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JAPANESE WHALING IN THE PACIFIC OCEAN: DEFIANCE OF INTERNATIONAL WHALING NORMS IN THE NAME OF “SCIENTIFIC RESEARCH,” CULTURE, AND TRADITION

REUBEN B. ACKERMAN*

Abstract: Japanese whaling practices have always sparked controversy among the international community. Japan’s recent defiance of international environmental norms, however, risks a full-scale trade war led by U.S. demands to reform Japan’s whaling practices or suffer trade sanctions. Although the species’ endangered status may support sanctioning measures under international law, the United States must exercise caution in imposing restraints on international trade in light of its commitments under international trade agreements. The future of Japanese whaling remains unclear, but the international condemnation and call for restrictions is well-founded on international whaling and environmental norms.

INTRODUCTION

Japanese whaling in the northern Pacific Ocean has sparked significant international protest, with the potential to become a full-scale trade war if Japan refuses to reexamine and reform its whaling practices.¹ The international community and conservationists allege that Japan is egregiously violating conventional environmental and whaling norms.² Japan, on the other hand, defends its whaling practices as complying with the regulations promulgated by the International Whaling Commission (IWC), the primary body charged with policing international whaling practices.³

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¹ E.g., Jitendra Joshi, *Japan, U.S. Agree on Whaling Workshop but Sanctions Fate Unclear*, AGENCY FR. PRESSE, Jan. 11, 2001, available at 2001 WL 2318791.

² Danielle Knight, *Pressure Mounts on Japan to End Whaling Program*, INTER PRESS SERV., Nov. 14, 2000, available at 2000 WL 28919729.

³ *Id.*; Doug Struck, *U.S. Fishing Sanctions Gall Japan; Clinton’s Response to Whaling is Seen as Election-Year Ploy*, WASH. POST, Sept. 16, 2000, at A15.

In September, 2000,⁴ the United States attempted to pressure Japan into ceasing its illegal whaling by restricting Japanese fishing rights within the U.S. exclusive economic zone (EEZ).⁵ More importantly, the United States even has contemplated, although not yet imposed, trade sanctions as a more potent measure to stop Japanese whaling.⁶ In addition to disputing the illegality of its actions, the Japanese government also argues that U.S. trade sanctions would not comport with the requirements of the World Trade Organization (WTO).⁷

This Note discusses the legality of the Japanese whaling industry, the reasons for concern within the international community, and possible resolutions under international law. Part I provides a background on Japanese whaling activities and the relevant international regulations on whaling. In addition, this section discusses the history of the IWC and its authority under international law. Finally, this section analyzes the U.S. authority to impose trade sanctions and discusses conservationists' allegations that Japan's continued whaling research is actually a pretext for the commercial sale of whale meat on the Japanese markets.⁸

Part II examines the legality of the Japanese action under the IWC regulations and accepted international norms. This section also addresses the legality and likely success of the U.S. imposition of trade sanctions upon Japan, and Japan's purported defense in the WTO. Part III suggests that trade sanctions may be warranted in light of Japan's refusal to cooperate with international demands and environmental norms.⁹ However, this section also analyzes Japan's efforts at reconciliation with the United States and the establishment of the IWC workshop that may rescue Japan from sanctions, at least in the short term. Additionally, this section argues that conservationists' concerns are well founded, and that the unclear status of the species'

⁴ Mark Rowe, *U.S. Threatens Trade War with Japan*, INDEP. (LONDON), Sept. 24, 2000, at 24.

⁵ Dexter Van Zile, *Op-Ed: As You Were Saying . . . It's Time for Administration to Lift Moratorium on Whaling*, BOSTON HERALD, Oct. 1, 2000, at 26.

⁶ *Id.*

⁷ See David H. Feldman, *Stop Japan's Whale Killing*, BALTIMORE SUN, Dec. 28, 2000, at 13A.

⁸ Sue Fisher, *Saving Whales*, WORLD TODAY, July 1, 2001, at 25, available at 2001 WL 13346504; Int'l Fund for Animal Welfare, *Japan's "Scientific" Whaling* (Feb. 4, 2001), available at http://www.stopwhalingnow.com/info_japan1.html [hereinafter *Japan's "Scientific" Whaling*].

⁹ See *Japan's "Scientific" Whaling*, *supra* note 8, at 3.

existence lends support for strict safeguards to ward against possible extinction. Finally, this Note concludes that Japan's defiance of international pressures, environmental concerns, and its exploitation of a loophole in the IWC's regulations warrants the imposition of trade sanctions and possible international liability under existing international conservation agreements.

I. BACKGROUND

A. *Japan's Whaling Activities*

Since 1994, Japan has conducted a "research whaling program" in the northern Pacific Ocean.¹⁰ This program is conducted in blatant defiance of objections of the international community, animal rights advocates, and environmentalists worldwide who claim that Japan's purported whale research is nothing more than a pretext for the illicit commercial use of whale products on Japanese markets.¹¹ "Putting it plainly," former Commerce Secretary Norman Mineta said, "Japan is killing whales in the name of scientific research to satisfy a demand for whale meat in a few high-end restaurants and gourmet boutiques."¹² When Japan announced the continuation and expansion of its controversial whaling program in 2000, and its intention to increase its annual kill of certain species of whales in May, 2000, international outrage ensued.¹³ UK Fisheries Minister Elliot Morley described the Japanese announcement as "a blatant act of defiance of international opinion," deserving "widespread international condemnation."¹⁴ Additionally, the IWC alleged violations of international whaling norms, because of an international ban on commercial whaling, arguing further that Japan's alleged research purposes are an exploitative and disingenuous reading of the IWC regulations to accomplish Japan's commercial objectives.¹⁵ In defiance of IWC resolutions and the pleas of other countries such as the United States and the United Kingdom, Japan has targeted primarily minke whales.¹⁶ With the expansion of its research program, Japan extended

¹⁰ *Id.* at 3.

