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## Notes

### Norwegian Whaling and the Pelly Amendment: A Misguided Attempt at Conservation

Clay Erik Hawes

The debate over the desirability of hunting whales has been raging for several decades.<sup>1</sup> During the 1960s, the United States, in conjunction with the growth of public environmental awareness, became a strong leader in the fight to end whaling.<sup>2</sup> Throughout the 1960s and 1970s, the cry "Save the Whales!" echoed throughout the world,<sup>3</sup> and the number of whales killed each year decreased steadily.<sup>4</sup> However, nations such as Norway and Japan have long national traditions of whaling<sup>5</sup> and are not willing to simply capitulate and allow whale hunting to become a thing of the past.<sup>6</sup> Indeed, Norway has recently re-

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1. One commentator describes the debate as "based on two views of the whales: (1) the conservationists, who view the whales from a . . . utilitarian point of view, and (2) the protectionists, who view the slaughter as a violation of the natural right of life itself." Luis Kutner, *The Genocide of Whales: A Crime Against Humanity*, reprinted in *Outlaw Whaling: Hearing Before the Senate Comm. on Commerce, Science, and Transportation*, 96th Cong., 1st Sess. 129, 136 (1979).

2. *Id.*

3. In the words of The Humane Society of the United States (HSUS) and the Earth Island Institute (EII), "Save the whales' became a rallying cry that accompanied the birth of the modern environmental movement." COMMERCIAL WHALING INFORMATION KIT (HSUS, Gaithersburg, Md., & EII, San Francisco, Cal.).

4. For example, in 1966, the alarmingly decimated populations of the blue whale and the humpback whale became completely protected from all whaling. William Graves, *The Imperiled Giants*, 150 NAT'L GEOGRAPHIC 722, 724 (Dec. 1976).

5. See *infra* notes 25-27 and accompanying text.

6. In discussing the effect of privately organized boycotts and the looming threat of possible U.S. trade sanctions, the Norwegian Minister of Foreign Affairs has told the Norwegian Parliament that "[w]e are not prepared to give way to campaigns and sanctions." Johan Jorgen Holst, Statement to the Storting (May 18, 1993) (on file with the *Minnesota Journal of Global Trade*) [hereinafter Holst Statement]. Japan has even indicated that there is growing pressure in the Japanese Parliament for Japan to withdraw from the International Whaling Commission, the chief regulatory body in the area of global whaling practices. COMMERCIAL WHALING INFORMATION KIT, *supra* note 3.

sumed limited commercial minke whaling operations.<sup>7</sup> Thus, the whaling issue is far from settled.<sup>8</sup>

The whaling issue is currently at the forefront of the trade and environment debate<sup>9</sup> as a result of Norway's recent decision to resume commercial whaling and the U.S. response to that decision.<sup>10</sup> Specifically, pursuant to the Pelly Amendment to the Fishermen's Protective Act,<sup>11</sup> the United States has threatened to impose an embargo on certain Norwegian goods if Norway does not cease its whaling operations. The current conflict over whaling and the threat of a U.S. embargo against Norway provide a backdrop against which to evaluate the desirability of unilateral sanctions as a way to achieve environmental protection.

This Note examines whether the imposition of unilateral U.S. trade sanctions against Norway would be an appropriate response to Norway's recent resumption of commercial whaling. Part I outlines the history of whaling and the development of international efforts to preserve whale populations. Part II details U.S. legislation that attempts to enforce international whale conservation programs by imposing unilateral sanctions. Part III discusses the current controversy over Norway's resumption of limited commercial whaling, and identifies the major arguments on both sides of the debate. The arguments range from scientific justifications for the permissibility of limited

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7. See *infra* notes 109-12 and accompanying text.

8. Rather than giving in, Norway and Japan are stepping up their efforts to end the global ban on whaling. Japan, for example, has recently launched a massive publicity campaign in an effort to sway public opinion towards the side of the pro-whaling nations. *Japan to Press for Resumption of Commercial Whaling*, European Report, Feb. 13, 1993, available in LEXIS, World Library, Allnws File.

9. The conflict which has recently developed between free trade and environmental protection appears to have been inevitable. The immediate objectives of trade policies and environmental policies often are diametrically opposed. For example, "free trade supporters fear that environmental regulations will be used as a facade to conceal discriminatory or protectionist trade agendas, while environmentalists argue that nations are escaping their duty to protect the environment by relying on free trade provisions embodied in the General Agreement on Tariffs and Trade (GATT)." Janet McDonald, *Greening the GATT: Harmonizing Free Trade and Environmental Protection in the New World Order*, 23 ENVTL. L. 397, 399 (1992). Despite this conflict, both types of policies must be protected and encouraged because "both values are essential to our future survival and well-being." Thomas J. Schoenbaum, *Free Trade and Protection of the Environment: Irreconcilable Conflict?*, 86 AM. J. INT'L L. 700, 703 (1992).

10. See *infra* notes 86-91 and accompanying text.

11. 22 U.S.C. § 1978 (Supp. II 1990).

whaling practices to emotional appeals for strong conservation measures.

Part IV analyzes the potential U.S. ban of certain Norwegian imports under the Pelly Amendment in the context of the General Agreement on Tariffs and Trade (GATT),<sup>12</sup> and concludes that such sanctions would constitute an unjustifiable quantitative restriction. Part V analyzes the whaling debate in a broader, policy context. The Note concludes that unilateral trade measures to protect the environment, while generally undesirable, are especially inappropriate in the whaling context because there is no scientific justification for the proposed measures.

## I. THE HISTORY OF WHALING AND CONSERVATION

Whaling has not always been the subject of international controversy. Indeed, whaling was recognized for hundreds of years as a valuable and necessary industry in many parts of the world.<sup>13</sup> Ironically, the widespread popularity of whaling led to the chronic overfishing that endangered the very existence of many species of whales.<sup>14</sup> The volatile history of whaling provides a compelling example of the struggle between the allure of a lucrative industry and the need to conserve the limited natural resource which supports that industry.

### A. EARLY HISTORY

Humans have been hunting whales for thousands of years.<sup>15</sup> For early humans, whales were highly valued for the resources they contained. One whale yielded not only a large amount of food, but also oil, clothing, tools, and weapons.<sup>16</sup> Although humans often revered whales as "companions of the gods,"<sup>17</sup> the practical benefits that whales provided eventually

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12. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. pts. 5, 6, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter GATT].

13. "Even today a measure of the wealth and power of the whaling captains endures in the elegant homes many of them built for themselves in the major ports of the fishery — Nantucket, Fairhaven, New London, Sag Harbor, and . . . New Bedford." Graves, *supra* note 4, at 730.

14. See, e.g., *infra* note 95 and accompanying text.

15. Some sources indicate that whaling began as early as 4,000 years ago. Graves, *supra* note 4, at 725. Other sources mention cave paintings which depict whaling methods and argue that prehistoric whaling began in the Neolithic period, over 8,000 years ago. JEAN-PIERRE PROULX, *WHALING IN THE NORTH ATLANTIC: FROM EARLIEST TIMES TO THE MID-19TH CENTURY* 7 (1986).

16. PROULX, *supra* note 15, at 7.

17. Graves, *supra* note 4, at 725.

led prehistoric hunters to take to the open sea in pursuit of these mighty creatures.<sup>18</sup>

As time wore on, whaling techniques grew more sophisticated and whale populations began to decline.<sup>19</sup> The Basques began the first organized whaling operation approximately 800 years ago and succeeded in almost eliminating an entire species known as the Biscayan right whale.<sup>20</sup> Near-extinction was to become a familiar occurrence in the whaling industry.<sup>21</sup>

By the mid-1800s, severe overfishing had nearly destroyed the whaling industry.<sup>22</sup> By 1860, however, the quickening pace of technology rejuvenated the sagging industry.<sup>23</sup> The innovation of the steamship, for example, found its way into the industry, making sailing ships a thing of the past.<sup>24</sup> More importantly, in the late 1860s, the Norwegian sailor Svend Foyn developed an effective harpoon gun<sup>25</sup> and, suddenly, whaling was booming again.<sup>26</sup> In the words of whaling experts, "[w]ith the appearance on the scene of the Norwegians in the 1860s, the modern history of whaling begins."<sup>27</sup>

#### B. EVOLUTION OF CONSERVATION EFFORTS AND THE INTERNATIONAL WHALING COMMISSION

The dramatic rise and fall of whale stocks has always plagued the whaling industry.<sup>28</sup> Despite this recurring problem and the overall decline in whale stocks brought on by more effi-

18. PROULX, *supra* note 15, at 7.

19. Kutner, *supra* note 1, at 134.

20. Graves, *supra* note 4, at 725.

21. Kutner, *supra* note 1, at 133.

22. Graves, *supra* note 4, at 732. The discovery, in 1859, of petroleum as a cheap substitute for whale oil also threatened the health of the industry. *Id.*

23. *See id.*

24. The year 1861 proved to be "the death-blow to sailing vessels." J.T. JENKINS, A HISTORY OF THE WHALE FISHERIES 257 (1921).

25. Though harpoon guns had been developed somewhat earlier, Foyn's was a marked improvement in that it had a range of nearly fifty yards. *Id.* at 264.

26. Foyn's personal efforts to revitalize the industry should not be overlooked. In the words of one early twentieth century fisheries expert, "[w]haling appeared to be dying out completely" prior to the introduction of Foyn's improved harpoon gun. *Id.* "Svend Foyn's personal contribution was decisive" in revolutionizing the whaling industry. J.N. TONNESSEN & A.O. JOHNSEN, THE HISTORY OF MODERN WHALING 14 (R.I. Christophersen trans., 1982).

