whale meat belong to the IWC.⁸³ For example Canada,⁸⁴ Indonesia, the Philippines, and Tonga all consume or hunt whales, but are not member states to the IWC.⁸⁵

In short, the IWC is no longer the organization that it was once established to be, nor does it adequately serve the needs of the member nations today. The organization has transformed into a political forum where the “anti” whalers and the “pro” whalers battle out their political agendas. With the number of pro-whaling members on the rise, there is also a very realistic possibility that the moratorium may be overturned in the coming years.⁸⁶ Currently, the IWC is held together by the moratorium, which in turn is held together by the anti-whaling nations who have economic power over the pro-whalers. If the moratorium is ever lifted, the organization could very well fall apart. Should that day come, there will be no mechanism of control over the future of whaling, and nations will have even fewer incentives to remain members of the organization.

B. IWC and Small Cetaceans

The above section dealt with the general framework of the IWC as concerning large cetaceans. However, another problematic feature of the IWC is that it does not regulate small cetaceans. Currently the small cetaceans have zero protection from the organization, and therefore countries such as Japan are allowed to “run free” and continue hunting dolphins without regard for the consequences to both humans and the environment. Partly as a result of the moratorium, the number of small cetaceans hunted in

82. List of Member Nations, International Whaling Commission Home Page, <http://www.iwcoffice.org/commission/iwcmain.htm#nations> (last visited Jan. 31, 2009).

83. KOMATSU, *supra* note 8, at 94-95.

84. The Inuits still practice small scale whaling, because they qualify under the Aboriginal Subsistence Whaling Quota. However, because the country itself is not a member of the IWC, they are not bound by these rules at all. See Aboriginal Subsistence Whaling catches since 1985, International Whaling Commission Home Page, http://www.iwcoffice.org/conservation/table_aboriginal.htm (last visited Jan. 31, 2009).

85. KOMATSU, *supra* note 8, at 94-95.

86. See Kobayashi, *supra* note 7, at 208.

Japan has steadily increased over the past twenty years.⁸⁷ While the Japanese government has instituted quotas for the various species, the number killed is now higher than the number traditionally killed prior to the quotas. Moreover, they are generally left to the discretion of each local prefecture and are rarely enforced.⁸⁸

Although the IWC has conducted research on many of the small cetacean species and advised Japan and other member nations that certain species appear to be threatened or highly endangered, the status of many species still is not known. Information concerning certain types of dolphins is almost completely lacking, making it difficult to set appropriate quotas, *even if the IWC regulated dolphin hunts*. While a call for a complete halt of the practice out of precautionary measures (or purely from an animal rights perspective) is certainly respectable, a blanket prohibition without accurate scientific data is not a practical solution from an economic or political standpoint.

Going forward, (1) the hunting of small cetaceans must be regulated; (2) the IWC in its current form is both inadequate and unwilling to take on such a role; and (3) the organization that is equipped to do so must be one that (a) has a large membership, not only of pro- and anti-whaling nations, but preferably some neutral countries as well; (b) has an enforcement mechanism; and (c) is able to conduct extensive research on all of the cetaceans, including their habitat, migratory patterns, reproductive patterns, influence from environmental pollutants, possible adverse effects of the drive hunts on later released dolphins, improved and humane hunting methods, and the overall balance of the ecosystem and the possible impacts on marine life that could result from the disappearance or overabundance of cetaceans.

C. Other International Organizations

While not specific to whaling or dolphin hunting, there are several international organizations that aim to protect wildlife and/or marine mammals. The Convention on the Conservation of Migratory Species of Wild Animals ("CMS") is an organization created to protect migratory species, aiming "to conserve terrestrial, marine, and avian migratory species throughout their range. It is an

87. Perry & Thornton, *supra* note 35, at 2.

88. *Id.* at 7.

intergovernmental treaty concluded under the aegis of the United Nations Environment Programme, concerned with the conservation of wildlife and habitats on a global scale.”⁸⁹ The organization has 109 members, and creates “Agreements,” which are binding on members, and “Memoranda of Understanding,” which are advisory.⁹⁰

Under Article IV Section 4, CMS has adopted two Agreements concerning cetaceans: the Agreement on the Conservation of Cetaceans of Black Sea, Mediterranean Sea, and Contiguous Atlantic Area (“ACCOBAMS”), which covers large and small cetaceans in the region,⁹¹ and the Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas (“ASCOBANS”), which covers small cetaceans in the region.⁹² CMS could perhaps play a bigger role in the regulation of cetaceans and other marine life going forward. However, a practical problem is the fact that whaling nations including Japan and Iceland are not members of the organization.⁹³

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”) is an international agreement whose “aim is to ensure that the international trade in specimens of wild animals and plants does not threaten their survival.”⁹⁴ CITES lists endangered species of wildlife in their Appendices I, II, and III (Appendix I being the most endangered), and requires protection to those species accordingly.⁹⁵ It is a voluntary organization, with 174 members (including Japan, Norway and Iceland); however, the agreements do not have enforcement capabilities, and it merely provides a “framework to be respected by each Party, which has to

89. Introduction to the Convention on Migratory Species, Convention on Migratory Species Home Page, <http://www.cms.int/about/intro.htm> (last visited Jan. 31, 2009).