¹¹ *Id.* at 1.

¹² Steven Pearlstein, *Clinton Presses Japan to Halt Whale Hunts*, WASH. POST, Sept. 14, 2000, at A31.

¹³ See, e.g., *Japan's "Scientific" Whaling*, *supra* note 8, at 3.

¹⁴ *Id.* at 1.

¹⁵ *Id.*

¹⁶ *Id.*

its targeted whale species to the sperm and bryde's whales, mammals that are deemed endangered and protected under U.S. law.¹⁷

In 2000, the United States threatened trade sanctions under the Clinton administration,¹⁸ but Japan avoided their imposition in January, 2001 after Mineta met with Agriculture, Forestry and Fisheries Minister Yoshio Yatsu.¹⁹ The two agreed to establish an IWC workshop to study the effects of Japan's whaling.²⁰ While sanctions were not imposed at that time, the United States indicated the possibility that it would reconsider sanctions if Japan continued its whaling next year; thus the imposition of trade sanctions against Japan remains a possibility.²¹ Instead of imposing sanctions at that time, the United States prohibited the continuation of Japanese fishing operations within portions of U.S. waters in September, 2000.²² It is uncertain whether the economic impact of this prohibition is sufficient to force Japan to conform its whaling industry.²³

When George W. Bush assumed the U.S. presidency in 2001, his administration reiterated the nation's support for the international community's call on Japan to cease its "lethal research program."²⁴ A bipartisan group of U.S. lawmakers also submitted a resolution calling on President Bush to take action against Japanese whaling, recommending bilateral negotiations and sanctions.²⁵ Although the United States has continued to express its opposition to Japan's whaling practices, it has not imposed trade sanctions and Japan has continued its scientific whaling program.²⁶

B. *The International Convention for the Regulation of Whaling and the IWC*

For centuries leading up to the early 1900s, whales were considered a "free resource, a gift from nature, available to anyone who

¹⁷ Bandar Seri Begawan, *Japan, U.S. Near Deal on Whaling Dispute*, JAPAN POL'Y AND POL., Nov. 20, 2000, available at 2000 WL 29267352.

¹⁸ *Id.*

¹⁹ Joshi, *supra* note 1.

²⁰ *Id.*

²¹ *See id.*

²² Kathy Gambrell, *Clinton Skips Japan Sanctions*, UNITED PRESS INT'L, Dec. 29, 2000, at 1.

²³ *See* Feldman, *supra* note 7, at 13A.

²⁴ *U.S. Reiterates Objection to Japan's Whale Hunt*, JAPAN POL'Y & POL., Aug. 13, 2001, available at 2001 WL 24327338.

²⁵ *U.S. Lawmakers Making Anti-Whaling Noises Ahead of Japan-U.S. Summit*, ASIA PULSE, June 28, 2001, available at 2001 WL 20126665.

²⁶ *See* Daily Press Briefing, U.S. State Dept. (May 15, 2001), available at 2001 WL 20824385.

would hunt and kill them.”²⁷ During the first thirty years of the twentieth century, industrial whale hunting became a major commercial industry that, over time, caused the depletion of many species.²⁸ In the early twentieth century, prior to concerns of extinction, the whale hunting and fishing industries realized the need for regulation to maintain sizable numbers of whales for continued profitable whaling.²⁹ In 1927, at the Whaling Committee of the International Council for the Exploration of the Sea, whaling countries discussed restricting expansion and instituting a licensing system.³⁰ The International Bureau of Whaling Statistics was thereafter established in 1930.³¹ After further negotiations, the Convention for the Regulation of Whaling was concluded in 1931 under the League of Nations and, for the first time, set forth whaling regulations covering all seas, including territorial waters normally within the jurisdiction of the coastal state.³² This Convention went beyond mere commercial regulation in order to afford some measure of conservation for whales worldwide.³³ The taking of a limited number of species, such as immature whales, female whales accompanied by calves, and right whales, was prohibited altogether by the Convention.³⁴ However, despite the prohibitions, the 1931 Convention did little to actually reduce and effectively regulate the overexploitation of whales, and by 1938, the extermination of entire species of whale became a predominant concern.³⁵

Following World War II, most whaling nations recognized the need for a new international convention for the protection and conservation of whales because of the apparent decline in many whale

²⁷ Anthony D’Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT’L L. 21, 28–29 (1991).

²⁸ *Id.* at 28. The total number of whales killed increased from over 10,000 in 1910 to 54,664 in 1938. Anthony Matera, Note, *Whale Quotas: A Market-Based Solution to the Whaling Controversy*, 13 GEO. INT’L ENVTL. L. REV. 23, 37 (2000). The United States began commercial whaling in the eighteenth century utilizing whales as an important source of oil. Sarah Suhre, Note, *Misguided Morality: The Repercussions of the International Whaling Commission’s Shift From a Policy of Regulation to One of Preservation*, 12 GEO. INT’L ENVTL. L. REV. 305, 307–08 (1999). With the development of the U.S. petroleum industry, the U.S. whaling industry gradually declined. *Id.*

²⁹ D’Amato & Chopra, *supra* note 27, at 30.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*; Convention for the Regulation of Whaling, Sept. 24, 1931, 49 Stat. 3079, T.S. No. 880, 155 L.N.T.S. 349.

³³ D’Amato & Chopra, *supra* note 27, at 30.

³⁴ *Id.* at 31.