27. PROULX, *supra* note 15, at 77.

28. "Throughout its exploitation of the whales, the whaling industry has utilized a 'boom-bust' method of exploitation. After one species of whale is hunted to the point of 'commercial extinction', another species is sought in its place." Kutner, *supra* note 1, at 134.

cient whaling methods, the international community paid little attention to whale conservation or to the regulation of whaling until the twentieth century.<sup>29</sup> Leading scientists finally began to recognize the need for some form of regulation in the 1920s. In 1921, for example, Dr. J.T. Jenkins, a noted English fishery superintendent, wrote that "[t]here can be little doubt that in the future whaling all over the world should be the subject of suitable regulation, having for its main object the protection of the few remaining Cetacea."<sup>30</sup>

Despite this recognition, the whaling industry continued to expand throughout the 1920s.<sup>31</sup> One of the foremost causes of this expansion was the beginning of pelagic whaling by Japan, Germany and the Soviet Union.<sup>32</sup> Pelagic whaling involves the use of huge floating whaling "factories."<sup>33</sup> The practice is particularly conducive to overfishing, and is now strictly forbidden under international law.<sup>34</sup>

Concerned about the future of the industry, whaling companies eventually made an attempt at self-regulation in the early 1930s.<sup>35</sup> Though ineffective,<sup>36</sup> the mere attempt indicated that the days of unrestricted whaling had passed.<sup>37</sup> Finally, at the 1946 International Convention for the Regulation of Whaling (ICRW),<sup>38</sup> the major whaling nations of the world established

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29. *Id.* at 135.

30. JENKINS, *supra* note 24, at 57.

31. TONNESSEN & JOHNSEN, *supra* note 26, at 367.

32. *See id.* at 414-32.

33. In a pelagic whaling operation, the whales are actually caught by small, swift "catcher boats." These boats deliver their catches to the factory ships, where the whales are thoroughly processed before being stored for the fleet's return home. Kutner, *supra* note 1, at 138.

34. The International Whaling Commission, discussed *infra* text accompanying notes 39-45, presently forbids pelagic whaling. This is one of the few IWC rules which is not the subject of debate. Norway itself states that "[t]his form of whaling has been halted once and for all, and Norway has no desire to resume industrial whaling." *Norwegian minke whaling: Coastal livelihood and natural resource management*, NORWAY INFORMATION (Norwegian Ministry of Foreign Affairs), Mar. 1993, at 1 [hereinafter *Norwegian minke whaling*].

35. This attempt followed the 1931 Whaling Convention. The Convention, under the auspices of the League of Nations, was a rather feeble effort at an international conservation program. Kutner, *supra* note 1, at 135.

36. *Id.*

37. The self-regulation scheme of the early 1930's was followed by a series of bilateral production agreements between Norway and Great Britain, the two chief whaling powers of the time. *See* TONNESSEN & JOHNSEN, *supra* note 26, at 436-42.

38. International Convention for the Regulation of Whaling, *opened for signature* Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72 [hereinafter ICRW].

the International Whaling Commission (IWC)<sup>39</sup> and ushered in the era of "quota whaling."<sup>40</sup>

The IWC, as the world's preeminent organization on whaling, is designed "to establish a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks . . ."<sup>41</sup> The chief tool which the IWC has used in pursuit of this goal is a system of catch limits, or quotas, on the annual harvest of each species of whale.<sup>42</sup> However, throughout its forty-seven year history, the IWC has consistently received unfavorable reviews,<sup>43</sup> primarily because it is not particularly well-suited to accomplish its objectives. The IWC has no enforcement power, and any government which formally objects to an IWC rule is automatically exempt from compliance with that rule.<sup>44</sup> The IWC's inability to enforce its rules and quotas has led the United States to develop its own unilateral mechanisms designed to enforce IWC rules.<sup>45</sup>

## II. U.S. ANTI-WHALING LEGISLATION

Between the 1850s and the 1960s, the United States evolved from the world's dominant whaling nation<sup>46</sup> into the most influential force in the fight to end whaling altogether.<sup>47</sup>

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39. *Id.* art. III.

40. TONNESSEN & JOHNSEN, *supra* note 26, at 499.

41. ICRW, *supra* note 38, pmb.

42. In recent years, this quota system has taken the form of a total global moratorium on commercial whaling. See *infra* note 52 and accompanying text.

43. The IWC's record in regulating whaling has been described by some as "dismal." Kutner, *supra* note 1, at 130. At an early-1980s meeting of the Convention on International Trade in Endangered Species (CITES), several countries attacked the IWC, "presenting voluminous and overwhelming evidence that the sperm, fin and sei whales have been grossly mismanaged under the IWC. . . ." *U.S. Whaling Policies/International Whaling Commission: Hearing Before the Senate Committee on Commerce, Science, and Transportation*, 97th Cong., 1st Sess. 54 (1981) [hereinafter *Hearing*] (statement of Craig Van Note, Executive Vice President, Monitor Consortium).

44. ICRW, *supra* note 38, art. V.

45. The U.S. Congress has declared that the ICRW, as implemented by the IWC, "is not providing adequate protection for whales . . . ." Dept. of State Authorization Act, Fiscal Years 1980 and 1981, Pub. L. 96-60, tit. IV, § 405, 93 Stat. 395, 403 (1979).

46. TONNESSEN & JOHNSEN, *supra* note 26, at 11.

47. Graves, *supra* note 4, at 732. Conservationist Christine Stevens attributes this change in attitude to increased knowledge about whales. *Id.* She notes, "We were poor when we were whalers and, about whales, very ignorant and narrow-minded. . . . [W]e know enough in 1976 to admire whales and to fight for them against their persecutors." *Id.*

During the 1960s and 1970s, the U.S. pro-whale position<sup>48</sup> developed hand-in-hand with the growth of environmental awareness in the American public.<sup>49</sup> By 1976, the United States had become what some observers considered "[t]he nation most deeply committed to the preservation of whales . . . ."<sup>50</sup>

The efforts which the United States has taken to protect whales are indeed extensive. For over ten years, the United States has pursued an absolute global moratorium on commercial whaling,<sup>51</sup> and, in 1985, finally achieved its goal in the IWC.<sup>52</sup> Perhaps more importantly, the U.S. Congress has passed several significant laws aimed at protecting marine mammals and ensuring that the rules of the IWC are obeyed.<sup>53</sup> Although the international legal status of some of these laws has been the subject of dispute,<sup>54</sup> the practical effect they have had, and will continue to have, is undeniable.<sup>55</sup>

Outside of the IWC, which has little concrete regulatory authority, the only effective legal provisions regulating international whaling are contained in U.S. domestic law. U.S. law is important to the international effort to regulate the whaling industry because the United States has a history of imposing unilateral trade measures in the name of environmental

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48. The anti-whaling legislation enacted by Congress during the 1970s provides an excellent example of the general pro-whale sentiment that has developed in the United States. See *infra* notes 53-76 and accompanying text.

49. Kutner, *supra* note 1, at 136.

50. Graves, *supra* note 4, at 732.

51. *Hearing, supra* note 43, at 3 (statement of James Walsh, Acting Administrator, National Oceanic and Atmospheric Administration (NOAA), Dep't of Com.).

52. The IWC has had a moratorium in place since 1987 and recently affirmed this policy at their annual meeting. *Whaling: IWC Committee Chairman's Resignation a Shout of Protest*, Europe Environment, July 6, 1993, available in LEXIS, World Library, Allnws File.

53. The three most significant U.S. statutes in this area are the Marine Mammal Protection Act, 16 U.S.C. §§ 1371-1385 (1993) [hereinafter MMPA], the Packwood-Magnuson Amendment to the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1821(e)(2) (1993) [hereinafter Packwood-Magnuson Amendment], and the Pelly Amendment to the Fishermen's Protective Act, 22 U.S.C. § 1978 (1992) [hereinafter Pelly Amendment]. For further discussion of these statutes, see *infra* notes 58-76 and accompanying text.

54. The MMPA, for example, was recently found to violate GATT. GATT Dispute Settlement Panel, *United States — Restrictions on Imports of Tuna*, 30 I.L.M. 1594 (Aug. 16, 1991) [hereinafter *Tuna/Dolphin*].

55. Speaking of the sanctions called for by the Pelly and Packwood-Magnuson Amendments, the Administrator of the NOAA has said, "[i]n the cases that we've gone to [the offending nations] in the first instance and said, let me give you notice, we're about to apply this sanction, we find they change their behavior." *Hearing, supra* note 43, at 6 (statement of James Walsh).

protection.<sup>56</sup> In addition, the United States has gradually become a strong leader for the governments and organizations dedicated to eliminating commercial whaling.<sup>57</sup> For these reasons, an examination of whaling regulation necessarily focuses on U.S. environmental legislation.

One of the first U.S. laws affecting whales was the Marine Mammal Protection Act (MMPA),<sup>58</sup> passed in 1972. Heralded as a milestone in the fight to protect whales, the MMPA provides, *inter alia*, that it shall be a crime for any person to import into the United States any marine mammal which was taken in violation of regulations promulgated by the Secretary of the Interior.<sup>59</sup> Although a GATT panel has declared that the MMPA violates international trade law,<sup>60</sup> the MMPA played a major role in the reformation of the Mexican tuna fishing industry, which had been killing excessive numbers of dolphins during the 1980s.<sup>61</sup>

Another important U.S. statute is the Packwood-Magnuson Amendment to the Magnuson Fishery Conservation and Management Act.<sup>62</sup> Passed in 1979, the Packwood-Magnuson Amendment is designed to enforce the rules and quotas of the IWC.<sup>63</sup> The thrust of the Packwood-Magnuson Amendment is that any foreign country that diminishes the effectiveness of the ICRW is automatically subject to revocation of fishing privileges

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56. A recent example of such a trade measure is the 1990 U.S. embargo of Mexico's "dolphin killing" tuna. See *Tuna/Dolphin*, *supra* note 54.

57. See *supra* notes 46-53 and accompanying text.

58. 16 U.S.C. §§ 1371-85 (Supp. II 1990).

59. 16 U.S.C. §§ 1372(c), 1373, 1375.

60. *Tuna/Dolphin*, *supra* note 54. The panel report was never adopted by GATT and, technically, such reports are only binding once they have been so adopted. Schoenbaum, *supra* note 9, at 704. See *infra* notes 174-89 and accompanying text for further discussion of *Tuna/Dolphin*.

61. Despite the findings of the Tuna/Dolphin panel, the sanctions of the MMPA, backed by the political clout of the United States, convinced Mexico to present the United States with a plan for making its tuna industry more "dolphin-friendly." *Mexico Agrees to Defer Action on Complaint on U.S. Tuna Embargo*, Int'l Trade Rep. (BNA) Sept. 18, 1991, available in LEXIS, BNA Library, Intrad File.

62. 16 U.S.C. § 1821(e)(2) (1988).