90. *Id.*

91. ACCOBAMS, *opened for signature* Nov. 24, 1996, Convention on Migratory Species, http://www.cms.int/species/accobams/acc_bkrd.htm.

92. ASCOBANS, Mar. 17, 1992, Convention on Migratory Species, http://www.cms.int/species/ascobans/asc_bkrd.htm.

93. Convention on Migratory Species, Parties to the Convention on the Conservation of Migratory Species of Wild Animals and its Agreements (2008), http://www.cms.int/about/Partylist_eng.pdf.

94. Convention on Int’l Trade in Endangered Species, What is CITES?, <http://www.cites.org/eng/disc/what.shtml> (last visited Jan. 31, 2009).

95. Convention on Int’l Trade in Endangered Species of Wild Fauna and Flora art. II (1973), <http://www.cites.org/eng/disc/text.shtml#II>.

adopt its own domestic legislation to ensure that CITES is implemented at the national level."⁹⁶ While not as relevant to the cetacean hunts as CMS, CITES could potentially play a role in protecting dolphins and porpoises captured for the aquariums and other entertainment institutions.⁹⁷ However, at this time CITES's official position is that "because there is no evidence that the trade is detrimental to the survival of the populations, CITES has no legal authority to intervene."⁹⁸

There are other organizations, such as the North Atlantic Marine Mammal Commission ("NAMMCO"), that aim to provide research and information for the study of marine mammals in the region,⁹⁹ and the Convention on Biological Diversity ("CBD"), whose goals include "conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources."¹⁰⁰ Nevertheless, as with some of the organizations mentioned earlier, those organizations tend to be too regional (NAMMCO) and/or lack teeth for meaningful enforcement of the laws (CBD).

D. UNCLOS as the Best Organization for Future Control

Many of the above mentioned organizations have much to offer, and their potential roles for the conservation of cetaceans and the regulation of their hunts should not be underestimated. However, for the reasons discussed below, UNCLOS is likely the best organization to play an over-arching role of authority.

UNCLOS "lays down a comprehensive regime of law and order in the world's oceans and seas establishing rules governing all uses of the oceans and their resources."¹⁰¹ UNCLOS has 150 member states, including the primary whaling nations¹⁰² and would likely be

96. Convention on Int'l Trade in Endangered Species, *supra* note 94.

97. Adam, *supra* note 38, at 165-66.

98. *Id.* at 166.

99. The North Atlantic Marine Mammal Comm'n Home Page, <http://www.nammco.no/> (last visited Jan. 31, 2009).

100. The Convention on Biological Diversity art. 1, *opened for signature* June 5, 1992, <http://www.cbd.int/convention/articles.shtml?a=cbd-01>.

101. Overview and Full Text, United Nations Convention on the Law of the Sea Home Page (1982), http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm (last visited Feb. 1, 2009).

102. *Id.* at 101.

the most appropriate organization to regulate and oversee cetacean hunts going forward for several reasons.

First, as part of the United Nations, UNCLOS boasts a large membership, extensive resources and research capabilities, and exudes authority in a way that other organizations cannot. UNCLOS is capable of regulating migratory species of marine mammals, which would include both large and small cetacean species. UNCLOS also regulates coastal fishing rights along the Exclusive Economic Zones ("EEZ"), which would specifically benefit the small cetaceans because most of the hunts are performed in the coastal waters.¹⁰³ In Article 56, UNCLOS states that coastal states have "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil."¹⁰⁴ The Convention further requires that coastal states respect the rights of other nations and their rights, in accordance with the rest of the provisions.¹⁰⁵ Particularly with respect to cetaceans, the Convention states that "[s]tates shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study."¹⁰⁶

Contrary to the IWC, UNCLOS requires individual coastal nations to determine the number of allowable catches along their EEZs, using the "best scientific evidence available," noting that scientific evidence such as, "catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organizations."¹⁰⁷ Subsection 2 of Article 61 further mandates that member states work to ensure that the "maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation."¹⁰⁸ One of the primary issues with

103. Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, pt. V, July 28, 1994, http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm.

104. *Id.* at art. 56(1)(a).

105. *Id.* at art. 56(2).

106. *Id.* at art. 65.

107. *Id.* at art. 61(5).

108. *Id.* at art. 61(2).

regard to cetacean hunts is the fact that for many species, there is simply no data. An entity as large as UNCLOS has the capability of overseeing the exchange of information, sharing scientific data, and ensuring cooperation between the member nations so that nations will have access to conforming data.