³⁵ *Id.* at 31, 32.

populations.³⁶ As a result, in 1946, the International Convention for the Regulation of Whaling (Whaling Convention) was signed and entered into force in 1948.³⁷ Today, over forty states have joined the Whaling Convention.³⁸ Recognizing that it was “essential to protect all species of whales from further over-fishing,” the Whaling Convention’s stated purpose was to “ensure proper and effective conservation and development of whale stocks”³⁹ The new international agreement superseded all previous whaling agreements.⁴⁰

The Whaling Convention established the IWC, which is composed of one member from each party state.⁴¹ The IWC’s purpose is to study and investigate whaling practices and to disseminate information worldwide concerning methods of maintaining and increasing the populations of whale stocks.⁴² Since its founding, the IWC has evolved from an organization whose primary purpose was to facilitate commercial whaling into an organization focused more on conservation and protection of whales.⁴³

In 1986, in response to the realization that the existing regulation scheme was not preserving the whale population, the IWC issued a moratorium on commercial whaling, following what it deemed decades of “over-exploitation which had driven several whale species to the edge of extinction.”⁴⁴ Subsequently, the IWC issued numerous resolutions criticizing the Japanese scientific whaling program and

³⁶ *Id.* at 33.

³⁷ II A GUIDE TO THE UNITED STATES TREATIES IN FORCE 777 (Igor I. Kavass ed., 1999). Today, the parties to the International Convention for the Regulation of Whaling include Antigua and Barbuda, Argentina, Australia, Austria, Brazil, Chile, China, Costa Rica, Denmark, Dominica, Finland, France, Germany, Grenada, Guinea, India, Ireland, Italy, Japan, Kenya, Korea, Mexico, Monaco, Morocco, Netherlands, New Zealand, Norway, Oman, Peru, Russia, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Senegal, Solomon Islands, South Africa, Spain, Sweden, Switzerland, the United Kingdom, and the United States. Int’l Whaling Comm’n, *List of Member Nations*, available at <http://ourworld.compuserve.com/homepages/iwcoffice/iwc.htm#members> (last modified Mar. 24, 2001).

³⁸ Int’l Whaling Comm’n, *List of Member Nations*, *supra* note 37.

³⁹ International Convention for the Regulation of Whaling, Dec. 2, 1946, art. XI, 62 Stat. 1716, T.I.A.S. No. 1849, 161 U.N.T.S. 72, 4 Bevens 248, 249 [hereinafter Whaling Convention].

⁴⁰ D’Amato & Chopra, *supra* note 27, at 33.

⁴¹ Whaling Convention, *supra* note 39, 4 Bevens at 250.

⁴² *Id.* at 250–51.

⁴³ For a brief history of the IWC, see The Humane Soc’y of the U.S., *It Won’t Be Smooth Sailing at the First IWC Meeting of the Millennium* (Feb. 4, 2001), available at <http://www.hsus.org/programs/wildlife/marine/iwc00.html> [hereinafter *First IWC Meeting*]. See generally Johanna Matanich, *A Treaty Comes of Age for the Ancient Ones: Implications of the Law of the Sea for the Regulation of Whaling*, 8 INT’L LEGAL PERSP. 37, 37 (1996).

⁴⁴ Rowe, *supra* note 4, at 24.

pleaded with Japan to stop the practice.⁴⁵ The IWC contends that less harmful methods of obtaining the scientific research are possible and should be studied before Japan continues its whaling.⁴⁶ Nonetheless, Japan ignored these requests and continued its whaling program.⁴⁷

Article VIII of the Whaling Convention permits countries to engage in whaling for the purposes of scientific research.⁴⁸ It is this provision that conservationists claim Japan has exploited in purporting to cease its commercial whaling, while continuing to kill and allegedly research whales.⁴⁹ Critics question whether the scientific research is a mere pretext for commercial whaling.⁵⁰ The IWC contends that the Japanese research explanations are not sufficient, and that its reasons are not "critically important" to justify the killing of whales for research purposes.⁵¹ Moreover, the Japanese government sells the meat of whales killed for research purposes for food once the scientists have completed their work.⁵² This allegation is confirmed by DNA analyses that have found whale meat from these "researched" whales on sale in Japanese markets.⁵³ Tests of 574 samples from Japanese restaurants showed that a high proportion of the whale meat being consumed came from a highly endangered subspecies of minke whales.⁵⁴

Although scientific permits for research whaling granted by a party state do not explicitly require IWC approval,⁵⁵ as the leading

⁴⁵ *Japan's "Scientific" Whaling*, *supra* note 8, at 5.

⁴⁶ *Id.*

⁴⁷ *Id.* Similarly, Norway has defied international pressures to cease lethal whaling in other restricted areas. *Id.* at 3.

⁴⁸ Whaling Convention, *supra* note 39, 4 Bevens at 252. Exceptions also have been granted for certain aboriginal groups. D'Amato & Chopra, *supra* note 27, at 56. D'Amato and Chopra maintain, however, that the aboriginal exemption and Japanese whaling are wholly unrelated. *Id.*

⁴⁹ The Humane Soc'y of the U.S., *U.S. Threatens Sanctions Over Japan's Extended Scientific Whale Hunt* (Aug. 1, 2000), available at <http://www.hsus.org/whatnew/whale0801000.html>.

⁵⁰ *Japan's "Scientific" Whaling*, *supra* note 8, at 5; see also Simon Cunliffe, *Japanese Whaling: Good Science of Bad Taste*, THE PRESS, at 5, Mar. 23, 2001, available at 2001 WL 14118565.

⁵¹ *Id.*

⁵² Blair Pethel, *Japan Escapes Sanctions Over Whaling*, THE RECORD (BERGEN CO., N.J.), Dec. 30, 2000, at A12. Pethel notes that Japan's Ministry of Agriculture, Forestry and Fisheries estimates that sales of whale products totaled \$6.7 million in 1998, the last complete year for which data are available. *Id.*

⁵³ *Japan's "Scientific" Whaling*, *supra* note 8, at 1. For the details of this research of Japanese markets, see The Humane Soc'y of the U.S., *Japan Kills a Bryde's Whale* (Aug. 11, 2000), available at <http://www.hsus.org/whatnew/whale081100.html> [hereinafter *Japan Kills a Bryde's Whale*].