63. The enforcement provisions of the Packwood-Magnuson Amendment are not triggered until the Secretary of State finds that a foreign nation is diminishing the effectiveness of the International Convention for the Regulation of Whaling (ICRW). 16 U.S.C. § 1821(e)(2)(i). Because the ICRW is made effective through the rules of the IWC, the Packwood-Magnuson Amendment is an attempt by Congress to assist the IWC in obtaining compliance with its own rules.

in U.S. waters.<sup>64</sup> Although these sanctions are not as severe as an import prohibition, the Packwood-Magnuson Amendment has nevertheless been a highly effective tool for U.S. whale protection efforts.<sup>65</sup>

The U.S. law which most extensively affects whaling is the Pelly Amendment to the Fishermen's Protective Act.<sup>66</sup> The Pelly Amendment, passed in 1971 out of concern over high seas salmon fishing,<sup>67</sup> applies to all species of marine creatures that are the subject of an "international fishery conservation program."<sup>68</sup> As a result, over the last twenty years the Pelly Amendment has become an important part of the U.S. legislative anti-whaling arsenal and is at the center of the current debate over Norwegian whaling practices.<sup>69</sup>

The Pelly Amendment provides that, upon a finding that a foreign nation is diminishing the effectiveness<sup>70</sup> of an international fishery conservation program,<sup>71</sup> the U.S. Secretary of Commerce shall certify that fact to the President.<sup>72</sup> After certification occurs, the President may direct the Secretary of the Treasury to prohibit the importation of any fish products from

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64. In terms of the statute, what is taken away are fishing "allocations" which were initially granted to the foreign nation under the Magnuson Fishery Conservation and Management Act. 16 U.S.C. § 1801 (Supp. II 1990). Once the required finding of diminished effectiveness has been made, the Secretary of State is required to reduce the allocations by at least 50 percent. 16 U.S.C. § 1821 (e)(2)(B)(ii). Further reductions may occur if the foreign nation does not take steps towards compliance with IWC rules within the 365-day remedial period. 16 U.S.C. § 1821 (e)(2)(D).

65. For example, in the mid-1980s, sanctions imposed pursuant to the Packwood-Magnuson Amendment helped to bring about an end to whaling by the Soviet Union. Gene S. Martin, Jr. & James W. Brennan, *Enforcing the International Convention for the Regulation of Whaling: The Pelly and Packwood-Magnuson Amendments*, 17 DENV. J. INT'L L. & POL'Y 293, 301 (1989).

66. 22 U.S.C. § 1978.

67. Martin & Brennan, *supra* note 65, at 294.

68. 22 U.S.C. § 1978(a)(1).

69. The Pelly Amendment is prominent in this situation since it is the only law which the United States can use to exert pressure on Norway. The MMPA cannot be invoked because neither whales nor whale products are actually imported into the United States. The Packwood-Magnuson Amendment is inapplicable because Norway has no fishing allocations in U.S. waters.

70. 22 U.S.C. § 1978(a)(1).

71. *Id.* The Amendment also has provisions which apply to any "international program for endangered or threatened species." 22 U.S.C. § 1978(a)(2).

72. 22 U.S.C. § 1978(a)(1). It is interesting to note that a violation of IWC rules does not automatically establish a diminution of effectiveness for purposes of the Pelly and Packwood-Magnuson Amendments. See *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221 (1986).

the certified nation for as long as the President deems appropriate.<sup>73</sup>

To date, the sanctions called for by the Pelly Amendment have never actually been imposed. Nevertheless, the Pelly Amendment has been useful to the United States in its fight to stop whaling. Since 1972, several foreign nations have been certified pursuant to the Pelly Amendment.<sup>74</sup> In many of these cases, even though no sanctions were imposed, the threat of sanctions was enough to reform the whaling practices of the certified nation.<sup>75</sup> On numerous other occasions, the mere threat of certification has been a sufficient incentive for offending nations to comply with international restrictions on whaling.<sup>76</sup> Thus, even without the imposition of actual sanctions, the Pelly Amendment has been highly effective in obtaining compliance with IWC quotas and regulations.

### III. THE CURRENT WHALING DEBATE

Largely as a result of U.S. efforts in this area, the number of whales harvested by the global whaling community has decreased gradually over the last few decades.<sup>77</sup> However, the recent quantitative decline in annual whale harvests does not mean that the international debate over whaling is coming to a foreseeable end. Certain nations, most notably Norway and Japan, appear unwilling to bend in their opposition to the recently affirmed moratorium on commercial whaling imposed by the

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73. 22 U.S.C. § 1978(a)(4). The only limitation on the President's authority is that sanctions may be imposed only "to the extent that such a prohibition is sanctioned by the General Agreement on Tariffs and Trade." *Id.* For a discussion of whether the Pelly Amendment conforms to the rules of the General Agreement on Tariffs and Trade, see *infra* part IV.

74. Between 1971 and 1989, certification pursuant to the Pelly Amendment occurred nine times. Martin & Brennan, *supra* note 65, at 296.

75. For example, in 1978, in response to violations of IWC quotas, the United States certified Chile, Peru, and the Republic of Korea. After the governments of those nations were informed of possible sanctions under the Pelly Amendment, all three took steps to join the IWC. *Id.* at 297.

76. In 1980, after exceeding the IWC quota on fin whales, Spain entered into bilateral consultations with the United States. At that time, the United States informed Spain of the possible applicability of the Pelly and Packwood-Magnuson Amendments. Subsequently, Spanish whalers complied with IWC catch limits. *Id.*

77. The annual total of whale catches declined gradually every year from 1980 to 1988. TABLE OF CATCHES SINCE 1980 (IWC, Cambridge, U.K.) 1992. The total decrease was from a catch of 14,810 whales in 1980 to only 666 in 1988. *Id.* 706 whales were caught in 1991, however. *Id.*

IWC.<sup>78</sup> Norway has gone one step further and, claiming that there is no danger to the stability of whale populations, has resumed very limited commercial whaling of North Atlantic minke whales.<sup>79</sup>

In the eyes of leading environmentalists, "Norway's unilateral decision to resume commercial whaling . . . puts the nation completely at odds with . . . the European Community, U.S. law and, indeed, with the rest of the world."<sup>80</sup> While this claim may be a slight exaggeration,<sup>81</sup> the weight of international opinion is strongly against Norway on this issue.<sup>82</sup> The European Community (EC) and the United States are at the forefront of international opposition to Norway's resumption of commercial whaling.

The EC's reaction to Norway's decision to resume whaling has been dramatic. Although current EC legislation does not totally prohibit whaling, members of the European Parliament were astonished by Norway's decision.<sup>83</sup> Because Norway and the EC are currently involved in negotiations regarding Norway's possible accession to the EC, the EC's dissatisfaction with Norwegian whaling policies undoubtedly carries a considerable amount of weight in Oslo. Although Norway is seeking concessions from the EC on the whaling issue,<sup>84</sup> anti-whaling senti-

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78. Prior to the IWC's recent annual meeting, one publication described the situation like this:

[t]he rather shaky ban on commercial whaling is under severe pressure from Norway which wants to resume hunting minke whales and has threatened to leave the organisation that regulates whaling if it does not get its way. . . . [T]he Japanese have equally indicated they could follow suit if the ban is not lifted.

*Whaling Conference Opens Amidst Growing Controversy*, European Report, May 8, 1993, available in LEXIS, World Library, Allnws File.

79. "Norway plans to catch 296 minke whales this year in defiance of a 1985 moratorium imposed by the [IWC]. Oslo says the northeast Atlantic minke whale stock has recovered to 86,700 and that it is safe to kill some." Stella Bugge, *Norway Will Not Give in on Whaling, Slams U.S. Move*, Reuter Newswire - Western Europe, Aug. 11, 1993, available in LEXIS, World Library, Allnws File.

80. COMMERCIAL WHALING INFORMATION KIT, *supra* note 3.

81. Norway does have pro-whaling allies in Japan, Iceland, and a few other nations.

82. See *infra* notes 218-33 and accompanying text.

83. *Norway Set to Resume Whaling*, Europe Environment, Apr. 15, 1993, available in LEXIS, World Library, Allnws File.

84. In 1993, during accession talks, Sweden received concessions from the EC which will allow them to continue hunting bears, beavers, and other animals which are protected by the Community's Directive on Habitats and Protected Species. Janet McEvoy, *Sweden Intends to Stick to Higher Environmental Standards*, Reuter European Community Report, June 8, 1993,

ment within the Community represents a formidable hurdle which Norway must clear if it wants to become an EC member.<sup>85</sup>

Consistent with its position as the world's dominant anti-whaling nation,<sup>86</sup> the United States has joined the EC in exerting pressure on the Norwegian government to abandon whaling altogether. The main tool that the United States has employed in these efforts is the threat of import sanctions. As noted previously, the Pelly Amendment gives the U.S. President the power to ban imports of certain fishery and wildlife products from nations whose actions diminish the effectiveness of an international conservation program like the IWC.<sup>87</sup>

In October, 1993, President Clinton decided to postpone the final decision on possible sanctions against Norwegian imports.<sup>88</sup> Although the President said that the situation was "serious enough to justify sanctions,"<sup>89</sup> he determined that U.S. objectives could best be achieved by "delaying the implementation of sanctions until we have exhausted all good-faith efforts to persuade Norway to follow agreed conservation measures."<sup>90</sup> Although it has been given a reprieve, the threat of sanctions still looms over Norway as it contemplates its commercial whaling plans in 1994.<sup>91</sup>

The current debate over Norway's resumption of commercial whaling provides a representative example of the more gen-

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available in LEXIS, World Library, Allnws File. Norway finds these concessions "politically interesting" since whales are included in that same Directive. *Boycott of Norwegian Exports Continues over Whaling Controversy*, Europe Environment, July 6, 1993, available in LEXIS, World Library, Allnws File.

85. The European Commission has "made it quite clear that continued whaling could compromise Norway's chances for admission to the European Community." *Norway Set to Resume Whaling*, *supra* note 83.

86. See *supra* notes 45-52 and accompanying text.

87. See *supra* notes 66-76 and accompanying text.

88. *Clinton to Delay Sanctions on Norwegians for Whaling*, N.Y. TIMES, Oct. 6, 1993, at A9.

89. James Morrison, *Embassy Row*, WASH. TIMES, Oct. 6, 1993, at A13.

90. *Clinton to Delay Sanctions on Norwegians for Whaling*, *supra* note 88, at A9.