Second, while UNCLOS emphasizes the need for nations to work together, it first and foremost recognizes the importance of the sovereignty of each country.¹⁰⁹ One issue with the IWC has been a blurring of the notion of sovereignty, as members engage in cultural and political wars, pressuring nations to vote for (or against) the moratorium, buying votes, and encouraging a global media frenzy. Such tactics do not foster cooperation among nations, especially if members feel they are oppressed or that their sovereignty is being threatened. Therefore, it is crucial that the organization that regulates cetaceans going forward respects the individual sovereignty of the nations, while at the same time demanding cooperation and adherence to the rules. Nations should not be required to tolerate unlawful acts by radical organizations on their territory, even if some believe that conduct is justified. In short, the clearer the rules, the less confusion as to who is "in the wrong."

Third, UNCLOS, unlike the IWC and other organizations, has dispute settlement and enforcement mechanisms. Disputes between member nations may be submitted to the International Tribunal for the Law of the Sea, which has jurisdiction to decide questions of interpretation of the Convention.¹¹⁰ Such concrete mechanisms of regulation are useful because an adverse decision by the UNCLOS Tribunal for the Law of the Sea has a more substantial impact on a nation's standing and credibility as viewed by the rest of the world. Whereas the IWC decisions are purely voluntary with an opt-out provision, the framework of UNCLOS makes it more difficult for member nations to opt out of agreements and regulations.

Finally, having a supervising authority that is part of the U.N. will provide an extra boost of legitimacy in this complicated area of

109. The Preamble of UNCLOS states that it recognizes "with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment" *Id.* at pmbl.

110. *Id.* at art. 188.

law. It is important to note that the IWC has become a forum for propaganda and cultural attacks by both sides. One problem with the organizational structure of the IWC is that it was established by pro-whalers to promote whaling, but is utilized today by anti-whalers to ban whaling; in short, it has never been a neutral organization. It is imperative that an entity such as UNCLOS step in to establish an aura of neutrality.

Japan in particular has developed an attitude of hostility towards the IWC, and as a result, even if IWC successfully continues the moratorium, Japan will likely not be an enthusiastic participant. Japan has threatened to leave the IWC before,¹¹¹ and if the moratorium continues, it may very well carry out its threat in the future. Threatening to leave the UNCLOS, however, is a different story. It will be more difficult for nations to opt out or leave UNCLOS, because leaving means they are leaving themselves susceptible to violations of international law by other countries in their territory. Moreover, there is more public embarrassment associated with leaving a U.N. organization, as opposed to leaving the IWC, a factor that is important because "saving face" is an important cultural norm in Japan.

Alternatively, UNCLOS could "oversee" the IWC through collaboration. IWC conducts useful research and has knowledgeable members who devote their time and money to protecting cetaceans. Such resources will certainly be useful for the regulation of cetacean hunts in the future. Moreover, because the IWC already exists, it may be more practical to utilize the skills and resources already available. However, such an endeavor should be carried out with caution for the very reasons laid out above: countries already hostile to the IWC will likely be skeptical of such an arrangement. UNCLOS must find a way to distance itself from the IWC and make very clear that the U.N. is a neutral arbitrator of the issues involved. All parties have an interest in protecting the environment to ensure continued availability of food sources, and preserving their right to exploit natural resources in their own territory. Countries will likely be more cooperative if they realize that abiding by the regulations will be in their interest.

111. Alex Kirby, *Japan Threatens Whaling Walkout*, BBC, Jun. 16, 2003, <http://news.bbc.co.uk/1/hi/sci/tech/2992622.stm>.

IV. Conclusion: Path for the Future

Whaling and dolphin hunting practices continue to be highly controversial, political, and emotional issues that will not be easily resolved. Exploiting while simultaneously conserving marine mammals is difficult because of their migratory nature and the practical difficulty of gathering accurate data. While the IWC has traditionally regulated the whaling industry, it does not regulate small cetaceans, many of which are believed to be endangered or in threatened condition. Moreover, the IWC has lost the momentum and legitimacy that it once enjoyed, and therefore there is a dire need for a more effective and over-arching authority.

UNCLOS is the most appropriate institution to take over the role because of its superior positioning among international organizations, wide range of available resources, dispute resolution and enforcement mechanisms, and neutrality, all of which are lacking in the IWC. Going forward, a quota system or even a moratorium may very well become necessary. However, before any meaningful rules can be implemented, nations must collaborate in an effort to further scientific research to obtain more accurate and detailed data on the various species of cetaceans. It is time to step back and take a critical look at the whaling industry as a whole and approach the issue from a new perspective, a perspective that respects each nation's sovereign rights while recognizing the dire need for cooperation to ensure the continued co-existence of humans and our Earth's natural resources.