⁵⁴ Elizabeth Sullivan, *Weeping and Whaling*, PLAIN DEALER (CLEVELAND), July 2, 2000, at 5D.

⁵⁵ See Whaling Convention, *supra* note 39, 4 Bevens at 252.

international authority on whaling regulation, the IWC has passed numerous resolutions criticizing Japan's scientific whaling.⁵⁶ In a 1998 resolution, the IWC strongly urged the Japanese government to refrain from issuing scientific permits, and highlighted the concerns of many in the international scientific community over the continuation of lethal whale research programs.⁵⁷

The primary purpose of Japan's whaling program, Japan maintains, is to examine the impact of whales on the fisheries resources of the north Pacific, where whales compete for the same fish that feed humans.⁵⁸ Japan's justification for the expansion of its north Pacific program is to "[s]urvey prey species and numbers consumed by whales in detail," and to further contribute to the study of ocean ecosystems.⁵⁹ Specifically, Japan's research objective is to "obtain estimates of various biological parameters, especially of age-specific natural mortality."⁶⁰

Japan further argues that non-lethal tests and photography are not feasible research methods for these purposes.⁶¹ Moreover, Japan defends its practices by stating that the small take of sperm and bryde's whales will have only a negligible impact on the allegedly abundant stocks of whales for research purposes.⁶² Furthermore, Japan justifies its commercial sale of previously "researched" whales by the requirement of the Whaling Convention that the byproducts of the research be processed to ensure that resources are not wasted.⁶³ In this regard, Japan argues that its research is not a mere pretext for commercial use, but rather specifically supported by the Whaling Convention.⁶⁴

⁵⁶ *Japan's "Scientific" Whaling*, *supra* note 8, at 5.

⁵⁷ *Id.*

⁵⁸ Dan Goodman, *U.S. Whaling Sanctions Smack of Hypocrisy*, THE JAPAN TIMES, Sept. 17, 2000, at 1.

⁵⁹ The Humane Soc'y of the U.S., *Japan Wants to Hunt Two More Whale Species* (May 11, 2000), available at <http://hsus.org/whatnew/japan051100.html> [hereinafter *Japan Wants to Hunt Two More Whale Species*].

⁶⁰ D'Amato & Chopra, *supra* note 27, at 54.

⁶¹ *Id.*

⁶² *See id.* at 54–55.

⁶³ Goodman, *supra* note 58. Article VIII, section 3 of the Whaling Convention provides that, "[a]ny whales taken [for research purposes] . . . shall so far as practicable be processed and the proceeds . . . dealt with in accordance with the directions issued by the Government by which the permit was granted." Whaling Convention, *supra* note 39, 4 Bevans at 252.

⁶⁴ Goodman, *supra* note 58.

C. *The Possibility of Trade Sanctions and Other Potential Restrictions*

The U.S. imposition of trade sanctions in these circumstances may be authorized by the Pelly Amendment to the Fisherman's Protective Act of 1967⁶⁵ or the Packwood-Magnuson Amendment to the Magnuson Fishery Conservation and Management Act.⁶⁶ The Pelly Amendment is one of the U.S. government's primary tools to encourage other countries to comply with the Whaling Convention's conservation policies.⁶⁷ The Amendment permits the U.S. president to direct the Secretary of the Treasury to impose sanctions if the U.S. Secretary of Commerce determines that foreign fishing practices diminish the effectiveness of an international fishery convention, in this case, the Whaling Convention.⁶⁸ However, the Amendment limits the U.S. sanctioning ability such that it cannot conflict with U.S. obligations under existing international trade agreements, such as U.S. obligations to the WTO.⁶⁹ Arguably, the United States is restricted from imposing trade sanctions if such imposition will conflict with its obligations under the WTO.⁷⁰ Moreover, the president's ability to impose sanctions is discretionary, and although such a measure has been threatened often, the United States never has imposed sanctions on the offending nations.⁷¹

Similarly, the Packwood-Magnuson Amendment provides for an automatic reduction of at least 50% of a country's allocation of fish that it can harvest in the U.S. EEZ, if the U.S. Secretary of Commerce certifies that a country is engaging in whaling practices that diminish the effectiveness of the Whaling Convention.⁷² In addition to customary international law concerning the EEZ discussed below, the immediate denial of Japanese fishing rights, may, therefore, be permitted

⁶⁵ 22 U.S.C. § 1978(a) (2000).

⁶⁶ 18 U.S.C. § 1821(e)(2)(A) (2000).

⁶⁷ Gene S. Martin & 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, 294 (1989).

⁶⁸ 22 U.S.C. § 1978(a).

⁶⁹ See *id.*

⁷⁰ Feldman, *supra* note 7, at 13A.

⁷¹ Suhre, *supra* note 28, at 317-18.

⁷² 18 U.S.C. § 1821(e)(2)(A); Kazuo Sumi, *The "Whale War" Between Japan and the United States: Problems and Prospects*, 17 DENV. J. INT'L L. & POL'Y 317, 344 (1989). In addition to condemning the international community's treatment of whaling nations, Sumi contends that the Pelly and Packwood-Magnuson Amendments are of "dubious legality" under international law. *Id.* at 318. The utilization of the Packwood-Magnuson Amendment presumably provides the authority for the U.S. restriction of Japanese fishing rights in the EEZ. See 18 U.S.C. § 1821(e)(2)(A).

by the Packwood-Magnuson Amendment to the extent Japan's allocation of fish is in U.S. waters.⁷³