91. Many observers expect the issue of sanctions to flare up again in the spring of 1994. *Whaling Decision Brings Sigh of Relief*, ATLANTA J. & CONST., Oct. 6, 1993, at A4. There is reason to believe that Norway might not receive such favorable treatment next time. According to White House officials, "Norway's recent mediation of the historic agreement between Israel and the Palestinian Liberation Organization was among the considerations in Clinton's decision . . ." *Clinton Delays Norway Sanctions*, ST. PETERSBURG TIMES, Oct. 5, 1993, at A11. It seems likely that the President will have fewer reservations about imposing sanctions in the spring.

eral dichotomy between trade policy and environmental policy.<sup>92</sup> Questions surrounding the scientific accuracy in measuring the environmental impact of whaling<sup>93</sup> have clouded the debate and inhibited progress in reaching an effective compromise. An examination of the competing arguments surrounding Norway's resumption of commercial whaling provides a backdrop against which to analyze the scientific and emotional aspects of the whaling debate, as well as its international legal implications.

#### A. TRENDS IN WHALE POPULATIONS

The necessity of conserving truly endangered species of whales is well established. Even though it has resumed whaling, Norway has made it clear that "the Government of Norway supports the conservation of species, including marine mammals that are threatened with extinction or serious depletion."<sup>94</sup> The danger of extinction is a threshold issue in the current whaling debate, and the trend in whale populations is a critically important issue in resolving that debate.

Whale stocks are currently increasing. Of course, some species are increasing faster than others. However, populations of most stocks remain far below their unexploited, pre-whaling levels.<sup>95</sup> Nevertheless, the recent efforts at conservation are having a positive impact on global whale populations.<sup>96</sup> The bowhead whale — the species that has perhaps come the closest to extinction — provides a dramatic example of the resiliency of certain whale populations. In 1976, the world population of bowhead whales was uncertain, but experts estimated it at only 2,000.<sup>97</sup> Amazingly, only twelve years later, the IWC determined that the stock of bowhead whales in the Bering-Chukchi-

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92. See *supra* note 9.

93. See *infra* notes 99-108 and accompanying text.

94. *The Norwegian Government's Decision to Resume Commercial Small-Type Whaling in 1993*, NORWAY INFORMATION (Norwegian Ministry of Foreign Affairs), Aug. 1993 [hereinafter *Decision to Resume*].

95. As an example of extremely limited growth, after a decades-long ban on commercial whaling of right whales, their worldwide population was still estimated at less than 5,000 in 1990. Janet Rae-Dupree & Greg Krikorian, *Right Rare Sight; Catalina Ferry Encounters Seldom Seen Whale*, L.A. TIMES, May 18, 1990, at B1.

96. For example, in early 1993, based on estimates that the population of California gray whales had quadrupled since 1946, that species was removed from the endangered species list by U.S. officials. Maia Davis, *Back in the Swim*, L.A. TIMES, Jan. 2, 1993, at B1.

97. Victor B. Scheffer, *Exploring the Lives of Whales*, 150 NAT'L GEOGRAPHIC 752, 755 (Dec. 1976). Dr. Scheffer's 1976 estimates were criticized, if at all, for being overly optimistic. *Id.* at 754.

Beaufort Seas of the Northern Pacific alone had a population of approximately 7,500.<sup>98</sup> This represents a population increase of over 300%.

It is extremely difficult, however, for scientists to measure whale populations with any degree of accuracy.<sup>99</sup> The first problem involves the methods by which records of whale populations are kept. The IWC subdivides each species of whale into geographical "stocks." For example, minke whales are split into stocks labelled "Southern Hemisphere," "North Atlantic," and "North Pacific."<sup>100</sup> While, theoretically, these stocks are isolated from one another, one of the myriad problems associated with assessing whale populations is the definition of the stocks themselves. In 1993, Norway itself recognized this problem when it set out the following objective for its marine management program: "To clarify the question of actual separation between management stock units of minke whales in the North Atlantic, and to investigate migration and the possible interchange between stocks."<sup>101</sup>

In addition to the problem of stock definition, there is the larger problem of actual physical measurement. Although the pace of technology continues to advance in the 1990s, there are still no entirely satisfactory methods for determining the number of whales within a given geographic area. Despite efforts to develop new measurement techniques,<sup>102</sup> the traditional methods of "sightings"<sup>103</sup> and "catch per unit

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98. WHALE POPULATION ASSESSMENTS (IWC, Cambridge, U.K.) 1992.

99. See *infra* notes 103-05 and accompanying text.

100. WHALE POPULATION ASSESSMENTS, *supra* note 98. In addition, these stocks are often subdivided even further. The North Atlantic minke whale stock consists of "Northeastern," "Central," and "West Greenland" subgroups. *Id.*

101. *Norway's Integrated Research Program on: Whales and Seals*, NORWAY INFORMATION (Norwegian Ministry of Foreign Affairs), Feb. 1993.

102. The IWC has proposed using sightings conducted by helicopters to measure whale populations. 39 REP. INT. WHAL. COMM'N 46 (1989). It has also proposed estimating population using biological parameters. 37 REP. INT. WHAL. COMM'N 33 (1987). The Japan Whaling Association has even suggested using satellite tracking. *Japan Whaling Association: Commercial Whaling No Longer a Threat to Whale Populations*, in *Hearing*, *supra* note 43, at 70.

103. Measuring whale stocks by sightings usually consists of stationing observers on oceangoing vessels and recording their isolated observations, from which conclusions are drawn about the overall whale population in the area. See, e.g., *Annual Reports of the Scientific Committee*, 30-41 REP. INT. WHAL. COMM'N (1980-91). Such sightings can not be trusted to provide accurate estimates, however, for many reasons. The most obvious reason is that observers commonly miss whales because they are underwater. 39 REP. INT. WHAL. COMM'N 88 (1989). Problems also arise from observer error or inexperience. *Id.*

effort"<sup>104</sup> (CPUE) are still the most commonly used methods. Unfortunately, significant problems are associated with the use of both of these techniques.<sup>105</sup>

The difficulty associated with the measurement of whale populations has long been one of the central issues in the debate over whaling. According to Norway, "[t]he uncertainty surrounding the size of the Northeast Atlantic minke whale stock was one of the reasons why the [Norwegian] Government introduced a temporary ban on catches of the species [in] 1987."<sup>106</sup> Likewise, the need for more data was one of the rationales behind the U.S. pursuit of a global moratorium in the early 1980s.<sup>107</sup> On the other hand, one of the main planks of Norway's current pro-whaling platform is that research methods have improved to the point where sufficiently accurate measurements of whale stocks are now possible.<sup>108</sup> The adequacy of whale stock estimates will continue to be an important issue.

#### B. THE PRO-WHALING POSITION

Relying principally on the increase in whale populations and alleged improvements in the measurement of whale stocks, Norway recently resumed limited commercial whaling operations.<sup>109</sup> The Norwegian government set a 160-whale quota on

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Frozen water prevents observers from conducting counts in some northern seas. 37 REP. INT. WHAL. COMM'N 90 (1987). Fog has caused similar difficulties. 38 REP. INT. WHAL. COMM'N 89 (1988).

104. CPUE measurements are based on the idea that, when more whales are present in a given area, less effort will be required to catch one of them. Therefore, the number of whales caught for each man-hour spent hunting whales in a certain area can be used to estimate the overall size of the whale population in that area. See, e.g., *Annual Reports of the Scientific Committee*, 30-41 REP. INT. WHAL. COMM'N (1980-91). The most serious problem with using CPUE is the lack of detailed catch records from the early years of whaling. 38 REP. INT. WHAL. COMM'N 89 (1988). Additionally, the IWC lacks an adequate statistical model to explain the data which is available. 37 REP. INT. WHAL. COMM'N 44 (1987). Indeed, even Norway concedes that CPUE is "a very inaccurate technique." *Norwegian minke whaling*, *supra* note 34, at 2.

105. See *supra* notes 103-04.

106. *Norwegian minke whaling*, *supra* note 34, at 2.

107. One advocate of a global moratorium noted that since "there is such limited data for most of the populations, we ought to stop and secure more data . . ." *Hearing*, *supra* note 43, at 20 (statement of Thomas Garrett, Soc'y for Animal Protective Legislation).

108. The thrust of Norway's argument is that, in the last several years, "it has become clear that the decision to classify the Northeast Atlantic minke whale as a Protection Stock was . . . made on an erroneous basis." Holst Statement, *supra* note 6.

109. See *supra* note 7 and accompanying text.

the commercial catch of minke whales in 1993.<sup>110</sup> Despite opposition from all sides and a privately organized boycott of Norwegian products,<sup>111</sup> Norwegian whalers almost filled the commercial quota by the time the 1993 hunt ended on September 12.<sup>112</sup>

Norway bases its open defiance of the IWC's global moratorium<sup>113</sup> on evidence which strongly suggests that minke whale stocks have recovered to the point where a limited annual harvest poses no threat to the continuation of the species.<sup>114</sup> According to the best available estimates in September 1992, the Northeastern Atlantic stock of minke whales has increased to approximately 87,000.<sup>115</sup> Assuming this estimate to be accurate, the 1993 catch quota of 160 minke whales represents less than 0.2% of the total population of the Northeastern Atlantic stock. Norway also advances the position that this stock of minke whales is currently growing at a rate of 2% per year.<sup>116</sup> If Norway's figures are correct, the mathematical logic of Norway's position is readily apparent.<sup>117</sup>

In addition to the use of scientific evidence, Norway advances several other arguments in support of a limited commercial harvest. For example, Norwegian officials argue that whaling is an important means of livelihood for Norway's small coastal communities.<sup>118</sup> In this context, Norway stresses that

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110. Bugge, *supra* note 79. Norwegian commercial whaling is limited to minke whales.

111. *Boycott of Norwegian Exports Continues over Whaling Controversy*, *supra* note 84. In Europe, the boycott is spearheaded by several large German companies which have stopped buying many types of Norwegian goods, including fish products. *Id.* The boycott has also taken hold in the United States, where Burger King has cancelled a large contract to buy frozen fish from Norwegian suppliers. *Norwegian Decision to Hunt Whales Sparks Boycott, Could Affect U.S. Trade*, Int'l Trade Daily (BNA), May 28, 1993, available in LEXIS, BNA Library, BNAITD File.

112. *Whaling Decision Brings Sigh of Relief*, *supra* note 91.