Japan has indicated that it will pursue a claim against the United States in the WTO if the United States imposes trade sanctions.⁷⁴ The WTO prohibits trade restrictions on a production process if the actual products being shipped into the country are not in violation of local health standards.⁷⁵ The U.S. imposition of such trade sanctions would do exactly this, allowing the WTO to prohibit such action, which may then provide some leverage for Japan in the whaling debate.⁷⁶ Since whales are not the byproduct kills of some other commercial catch, and no whale products are shipped into the United States directly, trade sanctions may be necessarily limited.⁷⁷ The only option from this constrained view of U.S. trade power is to test a range of Japanese imports, such as certain perfumes, to ensure no trace amounts of whale oil are present (thus avoiding the limitation on production processes).⁷⁸ Experts disagree on whether such testing will have a definite economic impact upon Japanese practices, at what is likely to be a high financial and administrative burden.⁷⁹ Additionally, should the U.S. testing be deemed harassment of lawful commercial trade, the United States may face liability in the WTO on separate grounds.⁸⁰

A victory for Japan in the WTO is not entirely clear.⁸¹ The General Agreement on Tariffs and Trade (GATT) contains certain exceptions for species conservation, thereby warranting some U.S. restric-

⁷³ See 18 U.S.C. § 1821(e)(2)(A).

⁷⁴ Feldman, *supra* note 7, at 13A.

⁷⁵ See *id.*

⁷⁶ *Id.* The author refers to a similar trade dispute resolution under the WTO between the United States and Mexico, where it was determined that the U.S. could not impose import restrictions on Mexican tuna despite Mexico's use of dolphin-killing nets. *Id.* "So long as the product met U.S. health standards, the production process was beyond the reach of U.S. trade policy." *Id.*; GATT Dispute Panel Report on U.S.—Restrictions on Imports of Tuna, DS29/R (May 20, 1994), 33 I.L.M. 839 (1994), available at 1994 WL 907620 [hereinafter *Tuna II*]; GATT Dispute Panel Report on U.S.—Restrictions on Imports of Tuna, Aug. 16, 1991, GATT B.I.S.D. (39th Supp.) at 155 (1993), available at 1991 WL 771248 [hereinafter *Tuna I*]. See generally GATT Appellate Body Report on U.S.—Imp. Prohibition of Certain Shrimp and Shrimp Prods., WT/DS58/AB/R (Oct. 12, 1998), available at 1998 WL 720123 [hereinafter *Shrimp-Turtle*].

⁷⁷ *Id.*

⁷⁸ *Id.*; Edward Alden, *U.S. Takes Action on Japanese Whaling, Sanctions Threat Fleets Face Ban From American Waters*, THE FIN. TIMES (LONDON), Sept. 14, 2000, at 11.

⁷⁹ *Id.*

⁸⁰ See *id.*

⁸¹ See Alden, *supra* note 78, at 11.

tions.⁸² For example, Article XX provides that nothing in GATT shall be interpreted to prevent measures “necessary to protect human, animal or plant life or health.”⁸³ If the U.S. restrictions are deemed a necessary conservation measure, Japan may have little grounds upon which to challenge the U.S. action.⁸⁴

A decision by the WTO and the principle governing “trade and the environment” of the Rio Declaration on Environment and Development, however, indicated that the unilateral imposition of trade sanctions is only permissible if it is a last resort after exhausting all efforts at international cooperation.⁸⁵ In the *Shrimp-Turtle* case, the U.S. prohibited the importation of shrimp and shrimp products from India, Malaysia, Pakistan, and Thailand because those countries’ fishing methodologies were deemed harmful to species of sea turtles who were listed as endangered under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).⁸⁶ The United States invoked the authority of U.S. law to use its economic power to influence other nation’s environmental conduct.⁸⁷ The states that suffered as a result of the U.S. sanctions sought relief in the Dispute Settlement Body of the WTO.⁸⁸

The WTO panel concluded that in light of precedent and Principle 12 of the Rio Declaration, that there is an emphasized need for “international cooperation and for avoiding unilateral measures.”⁸⁹ Since the U.S. applied measures without any serious attempt to reach, beforehand, a negotiated solution, the WTO deemed the actions inappropriate.⁹⁰ Although it noted that recourse to unilateral measures were not altogether excluded, the WTO panel noted that general international law and international environmental law “clearly favor” the use of negotiated instruments rather than unilateral measures when addressing global environmental problems.⁹¹ Accordingly, success in the WTO would largely depend on the extent to which the

⁸² *Id.*

⁸³ General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XX, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

⁸⁴ *See id.*

⁸⁵ Kuei-Jung Ni, *Contemporary Prospects for the Application of Principle 12 of the Rio Declaration*, 14 GEO. INT’L ENVTL. L. REV. 1, 2, 31 (2001).

⁸⁶ *Id.* at 28–29.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 29.

⁹⁰ Ni, *supra* note 85, at 31.

⁹¹ *Id.* at 30.

U.S. has attempted and failed to reach a resolution of this matter through international negotiations. The United States has neither been successful in the *Tuna-Dolphin* case nor the *Shrimp-Turtle* case in applying trade sanctions to protect marine species pursuant to GATT Article XX, failing to satisfy the *chapeau* in both cases.⁹²

Japan also may claim that the U.S. sanctions and IWC restrictions constitute “cultural imperialism,” because many Japanese have grown up eating whale meat as part of their culture.⁹³ The Japanese Whaling Association claims that the modern ban on commercial whaling thus strips Japan of an important part of its culture and tradition, since whale meat traditionally has been a prized delicacy for special occasions.⁹⁴ However, any threat to Japan’s sovereignty in this regard is arguably outweighed, conservationists maintain, by the growing international consensus of a genuine threat to whale populations.⁹⁵

As an immediate measure, the United States has denied Japan certain fishing rights within the EEZ of the Pacific Ocean.⁹⁶ This area typically extends from three to two hundred nautical miles from the baseline of the U.S. coast.⁹⁷ Normally, the designation of an area as the EEZ yields “sovereign rights” to the coastal state for the management of natural resources and other natural activities.⁹⁸ Customary international law confers upon the coastal state “limited jurisdiction” over the protection and preservation of the marine environment.⁹⁹ Rights of other countries to participate in fishing in a state’s EEZ are subject to the coastal state’s regulation.¹⁰⁰

The United States exercised its coastal state authority in an attempt to impose economic pressure on Japan without the questionable legal authority of trade sanctions.¹⁰¹ By prohibiting the Japanese

⁹² See *infra* note 145 and accompanying text.