113. From a technical standpoint, Norway is not actually violating the rules of the IWC because it has filed an objection to the moratorium and, thus, is not bound by its terms. See *supra* note 44 and accompanying text. However, any active whaling operations run afoul of the *spirit* of the moratorium.

114. See *supra* note 79 and accompanying text.

115. WHALE POPULATION ASSESSMENTS, *supra* note 98. Despite all the aforementioned problems with measuring whale stocks, the IWC's Scientific Committee has determined with 95% confidence that the North Atlantic minke whale population is somewhere between 61,000 and 117,000. *Id.*

116. Morrison, *supra* note 89.

117. If a species reproduces at a rate of ten times the rate of attrition due to hunting, extinction would seem to be highly improbable.

118. *Norwegian minke whaling*, *supra* note 34.

minke whaling is generally carried on by small, family-owned fishing boats, as opposed to the "industrial, capital-intensive whaling of former years."<sup>119</sup> Thus, while "[t]he income from Norwegian minke whaling may appear insignificant for the country's economy, . . . it is of great importance to the families and local communities directly involved."<sup>120</sup>

In an interestingly ironic twist, Norway has also advanced several arguments that whaling is a "green" industry — i.e., that it is friendly to the environment. For example, in the opinion of Norwegian officials, "[t]he use of selective equipment to catch fish and [marine mammals] is perhaps the most environmentally-sound way of producing food for human consumption today . . . ."<sup>121</sup> Norwegian scientists also argue that controlled whaling is essential to the effective conservation of other forms of marine life.<sup>122</sup> According to Norway's Ministry of Foreign Affairs, "[a]rbitrary conservation decisions not based on [sound scientific] advice may have negative environmental and developmental consequences, threatening the balance of the ecosystem."<sup>123</sup>

Norway indirectly justifies its position by attacking the motivation and credibility of its critics. The main target of this attack has been Greenpeace and the other anti-whaling environmental groups. In a speech to the Norwegian parliament, Norway's Minister of Foreign Affairs made the claim that "[p]rivate international pressure groups view whaling campaigns as an important source of income. The fact that it is now clear that the minke whale is an abundant species does not fit well with their plans."<sup>124</sup> Furthermore, Norway disparages the integrity of the governments of anti-whaling nations, alleging that "they may be tempted to find a cheap way of easing their consciences for their lack of effort in the environmental field."<sup>125</sup>

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119. *Id.*

120. *Id.*

121. *Id.* The reasoning behind this statement is that "the environment remains unaffected, energy consumption is low in relation to yield, and there is no pollution from fertilizers, pesticides or other chemicals." *Id.*

122. "Whales . . . in the Northeast Atlantic Ocean . . . have a great impact on stocks of fish and crustaceans and thus compete with man for fisheries resources." Lars Folkow, *Impact of Marine Mammals on Stocks of Fish and Crustaceans*, ARKTISK FORENING, Oct. 1990, at 1.

123. *Decision to Resume*, *supra* note 94.

124. Holst Statement, *supra* note 6.

125. *Id.*

Such comments, although lacking an evidentiary basis,<sup>126</sup> strongly indicate Norway's determination to preserve whaling.

Perhaps Norway's most powerful argument is simply that its current whaling practices are nobody else's business. In the words of Norway's Minister of Foreign Affairs, "[i]f countries are permitted to force one another to accept rules prohibiting the use of resources without there being a sound basis for this, the very foundation of international cooperation and international agreement on environment and development issues will be endangered."<sup>127</sup> Norway asserts that the "right of a nation to utilize available natural resources on a scientific and sustainable basis"<sup>128</sup> should not be abridged solely on the basis of another nation's emotional attachments to a particular species. In this respect, Norway is justified in its concern that a surrender on the whaling issue could set a dangerous precedent having significantly detrimental long-term effects.

Despite all of its efforts to justify a limited commercial catch, Norway has not yet finalized its whaling policies for 1994. Although Norway has vowed not to give in to protests, boycotts, and embargo threats,<sup>129</sup> Norwegian officials have delayed the decision on whether a hunt will be allowed in 1994. Norwegian Prime Minister Gro Harlem Brundtland has said that a decision will be made following the next annual meeting of the IWC in May, 1994.<sup>130</sup>

### C. CONSERVATIONIST ARGUMENTS

Opponents of commercial whaling, in their fight to end Norwegian minke whaling, have advanced several persuasive functional arguments. One of these pragmatic contentions is that whales must be universally protected due to their value "as a symbol for world concern for the environment."<sup>131</sup> The basis of this position is that whales, by virtue of their brush with extinc-

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126. The above quote, for example, was used simply as a way to focus attention on all the environmentally-conscious actions for which *Norway* has been responsible, rather than to point out shortcomings in the environmental policies of any other nation. *Id.*

127. *Id.*

128. *Id.*

129. Bugge, *supra* note 80.

130. *Whaling Decision Brings Sigh of Relief*, *supra* note 91.

131. Kutner, *supra* note 1, at 133. Much of whales' symbolic value is due to the way that concern for whales has grown along with concern for the environment in general. See *supra* notes 2-4, 49 and accompanying text.

tion and their subsequent resurgence, "have become symbols of the fate of all species on Earth."<sup>132</sup>

The second important functional argument against Norway's actions is that they "could cause a massive unravelling of international environmental law."<sup>133</sup> While environmentalists are naturally concerned about the impact that Norway's decision may have on whaling and the IWC,<sup>134</sup> the concern runs much deeper. In the eyes of some environmentalists, "if Norway is successful in destroying the IWC, other nations with objections to other conservation treaties . . . will be encouraged to withdraw, threatening the delicate global support for international environmental protection."<sup>135</sup>

Notwithstanding these rather functional anti-whaling arguments, the most important arguments against whaling consist of highly sentimental appeals based on the distinctive characteristics that whales are said to possess. There are a wide variety of theories advanced in support of this position, including whales' high intelligence,<sup>136</sup> the inhumanity of current killing methods,<sup>137</sup> and the human-like qualities often attributed to whales.<sup>138</sup> Thus, the unique nature of whales plays a vital role in defining and evaluating the emotional arguments against Norway's recent resumption of commercial whaling.

Whales are the largest creatures to inhabit the Earth.<sup>139</sup> Their enormous size enables them to conserve body heat in the frigid temperatures of the ocean depths.<sup>140</sup> Another noteworthy characteristic of whales is their highly migratory nature. Scien-

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132. COMMERCIAL WHALING INFORMATION KIT, *supra* note 3. "Nature symbols" are important since societies use such symbols "to develop understanding about relationships between people and with the natural world." Arne Kalland, *Super Whale: The Use of Myths and Symbols in Environmentalism*, 11 ESSAYS ON WHALES AND MAN 5 (1993) (on file with the Minnesota Journal of Global Trade).

133. COMMERCIAL WHALING INFORMATION KIT, *supra* note 3.

134. "If Norway resumes commercial whaling, in defiance of the IWC, other nations, such as Japan and Iceland, will likely follow. The result could signal the total collapse of the IWC. . . ." *Id.*

135. *Id.*

136. See *infra* notes 143-47 and accompanying text.

137. COMMERCIAL WHALING INFORMATION KIT, *supra* note 3. In this context, modern whaling has been likened to "shooting a harpoon into a moose and dragging it alive behind a car." *Id.*

138. See *infra* notes 148-52 and accompanying text.

139. Graves, *supra* note 4, at 732. The blue whale can reach lengths of up to 100 feet and weigh up to 200 tons. *Id.*

140. Scheffer, *supra* note 97, at 759. Sperm whales are thought to dive to depths of well over a mile below the surface of the sea. *Id.* at 761.

tists use a number of methods to track whales in order to document their yearly journeys.<sup>141</sup> The results have shown that whales are, indeed, true world travellers. Every winter, for example, gray whales will migrate from Arctic feeding waters down to mating sanctuaries off the coast of southern California, a round trip of approximately 10,000 miles.<sup>142</sup>

Perhaps the most striking aspects of whales are their so-called "human-like" qualities. One of the most well-known and least documented of these qualities is the high intelligence level of whales. Like humans, whales' brains are disproportionately large with respect to the size and complexity of their bodies.<sup>143</sup> Although this fact alone does not conclusively denote a high intelligence,<sup>144</sup> there are other factors, such as complex social hierarchies<sup>145</sup> and the ability to communicate,<sup>146</sup> which suggest that whales are, indeed, highly intellectual creatures.<sup>147</sup>

There is even evidence that whales may experience feelings which are closely akin to human emotions.<sup>148</sup> Scientists generally agree that many whales live in family groups which stay

141. Among these tracking methods are several different ways of attaching radio transmitters to the smooth bodies of whales. *Id.*

142. Kutner, *supra* note 1, at 129.

143. Scientists can use a number known as the Encephalisation Quotient (EQ) to measure the size of an animal's brain compared to the size and complexity of its body and its metabolic rate. *Halt the Brain Drain - Help the Whale*, Reuters-Independent, Aug. 23, 1993, available in LEXIS, World Library, Allnws File. While chimpanzees' EQ is only around 3.0, bottlenose dolphins (close relatives of whales) boast an EQ of 5.6. The EQ of humans is approximately 7.4. *Id.*

144. One of the problems with measuring whale intelligence may be humans' limited frame of reference. As one work has queried, "[w]hat do we mean by intelligence?" KARL-ERIK FICHTELIUS & SVERRE SJOLANDER, *SMARTER THAN MAN?* 144 (Thomas Teal trans., 1972). In other words, just because whales' brains function in the same physiological way as those of humans, "does not mean that the intellectual activity must be the same." *Id.* at 145.

145. Again, using bottlenose dolphins as an analog, it is interesting to note that they spend approximately one-third of their time maintaining social ties within their dolphin "communities". *Halt the Brain Drain — Help the Whale*, *supra* note 143.

146. Not only do whales communicate with each other through various different sounds, they can do so over remarkable distances. There have been documented cases of humpback whales emitting their "songs" at depths which fall within two "sound reflecting layers" of the ocean. FICHTELIUS & SJOLANDER, *supra* note 144, at 135. Such a sound, emitted at such a place, could be heard by a human ear over 25,000 miles away. *Id.*

147. Not all scientists agree, however, that "the whale" has all the characteristics which are often attributed to it. See *infra* text accompanying notes 213-16.

148. In the opinion of two of the leading environmental groups in this field, "[i]t has long been established as fact that whales are sentient, socially complex,

together for years at a time.<sup>149</sup> In addition, some whales exhibit behavior which strongly resembles human kindness or altruism.<sup>150</sup> In the words of one noted marine mammologist, whales are "endowed with social instincts, family bonds, and capacities that seem at times very close to human feelings."<sup>151</sup> Furthermore, there is even evidence that whales may grow psychotic and even suicidal in captivity.<sup>152</sup>

The organizations and governments opposing Norway base many of their arguments on the unique characteristics of whales detailed above. Their central argument is that, due to these characteristics, it is simply wrong to kill whales. Usually, however, all of the specific theories about whales tend to combine to form a generalized appeal based almost exclusively on emotion.<sup>153</sup> Thus, it is also necessary to examine the debate in the context of more objective criteria.

#### IV. THE PERMISSIBILITY OF PELLY AMENDMENT SANCTIONS UNDER GATT

One question which arises in evaluating the use of measures such as Pelly Amendment sanctions to enforce international whale conservation programs is whether such sanctions would be consistent with GATT. GATT is "the central organiza-

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intelligent, playful, gregarious, altruistic, and, with respect to humans, incredibly benevolent." COMMERCIAL WHALING INFORMATION KIT, *supra* note 3.

149. Scheffer, *supra* note 97, at 759.

150. In the days of non-exploding harpoons, when a sperm whale was harpooned, "[a]pparently it was not uncommon for companions of the harpooned animal to gather around it and attempt to bite off the harpoon or the harpoon line, which they often managed to do." FICHTELIUS & SJOLANDER, *supra* note 144, at 142.

151. Scheffer, *supra* note 97, at 759.

152. According to the HSUS, whales are "socially complex and highly intelligent and cannot withstand stressfull removal from the wild and life in a small pool." COMMERCIAL WHALING INFORMATION KIT, *supra* note 3. In support of this theory, the HSUS notes that beluga whales live for 25 to 50 years in the wild, as opposed to five to seven years in captivity. *Id.* Even more dramatically, one American researcher believes that *suicide* claimed the lives of several of his bottlenose dolphins. Scheffer, *supra* note 97, at 764.

153. The emotional nature of many anti-whaling arguments is demonstrated by the following Humane Society quote: "Will the seas continue to redden with blood? Will the great whales' mysterious songs, which echo through the unfathomable deep, continue to be replaced by cries of agony and death? Will thousands of whales be brutally hunted down, their families destroyed?" *Slaughter on the High Seas*, CLOSE-UP RPT. (HSUS, Gaithersburg, Md.), Feb. 1993.

tion for coordinating national policies on international trade."<sup>154</sup> Its goal is to reduce or eliminate barriers to international trade.<sup>155</sup> Toward that end, GATT Article XI prohibits all member nations from imposing any form of quantitative restriction on imports or exports.<sup>156</sup>

The import prohibition contemplated by the Pelly Amendment is a quantitative restriction of the most serious kind because it is an absolute prohibition on the importation of certain goods.<sup>157</sup> Thus, the Amendment is manifestly inconsistent with GATT Article XI.<sup>158</sup> Moreover, the ban called for by the Pelly Amendment would apply to goods which are unrelated to whaling.

In *United States — Restrictions on Imports of Tuna ("Tuna / Dolphin")*, Mexico challenged the GATT consistency of a U.S. prohibition on Mexican tuna imports.<sup>159</sup> The United States implemented the ban because fishing methods of the Mexican tuna industry killed more dolphins incidentally than permitted under the MMPA.<sup>160</sup> The United States unsuccessfully argued that the prohibition did not violate Article XI, but was instead permissible as an internal regulation under Article III.<sup>161</sup> The United States contended that the ban sought to protect dolphins by regulating the production of tuna itself and thus was consistent with Article III.<sup>162</sup> In the context of Pelly Amendment sanctions, however, such an argument would not even be avail-

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154. JOHN H. JACKSON & WILLIAM J. DAVEY, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 295 (2nd ed. 1986).

155. The GATT preamble states that the Agreement is designed to facilitate "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce." GATT pmbl.

156. GATT art. XI:1. Specifically, Article XI:1 forbids "prohibitions or restrictions other than duties . . . on the importation of any product" of any other GATT member. *Id.* Note that Norway and the United States are both members of the GATT and were, in fact, two of the original members. *Id.* pmbl.

157. In *Tuna/Dolphin*, although the United States argued that Article XI did not apply to the MMPA, it did not dispute the fact that sanctions like those imposed by the MMPA and the Pelly Amendment are, indeed, quantitative restrictions. *Tuna/Dolphin*, *supra* note 54, at 1618.

158. It is interesting to note that the Pelly Amendment, by its own terms, requires that any sanctions imposed must conform to GATT. *See supra* note 73.

159. *See Tuna/Dolphin*, *supra* note 54.

160. *Id.* at 1599.

161. *Id.* at 1603-05. Internal regulations fall under GATT Article III, which allows a government to adopt any internal regulation it chooses, so long as the regulation provides foreign goods no less favorable treatment than like domestic products. GATT art. III:4.

162. *Tuna/Dolphin*, *supra* note 54, at 1603.

able. The import restrictions contemplated by the Pelly Amendment would apply to a variety of fishery and wildlife products unrelated to whaling. Thus, Pelly Amendment sanctions would simply be a blatant, unilateral attempt to affect the policies of another nation through the use of economic force.

Although Pelly Amendment sanctions would clearly violate GATT Article XI, GATT contains several broad exceptions which apply to most GATT rules.<sup>163</sup> Two of these exceptions are particularly relevant to possible U.S. sanctions against Norway. Article XX(b) is a broad exception for measures which are "necessary to protect human, animal or plant life or health."<sup>164</sup> Article XX(g) is an exception which applies to measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."<sup>165</sup>

The first paragraph of Article XX imposes two conditions on the application of any Article XX exception. First, the measure taken must not constitute arbitrary or unjustified discrimination.<sup>166</sup> Second, the measure must not be a disguised restriction on trade.<sup>167</sup> If the United States eventually decides to prohibit certain Norwegian imports, such a prohibition would be a discriminatory trade measure because it would apply only to the products of one particular nation.<sup>168</sup> However, the sanctions would be neither arbitrary nor unjustified because they would clearly be aimed at conservation, and would affect only Norway, the one nation in the world openly disregarding the IWC moratorium.<sup>169</sup> As for the second broad condition of Article XX, none

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163. Although the apparently broad application of the Article XX exceptions makes them potentially subject to abuse, they are necessary to allow special trade measures against imports to be used as part of a domestic regulatory scheme. JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 743 (1969).

164. GATT art. XX(b).

165. GATT art. XX(g).

166. GATT art. XX.

167. *Id.*

168. Ted L. McDorman, *The GATT Consistency of U.S. Fish Import Embargoes to Stop Driftnet Fishing and Save Whales, Dolphins and Turtles*, 24 *GEO. WASH. J. INT'L L. & ECON.* 477, 522 (1991). U.S. sanctions against Norway would be discriminatory because they would apply *only* to Norwegian products. Thus, by definition, such sanctions would discriminate between products of Norway and those of other countries.

169. Article XX prohibits the application of any measure "in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail." GATT art. XX. Since the "condition" currently prevailing in Norway — i.e., the open practice of commercial whaling — does not exist in any other country, no sanctions imposed against

of the parties involved suggest that U.S. sanctions would constitute a disguised restriction on international trade.<sup>170</sup>

GATT Article XX(b) allows a contracting party to violate a GATT rule if such a violation is "necessary to protect human, animal or plant life or health."<sup>171</sup> With new evidence tending to show that minke whales in the North Atlantic are no longer endangered,<sup>172</sup> it is doubtful that Pelly Amendment sanctions in this particular case would be "necessary" to protect the continued existence of the species. However, even if sanctions were found to be necessary, the inquiry would not end there. In *Tuna/Dolphin*, the GATT panel considered the drafting history of Article XX(b) in order to fashion a condition on this exception which does not appear in the text of GATT.<sup>173</sup>

The *Tuna/Dolphin* panel found that Article XX(b) was intended to allow a government to violate GATT only when necessary to protect the well-being of human, animals or plants within that government's own jurisdiction.<sup>174</sup> With this construction in mind, the United States may argue that the migratory nature of whales makes them part of an ecosystem which transcends national borders<sup>175</sup> and that they are, therefore, a suitable subject for protective efforts by all nations.<sup>176</sup> However, the United States presented a similar argument in *Tuna/Dolphin* and the panel found it unconvincing. Although the panel did not directly address the issue, it "considered that if the broad interpretation of Article XX(b) suggested by the United

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Norway could be considered arbitrary or unjustifiable within the meaning of Article XX.

170. The GATT's prohibition against "disguised restrictions on trade" has been interpreted by a Canada-U.S. FTA panel to require "that trade-restricting conservation measures must in fact have a true conservation purpose." *In re Canada's Landing Requirements for Salmon and Herring*, Oct. 16, 1989, 12 ITRD 1026, 1036. Although Norwegian officials have voiced several complaints about possible U.S. sanctions, see, e.g., *supra* note 125 and accompanying text, they have not, however, asserted that such sanctions would be imposed for any purpose other than the conservation of whales.

171. GATT art. XX(b).

172. See *infra* notes 193-94 and accompanying text.

173. *Tuna/Dolphin*, *supra* note 54. Specifically, the panel found that "the concerns of the drafters of Article XX(b) focused on the use of sanitary measures to safeguard life or health of humans, animals or plants within the jurisdiction of the importing country." *Id.* at 1620.

174. *Id.*

175. "Whales, which spend their entire lives roaming over the oceans of our planet, are true world citizens. They pass through man's carefully defined boundaries without hesitation." Kutner, *supra* note 1, at 129.