⁹³ Knight, *supra* note 2.

⁹⁴ Japan Whaling Ass’n, *The Facts, Japanese Culture* (Mar. 2, 2001), available at <http://www.jp-whaling-assn.com/facts.html>.

⁹⁵ See, e.g., *Japan Wants to Hunt Two More Whale Species*, *supra* note 59.

⁹⁶ Van Zile, *supra* note 5, at 26.

⁹⁷ RESTATEMENT OF THE LAW (THIRD) OF THE FOREIGN RELATIONS LAW OF UNITED STATES § 514 cmt. a (1987) [hereinafter RESTATEMENT].

⁹⁸ *Id.* § 514 cmt. c. The norms for the law of the sea derive from the Second United Nations Convention on the Law of the Sea. *Id.* Although the United States did not sign or ratify that convention, the description of the EEZ, and many other provisions of the convention, have been assimilated to U.S. practice under customary international law. *Id.* cmt. a.

⁹⁹ *Id.* § 511 cmt. b.

¹⁰⁰ *Id.* § 514 cmt. d.

¹⁰¹ See Alden, *supra* note 78, at 11.

from fishing in these waters, and thereby protecting marine life within the EEZ, the United States subjects Japan to international liability for a violation of these restrictions.¹⁰² Nonetheless, critics allege that this economic restriction only serves as a minimal deterrent against Japanese whaling practices.¹⁰³

D. *Endangered Species Grounds and Concerns*

The Humane Society and other marine life advocates have focused on the Japanese whaling industry as violative of international law and a threat to whale populations worldwide.¹⁰⁴ In 2000, the Humane Society formally requested then-Secretary of the Interior Bruce Babbitt to certify that Japan was undermining the CITES Convention's objective to protect endangered species.¹⁰⁵ Although Babbitt made such certifications, immediate sanctions were not imposed under the Pelly Amendment, presumably because of the concessions discussed above, namely the agreement to an IWC workshop to examine Japanese whaling and its temporary cutback of whale hunting.¹⁰⁶

The Humane Society highlighted the inherent risk in hunting a species that is either endangered or whose endangered status is unknown.¹⁰⁷ While the sperm whale's status is listed as endangered,¹⁰⁸ as is the bryde's whale,¹⁰⁹ studies indicate that the population numbers of sperm whale seem stable.¹¹⁰ Nonetheless, the Humane Society maintains that because of the numerous assumptions necessarily accompanying an estimate of whale populations, there is an inherent risk that these estimates may not be entirely accurate, and thus any

¹⁰² See RESTATEMENT, *supra* note 97, § 514.

¹⁰³ See *id.* In October, 2000, in response to the Japanese actions, members of the U.S. Congress introduced a resolution calling on the U.S. president to withhold support for Japan's efforts to gain a seat on the U.N. Security Council. Knight, *supra* note 2.

¹⁰⁴ See, e.g., *Humane Society of the United States Says New Leadership Provides Opportunity to End Japanese Whaling*, U.S. NEWSWIRE, June 28, 2001, available at 2001 WL 21895384; *Japan Kills a Bryde's Whale*, *supra* note 48.

¹⁰⁵ Pethel, *supra* note 49, at A12.

¹⁰⁶ See *id.*

¹⁰⁷ *Japan Kills a Bryde's Whale*, *supra* note 53. Others dispute that the particular species of whales being killed by Japan actually are endangered. Van Zile, *supra* note 5, at 26. Van Zile suggests that the population is large enough to support an annual commercial harvest, and that the conservationists' concerns are not well founded. See *id.*

¹⁰⁸ U.S. Fish & Wildlife Serv., Species List, Species Profile, available at http://ecos.fws.gov/species_profile/species_profile.html (last visited Mar. 15, 2001).

¹⁰⁹ *Japan Kills a Bryde's Whale*, *supra* note 53.

¹¹⁰ *Japan Wants to Hunt Two More Whale Species*, *supra* note 59.

hunting should proceed with caution.¹¹¹ This cautionary note is supported by the fact that when whaling nations were not concerned with conservation, and whale counts were not as prevalent or accurate, continued whale hunting pushed several species to the edge of extinction.¹¹²

II. DISCUSSION

A. *The Legality of Trade Sanctions and Their Effectiveness*

The Pelly Amendment authorizes the imposition of trade sanctions where countries act to diminish the effectiveness of an international fishery convention.¹¹³ Regardless of a species' status as endangered under the CITES Agreement or international law, therefore, U.S. law permits sanctions against Japan if the sperm and bryde's whale are being killed primarily for commercial use, contrary to the Whaling Convention moratorium.¹¹⁴ U.S. law also permits the denial of fishing rights the U.S.' EEZ when a particular nation undermines an international conservation agreement.¹¹⁵ It is unclear how effective this measure will be in deterring future Japanese whaling; although some say the application of the Packwood-Magnuson Amendment, coupled with the mere threat of sanctions under the Pelly Amendment, has been successful in the past in forcing compliance with the Whaling Convention.¹¹⁶ Fully imposed trade sanctions on Japan, if permissible under WTO scrutiny, likely would supply enough economic pressure on the country to cease its whaling.¹¹⁷ It is unclear to what extent sanctions would be imposed, and the Bush administration has not yet indicated how far it will go to apply pressure to Japan.

Furthermore, success in the WTO for either Japan or the United States is uncertain.¹¹⁸ As previously discussed, although the production-process distinction weighs in Japan's favor and the United States

¹¹¹ *Id.*

¹¹² See D'Amato & Chopra, *supra* note 27, at 29.