176. Steve Charnovitz, *The Environment vs. Trade Rules: Defogging the Debate*, 23 ENVTL. L. 475, 497 (1992).

States were accepted, each contracting party could unilaterally determine the life or health protection policies from which other contracting parties could not deviate . . . ."<sup>177</sup> Although, technically, future panels are not bound by this prior panel decision, it is highly unlikely that a future panel would find that Pelly Amendment sanctions fit within the exception provided for in Article XX(b).<sup>178</sup>

Article XX(g) suspends GATT obligations for trade measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."<sup>179</sup> The precise meaning of this exception is somewhat unclear in the wake of *Tuna/Dolphin*. The panel in that case drew upon an earlier panel report<sup>180</sup> to support its finding that Article XX(g), like Article XX(b), may not be applied in an "extrajurisdictional" manner.<sup>181</sup> Although the exact meaning of the term "extrajurisdictional" is not entirely clear,<sup>182</sup> U.S. efforts to end Norwegian whaling probably fall within this category, just as did its efforts to reform the Mexican tuna fishing industry. Again, although the outcome in *Tuna/Dolphin* is not binding precedent, it is an indication of how narrowly Article XX is interpreted,<sup>183</sup> and future panels are unlikely to adopt a new interpretation.<sup>184</sup>

It should be noted that to the extent that the sanctions called for by the Pelly Amendment are designed to enforce the rules and quotas of the IWC,<sup>185</sup> such sanctions are based on a

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177. *Tuna/Dolphin*, *supra* note 54, at 1620.

178. "Even though strict 'stare decisis' concepts of precedent do not apply in international law, it is clear that in practice prior 'precedents' do have weight. . . . Indeed, sometimes the deliberations of international dispute settlement panels . . . give every bit the appearance of common law lawyers arguing precedent." JACKSON & DAVEY, *supra* note 154, at 332.

179. GATT art. XX(g).

180. *Tuna/Dolphin*, *supra* note 54, at 1620-21. The earlier report upon which the Tuna/Dolphin Panel relied for support for this proposition was GATT Dispute Resolution Panel, *Canada — Measures Affecting Exports of Unprocessed Herring and Salmon*, BISD 35th Supp. 98, 114 (1989) (panel report adopted Mar. 22, 1988).

181. *Tuna/Dolphin*, *supra* note 54, at 1620.

182. It is interesting to note that "the panel did not offer any definition of an extrajurisdictional offense, even though the panel apparently invented this term." Charnovitz, *supra* note 176, at 497.

183. See *Tuna/Dolphin*, *supra* note 54, at 1619.

184. See *supra* note 178.

185. See *supra* notes 68-76 and accompanying text.

form of international consensus.<sup>186</sup> However, while there is broad international sentiment against whaling, there has been no demonstrated consensus on the use of unilateral measures by any individual nation to enforce IWC rules.<sup>187</sup> Further, as the GATT panel recognized in *Tuna/Dolphin*, unilateral actions are rarely an appropriate way to deal with a threat to the environment.<sup>188</sup> In the final analysis, unilateral measures are generally inconsistent with GATT's broad purpose of encouraging reciprocal reduction of trade barriers.<sup>189</sup>

## V. RESOLUTION OF THE WHALING DEBATE

The GATT inconsistency of Pelly Amendment sanctions is an important factor in the current whaling debate, but it is not the end of the story.<sup>190</sup> It is also important to examine the arguments on either side of the debate from a common sense standpoint. Such an examination reinforces the conclusion that U.S. sanctions would be an inappropriate response to Norway's resumption of commercial whaling.

### A. ASSESSING THE MERITS

It is important to keep in mind that no nation, including Norway, wants to resume commercial whaling of species that are endangered.<sup>191</sup> Thus, the first question which must be answered in resolving the whaling issue is whether Norway's scientific arguments are valid, that is, whether the limited hunting of minke whales is ecologically justifiable. Although, as noted, whale stock populations are difficult to measure,<sup>192</sup> recent evidence suggests that Norway is, indeed, correct in its contention that minke whales will not be endangered by a carefully con-

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186. In this respect, U.S. sanctions imposed against Norway would differ from the prohibition on the importation of Mexican tuna. The standards of the MMPA at issue in *Tuna/Dolphin* were purely of U.S. origin.

187. The *Tuna/Dolphin* panel suggested that negotiation of an international dolphin protection agreement might have been "desirable." *Tuna/Dolphin*, *supra* note 54, at 1620. Nowhere in its report, however, did the panel indicate that the U.S. ban on Mexican tuna would have been permissible if it were based on an international regulatory scheme.

188. The panel flatly stated that "a contracting party may not restrict imports of a product merely because it originates in a country with environmental policies different from its own." *Tuna/Dolphin*, *supra* note 54, at 1622.

189. See *supra* note 155 and accompanying text.

190. See *infra* notes 226-29 and accompanying text.

191. See *supra* note 94 and accompanying text.

192. See *supra* 102-05 and accompanying text.

trolled commercial whaling season.<sup>193</sup> In fact, the IWC's Scientific Committee, following years of research and study, has unanimously concluded that the minke whale population has recovered to the point where it can tolerate traditional whaling off the coast of Norway.<sup>194</sup> Because this evidence is so strongly in Norway's favor, the crucial question is whether any of the anti-whaling arguments are sufficient to warrant the imposition of unilateral sanctions by the United States against Norway.

As noted earlier, one argument in favor of using U.S. law to enforce a global moratorium on whaling is that whales deserve to be protected on the basis of their status as symbols of world environmental consciousness.<sup>195</sup> However, some evidence indicates that whales have been chosen by environmental groups to achieve this symbolic status on the basis of some very superficial and pragmatic considerations. For example, Steve Sawyer, the international director of Greenpeace, has admitted that "[o]ur philosophy regarding issues [which we address] is extraordinarily pragmatic. We choose those we feel we are in a position to win."<sup>196</sup> Similarly, anthropologist Arne Kalland concludes, "[b]ecause . . . whaling is pursued by only a few nations and the capital investment is small, campaigns against these activities are especially tempting."<sup>197</sup> In light of these factors, it is diffi-

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193. The United States and other anti-whaling nations have now apparently conceded the issue of ecological justification. In a release by the IWC, recent developments were described thus:

The [group of nations resisting whaling] has argued in recent years that commercial whaling cannot be allowed until there is firm evidence on the status of the stocks, that guaranteed control and monitoring systems are in place, and improvements are achieved in humane killing practices. *However, the position of these countries became clearer this year with the statement by the USA that it opposes the resumption of commercial whaling even if these requisite conditions are satisfied.*

WHALING AFTER THE 1993 MEETING OF THE IWC (IWC, Cambridge, U.K.), July, 1993 (emphasis added).

194. *IWC Committee Chairman's Resignation a Shout of Protest*, *supra* note 52. The management scheme proposed by the IWC was the culmination of the Comprehensive Assessment of whale stocks, begun by the IWC at its 1986 annual meeting. WHALING AFTER THE 1993 MEETING OF THE IWC, *supra* note 193.

195. See *supra* notes 131-32 and accompanying text.

196. Kalland, *supra* note 132, at 6 (alteration in original). Kalland explains, conservationist and animal welfare groups both have a tendency to address those issues which are easy to win. To win — or at least give the impression of victory through intensive mass media assaults — is important to build up public trust in an organization[']s effectiveness and therefore their legitimacy.

*Id.*

197. *Id.*

cult to attribute much weight to the symbolic value of whales when determining the desirability of unilateral U.S. action.

Another argument advanced by anti-whaling groups is that Norwegian whaling practices will bring about the demise of the IWC, and that if the IWC falls, other international environmental organizations will suffer the same fate.<sup>198</sup> This concern is certainly understandable. If Norway is able to violate the IWC with impunity, it would seem at least possible that other nations might emulate Norway's actions in other contexts. However, the current state of the IWC,<sup>199</sup> combined with the relationship which exists between Norway and the IWC,<sup>200</sup> is probably unique enough to significantly lessen the possibility of such a chain reaction.

First, as Norwegian officials eagerly point out, Norway's actions do not actually violate IWC rules. The International Convention for the Regulation of Whaling provides that a nation which objects to an IWC rule is automatically exempt from compliance with that rule.<sup>201</sup> Therefore, because Norway entered a formal reservation against the IWC moratorium in 1982, its actions are, technically, not in violation of the ICRW. Ironically, the same cannot be said of the IWC's actions. The purpose of the ICRW is "to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry."<sup>202</sup> However, despite this clear expression of purpose, it appears that the current members of the IWC are determined to block *any* development of the whaling industry.<sup>203</sup> Therefore, as Norway quite correctly contends, "[t]he position of member countries of the IWC which oppose whaling on principle is in fact in conflict with the Commission's own objectives."<sup>204</sup>

Second, the IWC is currently in such a state of disarray that its overhaul or even its total demise would surprise virtually no one and would have little effect on the life expectancy of other international organizations. At the moment, the IWC is an organization in search of an identity. On one hand, the IWC was

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198. See *supra* notes 133-35 and accompanying text.

199. See *infra* notes 205-08 and accompanying text.

200. See *infra* notes 201-04 and accompanying text.

201. See *supra* note 44 and accompanying text.

202. ORGANISATION AND FUNCTIONS (IWC, Cambridge, U.K.), May, 1993.

203. See *supra* note 193 and accompanying text.

204. *Norwegian minke whaling*, *supra* note 34, at 4. In addition, as the Norwegian government has pointed out, "Norway never agreed to join an organization in which decisions on whale conservation are made on the basis of emotional arguments and campaigns." Holst Statement, *supra* note 6, at 5.

set up to regulate the whaling industry on the basis of scientific principles.<sup>205</sup> On the other hand, by the IWC's own admission, "a majority of [current IWC] members now seem to hold the view that whales are not a resource to be utilised by hunting,"<sup>206</sup> thereby rejecting the scientific objectives of the organization. As an example of the confusion caused by this conflict, the IWC itself refers to the current global moratorium as a "pause" in commercial whaling,<sup>207</sup> despite the fact that the moratorium appears to be more or less permanent.<sup>208</sup> The demise of a group as internally confused and contradictory as the IWC would seem to pose no great threat to other organizations which do not suffer from such infirmities. Thus, Norway's secession from such an organization is unlikely to touch off a chain reaction of similar incidents within other international organizations.

Finally, as noted above, anti-whaling arguments have a strong sentimental appeal<sup>209</sup> because of the emotional way in which whales are viewed by a large segment of the world's population.<sup>210</sup> Even if one accepts the existence of all of the traits of whales that are cited in support of these emotional arguments,<sup>211</sup> however, one crucial question remains: Where do we draw the line? In other words, are whales unique enough to be seen as the *only* animals that are worthy of universal protection or might the end of whaling be followed by a movement to end other forms of hunting and fishing? This question has no easy answer.