¹¹³ 22 U.S.C. § 1978(a).

¹¹⁴ See *id.*

¹¹⁵ 18 U.S.C. § 1821(e)(2)(A).

¹¹⁶ Martin & Brennan, *supra* note 67, at 314–15.

¹¹⁷ See Rowe, *supra* note 4, at 24. Rowe describes the use of sanctions as a "nuclear trade weapon" that rarely has been threatened or used. *Id.*; see also Martin & Brennan, *supra* note 67, at 314–15 (concluding that the imposition and threat of sanctions under the Pelly Amendment have been relatively successful in encouraging whaling nations to comply with the Whaling Convention).

¹¹⁸ See Alden, *supra* note 78, at 11.

is normally unable to restrict trade on products whose production processes do not violate domestic law, the United States may successfully rely on the exceptions in the WTO Agreement for species conservation.¹¹⁹ However, the disputed nature of these species' endangerment may prove difficult for the United States in the WTO, and the United States has not always enjoyed success on environmental matters in the WTO, presumably because of the sanctions' limiting effect on free trade and the established preference for international cooperation over unilateral measures.¹²⁰

B. *The IWC and Governing International Agreements*

Some party states, including Japan and Norway, have questioned the IWC's authority under international law because of its inability to enforce the regulations and resolutions it puts forth.¹²¹ These states also claim that the Whaling Convention does not prohibit the harvesting of healthy whale populations, but rather promotes the sustainable harvesting of whale stocks.¹²² While it is unlikely Japan and Norway would repudiate their membership in the IWC, their objections signal a likelihood that they will continue to push for reform and test the outer bounds of whaling regulations.¹²³ Additionally, Japan continues to facilitate the membership in the IWC of pro-whaling nations that will vote in accordance with Japan.¹²⁴ The Humane Society alleges that Japan and Norway are attempting to "force the IWC to de-evolve back into a 19th Century view of the relationship between man and whale: one based on lethal exploitation with no thought to the future."¹²⁵

Moreover, the Japanese Whaling Association (JWA), among others, contends that the IWC has lost its legitimacy as an international regulatory body since it strayed from its fundamental objective of regulating the orderly development of the industry.¹²⁶ Instead, the JWA suggests that the IWC has allowed itself to be taken over by anti-

¹¹⁹ See Feldman, *supra* note 7, at 13A.

¹²⁰ See Knight, *supra* note 2. See generally *Tuna I*, *supra* note 76; *Tuna II*, *supra* note 76; *Shrimp-Turtle*, *supra* note 76.

¹²¹ See *First IWC Meeting*, *supra* note 43.

¹²² See Matanich, *supra* note 43.

¹²³ See *First IWC Meeting*, *supra* note 43.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ See Japan Whaling Ass'n, *Why was the International Whaling Commission established?* (Mar. 2, 2001), available at http://www.jp-whaling-assn.com/qa/why_iwc.html.

whaling groups such as Greenpeace who recruited into the IWC many countries that did not have any involvement in whaling.¹²⁷ Consequently, the JWA contends that the “blatant disregard” of the Whaling Convention objectives not only violates the Whaling Convention, but also the Vienna Convention on the Law of Treaties.¹²⁸

Additionally, these critics of the IWC contend that the IWC’s regulations imposed upon whaling cultures are not based upon a need to protect whales from extinction.¹²⁹ Instead, they argue that the restrictions are the result of a convenient political determination by the non-whaling states that lead the IWC, who fear no political retribution (and expect only political gain) by the states’ citizens since whaling is not a part of their culture.¹³⁰ Anti-whaling nations, in other words, have found a politically favorable topic and can push for conservation measures without the cost falling back on the electorate. These critics further maintain that commercial whaling can be maintained on a sustainable basis, and the whaling ban thus conflicts with the rights of human beings to “practice their culture.”¹³¹

As an alternative to the outright ban on commercial whaling, some propose a quota system that would permit the hunting of those whales that can be harvested sustainably.¹³² Despite the fact that the IWC’s initial attempts to regulate commercial whaling failed to prevent endangerment and extinction, this proposal implausibly suggests that the IWC would be capable of regulating rigid quota systems for whaling nations.

Pro-whaling nations advocate the adoption of a Revised Management Scheme (RMS).¹³³ The RMS would provide rules, likely similar to the “sustainable” quotas discussed above, whereby nations could conduct commercial whaling.¹³⁴ The Humane Society maintains that the RMS uses unreliable statistical assumptions and that its inherent

¹²⁷ See *id.*

¹²⁸ *Id.* The Vienna Convention on the Law of Treaties provides that treaties shall be interpreted in good faith in light of the treaty’s object and purpose. Vienna Convention on the Law of Treaties, Jan. 27, 1980, art. 31, 1155 U.N.T.S. 331, 340.

¹²⁹ *Matera*, *supra* note 28, at 37.

¹³⁰ *Id.*

¹³¹ *Id.* For this proposition, the author relies upon the Rio Declaration on Environment and Development, which provides that states are to recognize the identity, culture, and interests of indigenous people and their communities.

¹³² *Matera*, *supra* note 28, at 40–41.

¹³³ *First IWC Meeting*, *supra* note 43.

¹³⁴ *Id.*

inaccuracies for sustainable development would render the program ineffective in achieving meaningful conservation.¹³⁵

Certainly, Japan's refusal to conform to any of the IWC's resolutions demonstrates the Whaling Commission's inability to effectively enforce its whaling regulations.¹³⁶ In the IWC's favor, fishing regulations are presumably difficult to enforce by any organization. It is inherently difficult to patrol all parts of the high seas, and scrutiny at fishing docks for illicit fishing practices may not always be wholly effective. Furthermore, as is demonstrated by tremendous restrictions on the ability to impose meaningful sanctions, illegal fishing practices may be difficult to deter, especially if such practices yield commercial success with little consequence.