Some environmentalists argue that whales are, in fact, truly unique creatures deserving of special protection.<sup>212</sup> This issue is far from settled, however, since some authorities argue that "the whale" does not really have all of the characteristics which are often attributed to it. Arne Kalland, an anthropologist at the Nordic Institute of Asian Studies, has developed the theory of the "super whale," which suggests that whales may not be as unique as they seem.<sup>213</sup> This theory points out that environmentalists often speak of "the whale" in the singular when

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205. See *supra* note 202 and accompanying text.

206. WHALING AFTER THE 1993 MEETING OF THE IWC, *supra* note 193.

207. ORGANISATION AND FUNCTIONS, *supra* note 202.

208. See *supra* note 193.

209. See *supra* note 153 and accompanying text.

210. See *infra* notes 232-33 and accompanying text.

211. See *supra* text accompanying notes 136-52.

212. See *supra* notes 139-52 and accompanying text for examples of the attributes which allegedly make whales unique.

213. Kalland, *supra* note 132, at 7.

discussing some of the qualities of individual species of whales.<sup>214</sup> Yet, as Mr. Kalland observes, the particular qualities which "do hold some truth are rarely true for more than one or two of the more than 75 different whale species . . ."<sup>215</sup> While the mythical "super whale" may possess all of the amazing characteristics which are ascribed to whales, no one particular species of whale is quite as far removed from the rest of the Earth's creatures.

The above discussion indicates that anti-whaling arguments are based on emotion, rather than objective scientific criteria. In light of this reality, unilateral U.S. sanctions would be a particularly inappropriate response to Norway's resumption of commercial whaling. As Norway forcefully argues, it would set a dangerous precedent if the "right of a nation to utilize available natural resources on a scientific and sustainable basis" is abridged on the basis of another nation's "emotional attachments" to a particular species of animal.<sup>216</sup> A proliferation of unilateral trade restrictions would soon follow if such measures could be sustained by something as insubstantial as a fondness for certain marine mammals.<sup>217</sup>

#### B. WILL THE ISSUE BE RESOLVED IN THE PRESENT CONTEXT?

The debate over Norwegian whaling and the possible imposition of Pelly Amendment sanctions have the potential to substantially contribute to the evolution of the broader debate concerning trade and the environment. Unfortunately, however, the appropriateness of unilateral action might not be resolved in the context of the present whaling debate. For several reasons, it appears that the Norwegian government may be forced to give up minke whaling before it is possible to analyze the practical effects of the threat or the imposition of trade sanctions against Norway. All signs indicate that Norway's efforts to win acceptance for its whaling practices are doomed to failure.

The privately organized boycott of Norwegian products continues to gain momentum. In July, several large German com-

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214. *Id.*

215. *Id.*

216. Holst Statement, *supra* note 6, at 8.

217. Fred Singer, Director of the Science and Environmental Project, asks, "[s]hould we boycott the French for eating horsemeat and the Italians for eating songbirds?" Fred Singer, *Greens Sound a False Alarm on Whale Hunting*, WASH. TIMES, Oct. 3, 1993, at B2.

panies<sup>218</sup> announced that they would join other large corporations in the United States and elsewhere<sup>219</sup> in boycotting Norwegian products. The boycott has also been successful in exerting pressure on the Norwegian government from unexpected sources. A group of Norwegian businessmen, apparently swayed by the possible economic impact of the boycott, have sued their own country's government, alleging that its whaling policy violates Norway's anti-cruelty laws.<sup>220</sup>

Another factor exerting pressure on Norway is the EC accession talks. Although Norway will continue to appeal to the EC for concessions that would allow it to continue whaling,<sup>221</sup> it is unclear whether such concessions will be granted.<sup>222</sup> If Norway is forced to make a decision between joining the EC and standing firm on the whaling issue, economic concerns could lead it to choose the former.<sup>223</sup>

In addition to all of these pressures, the possibility of U.S. Pelly Amendment sanctions still looms over Norway. The issue of sanctions is likely to flare up again in the spring of 1994.<sup>224</sup> President Clinton's recent decision to "delay" sanctions was mo-

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218. *Boycott of Norwegian Exports Continues over Whaling Controversy*, *supra* note 84.

219. *Norwegian Decision to Hunt Whales Sparks Boycott, Could Affect U.S. Trade*, *supra* note 111.

220. Patricia Forkan, NEWS RELEASE (HSUS, Gaithersburg, Md.), July 14, 1993.

221. *See supra* note 84 and accompanying text.

222. Norway's request is based largely on similar concessions which were granted to Sweden to allow them to continue hunting bears, beavers, and certain species of birds. *See supra* note 84. Because whaling is much less popular than hunting bears and beavers, public opinion within the EC will make it much more difficult for Norway to get concessions than it was for Sweden. In short, the EC ban on whaling is still "seen as one of the most thorny and domestically explosive issues in [Norway's] negotiations with the Commission on EC entry." Brian Love, *Alarm Sounded on EC Bans on Seal Fur, Whale Meat, Ivory*, Reuter Library Report, Dec. 1, 1993, available in LEXIS, World Library, Allnws File.

223. At this point, the majority of the Norwegian cabinet still favors EC membership for Norway. Stella Bugge, *Norway Offers Little in Fisheries Talks*, Reuter European Community Report, Nov. 12, 1993, available in LEXIS, World Library, Allnws File. The opinion of the Norwegian public, however, might cause Norway to voluntarily forego EC membership rather than renounce whaling. "Opinion polls show that a wide majority of Norwegians oppose membership, partly due to worries about losing national control over resources such as fish . . ." *Id.*

224. *See supra* note 91.

tivated partly by extenuating circumstances,<sup>225</sup> and he is unlikely to show as much leniency when the issue comes up again. Furthermore, even if Norway successfully challenges the GATT consistency of U.S. sanctions, the victory is likely to be a hollow one, just as it was for Mexico in *Tuna/Dolphin*.<sup>226</sup> Although the GATT panel found that U.S. trade sanctions violated GATT rules, Mexico, in response to U.S. pressure, refrained from bringing the panel's report before the GATT Council.<sup>227</sup> As a result, the report never became binding on the United States, and Mexico eventually ceased its objectionable tuna fishing practices.<sup>228</sup> A panel report condemning U.S. sanctions against Norway would probably be similarly ineffective.<sup>229</sup>

It is inevitable that all the pressure on Norway will eventually take its toll. As environmentalists quite accurately point out, "[t]he public has continually exhibited a deep concern for the plight of whales and will not tolerate renewed commercial whaling."<sup>230</sup> Although Norway has science on its side,<sup>231</sup> Norwegian officials will eventually realize that all the science in the world is not going to change the public's opinion of whaling.

Whales have occupied a special place in human culture for hundreds of years<sup>232</sup> and continue to do so today.<sup>233</sup> As Norway continues whaling, the vast weight of public opinion will eventually have a serious effect on its economic well-being, as well as its foreign relations. When that effect becomes too pronounced, despite all of Norway's claims to the contrary,<sup>234</sup> Norwegian officials will likely decide that the benefits of their limited whaling industry simply do not justify the costs. At that point,

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225. The President's leniency is said to have been partially motivated by Norway's recent mediation of the talks between Israel and the Palestine Liberation Organization. *Clinton Delays Norway Sanctions*, *supra* note 91.

226. See *supra* notes 60-61 and accompanying text.

227. Schoenbaum, *supra* note 9, at 703 n.13.

228. See *supra* note 61.

229. U.S. public opinion strongly opposes whaling. See *infra* notes 232-33 and accompanying text. Consequently, the United States is not likely to show any more deference to Norway than it did to Mexico.

230. COMMERCIAL WHALING INFORMATION KIT, *supra* note 3.

231. See *supra* notes 193-94 and accompanying text.

232. Literary works concerning whales have been common for over a century, beginning, of course, with Herman Melville's *Moby Dick*, published in 1851. Whales are also becoming popular subjects for musicians and artists. Kalland, *supra* note 132, at 8.

233. The dramatic growth of the whale-watching industry is a good indication of just how popular whales have become. So-called "whale safaris" are conducted all over the world and, in recent years, have developed into a \$350 million a year business. COMMERCIAL WHALING INFORMATION KIT, *supra* note 3.

234. See *supra* note 6 and accompanying text.

thousands of years of Norwegian whaling will finally draw to an inglorious close.

## VI. CONCLUSION

Whether the United States should take unilateral measures to enforce international environmental rules is an important component of the general debate concerning free trade and environmental protection. Unilateral measures have had a significant impact on world trade in the past,<sup>235</sup> and undoubtedly will continue to do so in the future.<sup>236</sup> Although there is broad international support for a global ban on whaling, the threat of unilateral U.S. sanctions is a major catalyst sparking the debate over Norwegian whaling practices.

As a general matter, unilateral trade restrictions imposed in the name of environmental protection are inappropriate and should be avoided,<sup>237</sup> particularly when they are inconsistent with GATT. This principle applies with special force in the present context because the weight of scientific evidence is against those who oppose limited commercial whaling. Opponents of Norwegian whaling are thus reduced to making arguments based on emotion and sentimentality. If unilateral sanctions are allowed to stand on such a weak foundation, the stage would be set for a rapid deterioration of world trade, precipitated by a flood of unilateral trade restrictions. Thus, a U.S. embargo imposed against Norway pursuant to the Pelly Amendment would be a potentially dangerous and highly inappropriate response to Norway's recent resumption of commercial whaling.

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235. For example, the EC ban on seal fur "is widely seen as having led to the collapse in the mid-1980s of a controversial Canadian seal hunt which killed close to 200,000 baby seals a year for their fur." Love, *supra* note 222.

236. In addition to the threat of unilateral sanctions imposed by the United States, individual member states of the European Community are also authorized to "take any action they [want] . . . regarding punitive measures against Norway", according to an EC spokesman. *Norway to Ask for U.S. Agreement on Whaling*, European Report, Oct. 9, 1993, available in LEXIS, World Library, Allnews File.

237. The international community agrees that, as a general matter, "[u]nilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided." *Rio Declaration on Environment and Development*, U.N. Conference on Environment and Development, Principle 12, U.N. Doc. A/CONF.151/5/Rev. 1 (1992). As noted earlier, Pelly Amendment sanctions would not be completely unilateral since they would be partially founded on the rules of the IWC. See *supra* notes 185-86 and accompanying text. However, the fact that most IWC members favor a global moratorium on whaling does not necessarily mean that they would also favor unilateral U.S. action to enforce that moratorium.