Nonetheless, Japan's refusal to comply with IWC regulations is a breach of its obligations under the Whaling Convention and the IWC has failed to successfully enforce any deterrent against or punishment of Japan.¹³⁷ The Whaling Convention specifically established the IWC as the authority for the regulation of whaling practices.¹³⁸ If the United States is precluded from imposing trade sanctions, Japan's breach or bad faith exploitation of this agreement may warrant liability under international law. Similarly, Japan's hunting of endangered whales under the CITES agreement also may constitute a breach of an international agreement if such whaling is in fact commercial in nature. The United States, or any other party to the CITES agreement, then may have a cause of action against Japan.¹³⁹

C. Marine Life Concerns

The risk in hunting species whose endangered status is uncertain or even unknown causes great concern over Japan's practices because the risk of whale extinction and corresponding threat to the ecosystem.¹⁴⁰ Japan has attempted to alleviate international environmental concerns through an agreement with the United States to request that

¹³⁵ *Id.* The push for a Revised Management Scheme comes from both sides of the whaling debate. World Wildlife Fund, *WWF's Policy on Whaling*, available at <http://www.worldwildlife.org/species> (last visited Mar. 8, 2002). Conservationists cite a need for a new, presumably more restrictive RMS in light of the increasing number of whales killed each year under the current regulations. *Id.*

¹³⁶ See World Wildlife Fund, *WWF's Policy on Whaling*, *supra* note 135.

¹³⁷ See *id.*

¹³⁸ See Whaling Convention, *supra* note 39, 4 Bevens at 250.

¹³⁹ See *Japan Kills a Bryde's Whale*, *supra* note 53.

¹⁴⁰ *Id.*

the IWC set up a workshop ascertaining the effects of its "research" whaling on whale populations.¹⁴¹ This concession mitigated the possibility of trade sanctions, at least temporarily, although the United States has not ruled them out.¹⁴² While Japan refused to cease its whaling program entirely, it did agree to temporarily reduce its catch by limiting its research targets to the sperm whale only.¹⁴³

III. ANALYSIS AND ADVOCACY

Should the IWC's authority for the regulation of whaling continue to prove as ineffective as it has thus far and should negotiation efforts continue to fail, the United States should be justified in imposing trade sanctions to effect a change in Japanese whaling practices. Trade sanctions are permissible under U.S. law and may be supported by both international law and the parties to the Whaling Convention.¹⁴⁴ Additionally, a case may be made for the applicability of the exceptions for species conservation under the WTO.¹⁴⁵ However, up to this point, the *chapeau* of Article XX has been the pivotal issue.

Moreover, the overriding environmental concerns for preservation of a potentially endangered species support firm measures by the United States.¹⁴⁶ Other countries, such as the United Kingdom and New Zealand, also believe strong action is necessary.¹⁴⁷ The only possible mitigating factors for severe action at this time are Japan's willingness to continue negotiations for an amicable resolution and the state's agreement for an IWC workshop to study whaling.¹⁴⁸ However, although Japan has cut back on its whaling, it has not ceased its whal-

¹⁴¹ Joshi, *supra* note 1.

¹⁴² *See id.*

¹⁴³ Struck, *supra* note 3, at A15.

¹⁴⁴ *See* 22 U.S.C. § 1978(a).

¹⁴⁵ *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194; Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, art. XX, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1153 (1994). The *chapeau* provides that an exception "to protect human, animal or plant life or health" must not be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination . . . or a disguised restriction on international trade . . ." Article XX is reprinted in INTERNATIONAL TRADE LAW HANDBOOK 227 (Raj Bhala, ed. 2001).

¹⁴⁶ *See* *Japan Kills a Bryde's Whale*, *supra* note 53.

¹⁴⁷ *Japan's "Scientific" Whaling*, *supra* note 8, at 1, 5.

¹⁴⁸ *See* Joshi, *supra* note 1.

ing research in the interim period, despite the continued international outrage.¹⁴⁹

Japan claims that its research is for scientific purposes, yet it ignores the non-lethal methods of obtaining the same research information.¹⁵⁰ This disregard supports critics' charges of fabrication of a scientific purpose to cover for illicit commercial activity.¹⁵¹ Despite the unknown number of sperm and bryde's whales left, the CITES convention deems the mammals endangered, and therefore it is incumbent upon Japan to comply with the emerging international consensus regarding preservation of the world's ecosystem.¹⁵² Although the minke whale is not considered endangered, its populations have been depleted significantly by whaling in the north Pacific.¹⁵³ Moreover, the experiences with commercial whaling prompting the establishment of the IWC and the IWC's subsequent inability to maintain sustainable whale stocks without restrictions on commercial whaling endorses the view that commercial whaling on a sustainable basis is an implausible goal. These experiences and Japan's general environmental obligations under international law, coupled with Japan's explicit promises under existing international agreements, supports halting Japan's current whaling practices.

CONCLUSION

Japanese whaling practices have caused an international controversy due to alleged violations of international whaling regulations. Those alleged violations may give rise to a full-scale trade war, should Japan refuse reform of its lethal whaling. In light of the species' potential endangered status and in light of international legal authority, the United States may be justified in imposing trade sanctions on Japan if it continues to defy international demands. For the time being, Japan's moderate concessions have delayed the imposition of sanctions, and thus the future of Japanese whaling practices remains unclear.

¹⁴⁹ See Struck, *supra* note 3, at A15.

¹⁵⁰ Japan's "Scientific" Whaling, *supra* note 8, at 5.

¹⁵¹ See *id.*

¹⁵² See *Japan Kills a Bryde's Whale*, *supra* note 53.

¹⁵³ World Wildlife Fund, *Endangered Species, Minke Whales* (Mar. 15, 2001), available at <http://www.worldwildlife.org/species>.