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The Protection of Whales in International Law: A Perspective for the Next Century

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ARTICLES

THE PROTECTION OF WHALES IN INTERNATIONAL LAW: A PERSPECTIVE FOR THE NEXT CENTURY

*Howard Scott Schiffman**

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THE PROTECTION OF WHALES IN INTERNATIONAL LAW: A PERSPECTIVE FOR THE NEXT CENTURY

Howard Scott Schiffman

I. INTRODUCTION

Humans have hunted whales for centuries.¹ Only within the last fifty years, however, with many species of cetaceans on the brink of extinction, has the international community seen fit to regulate the practice of whaling by treaty.² Today, the world community views whales and whaling in a very different context than it did when it ratified the 1948 International Convention for the Regulation of Whaling (the Convention or Whaling Convention) and created the International Whaling Commission (IWC).³ So, too, is the framework of international law, in which concerned states resolve issues relating to the protection of whales, very different. Specifically, the environmental and preservationist forces arrayed against the

1. Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L L. 21, 28 (1991); see also DAVID DAY, *THE WHALE WAR* 1-15 (1987). David Day is a conservationist who has helped lead the fight against the whaling industry. The book is written from that perspective and is not particularly concerned with international legal issues. However, the book is frequently cited in the scholarly literature.

2. International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72 (entered into force Nov. 10, 1948) [hereinafter ICRW]. Although there were some limited attempts to regulate the commercial whaling industry before this date, the 1948 convention was the first comprehensive treaty. It superseded all prior agreements. The preamble of the convention recognized the need for an international agreement to preserve the long-term health of the industry. The ICRW was signed by the United States, Argentina, Australia, Brazil, Canada, Chile, Denmark, France, the Netherlands, New Zealand, Norway, Peru, the Soviet Union, the United Kingdom, and South Africa. The treaty came into effect on November 10, 1948, and was amended in 1956 by the Protocol to the International Convention for the Regulation of Whaling, Nov. 19, 1956, 10 U.S.T. 952, 338 U.N.T.S. 366. The Protocol extended the definition of "whale catcher" to helicopters and other aircraft. *Id.* art. I, 10 U.S.T. at 953, 338 U.N.T.S. at 366.

3. ICRW, *supra* note 2, art. III, 62 Stat. at 1717-18, 161 U.N.T.S. at 77-78. The IWC is comprised of one representative from each party that is a member to the Convention. *Id.* art. III(1). Article IV provides for the IWC to study the practice of whaling, collect and analyze data on whale stocks, and report on its activities. *Id.* art. IV, 62 Stat. at 1718, 161 U.N.T.S. at 78-80. Article V provides for the IWC to adopt regulations with respect to the conservation and utilization of whale resources. *Id.* art. V(1), 62 Stat. at 1718-19, 161 U.N.T.S. at 80.

remaining small minority of whaling states have many more scientific, legal, and political weapons at their disposal. Several international treaties and domestic statutes are available to further the policy goals of those states that have ended their practice of whaling and now seek to protect whales and other marine mammals in their natural habitats.⁴

Despite these international agreements and statutes, the future of cetacean protection is far from certain. Indeed, recent trade agreements such as the General Agreement on Tariffs and Trade (GATT)⁵ and the North American Free Trade Agreement (NAFTA),⁶ as well as certain provisions of the 1982 United Nations Convention on the Law of the Sea (UNCLOS),⁷

4. In 1982 the IWC voted to impose a moratorium on commercial whaling until more accurate data on whale stocks could be compiled. INTERNATIONAL WHALING COMMISSION, THIRTY-THIRD REPORT OF THE INTERNATIONAL WHALING COMMISSION 20-21 (1983) [hereinafter THIRTY-THIRD REPORT OF THE IWC]. The moratorium has been in effect since 1986. Debora MacKenzie, *Whaling Nations Threaten Unilateral Action*, NEW SCIENTIST, July 14, 1990, at 22. For the full text of the moratorium adopted as paragraph 10(e) of the Schedule to the Convention, see THIRTY-THIRD REPORT OF THE IWC, *supra*, at 40; see also Marian N. Leich, *Contemporary Practice of the United States Relating to International Law: Environmental Affairs*, 79 AM. J. INT'L L. 431, 435 n.4 (1985) (providing the full text of the moratorium). In 1994, at the 46th annual meeting of the IWC, a whale sanctuary was established in most of the waters south of 40 degrees south latitude. INTERNATIONAL WHALING COMMISSION, FORTY-FIFTH REPORT OF THE INTERNATIONAL WHALING COMMISSION 27-29 (1995) [hereinafter FORTY-FIFTH REPORT OF THE IWC]. In addition to the actions of the IWC, protection for whales is also provided for in treaties such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 13, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES], and the United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 21 I.L.M. 1261 (entered into force Nov. 16, 1994) [hereinafter UNCLOS]. In the United States, whales are protected by legislation passed in the 1970s, particularly the Packwood-Magnuson Amendment to the Magnuson Fishery Convention and Management Act, Pub. L. No. 94-265, 90 Stat. 331 (1976) (codified as amended at 16 U.S.C. § 1821 (1994)) [hereinafter Packwood-Magnuson Amendment or Packwood-Magnuson], the Pelly Amendment to the Fisherman's Protective Act of 1967, Pub. L. No. 92-219, 85 Stat. 786 (1971) (codified at 22 U.S.C. § 1978 (1994)) [hereinafter Pelly Amendment or Pelly], the Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, § 107, 86 Stat. 1027 (1972) (codified at 16 U.S.C. §§ 1361-1407 (1994)), and the Endangered Species Preservation Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified at 16 U.S.C. §§ 1531-1544 (1994)).

5. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT]; see *infra* note 156 and accompanying text.

6. North American Free Trade Agreement, *done* Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 296 [hereinafter NAFTA]; see *infra* note 157 and accompanying text.

7. UNCLOS, *supra* note 4, 21 I.L.M. at 1261.

may actually impede future whale protection policies.

This article is an analysis of the contemporary issues of whaling in an international legal context. Part II provides a brief history of whaling and the factors that led to over-exploitation, and includes an analysis of the failure of the IWC to effectively regulate whaling. Part III discusses reasons for a policy of whale protection and the changing policy goals of states with respect to the regulation of the industry. It includes a discussion of current status of relevant customary law. Part IV evaluates potential conflicts between recent treaties and the policy of whale protection in the United States. Finally, Part V contains specific recommendations on how the integration of political, economic, scientific, and legal measures can promote policy goals. That section concludes by discussing the future of whale protection within the framework of international law.

This article advocates a policy of whale preservation, which has advanced substantially in the last fifty years. However, there is a potential conflict between the goals of free trade and the goals of cetacean protection. The use of unilateral trade sanctions to punish environmentally destructive conduct is inconsistent with the new trend toward open markets. States will need to address global problems multilaterally. International and domestic law will need to adapt to the economic needs of states in the post-Cold War world. However, equally important goals of environmental protection could suffer as a result. A reconciliation of these divergent goals may prove to be one of the greatest legal and policy challenges of the next century.

II. A BRIEF HISTORY OF WHALING AND THE TRAGEDY OF THE COMMONS

A. *The Early Days*

Whaling began with the Basques in the thirteenth century and rapidly developed into an international industry as whalers headed further west in search of more abundant stocks.⁸ Whaling responded to the demands of the marketplace: whale oil provided smokeless lamp fuel and

8. SIMON LYSTER, *INTERNATIONAL WILDLIFE LAW* 17 (1985).

whalebones were an essential ingredient in women's fashions of the times.⁹ Basque whaling essentially ended by the close of the sixteenth century.¹⁰ However, the British and Dutch whaling industries grew at that time.¹¹

The seventeenth century saw whaling come to the North American colonies in New England and the mid-Atlantic region.¹² The industry continued to grow; it reached its peak in the mid-1800s, employing 70,000 people and nearly 729 ships.¹³ North American whaling was truly global in that its voyages extended as far as South America, Australia, and New Zealand.¹⁴ A second whaling industry developed on the west coast of the United States in the latter part of the nineteenth century to take better advantage of the whaling grounds in the Pacific and meet the growing needs of California.¹⁵

Later on, the United States would do its part to protect whales from commercial whaling, especially after electric lights replaced whale oil and other commercial uses of whales declined in importance. Today, the United States remains at the forefront of that movement.

In other parts of the world, however, commercial uses of whales remained important. In the early twentieth century, as American whaling declined, Norway began to take advantage of new technological developments such as steam engines and more effective harpoons that made the hunt easier.¹⁶ Norway expanded its geographic reach as well; it established its first

9. D'Amato & Chopra, *supra* note 1, at 28.

10. *Id.* The technology developed by the Basques was adopted and improved upon by other states. The decline of Basque whaling was probably due, at least in part, to the competition of these other states. *See id.*

11. *Id.* at 28; *see also* PATRICIA BIRNIE, *INTERNATIONAL REGULATION OF WHALING* 65-68 (1985).

12. E.J. SLIPJER, *WHALES* 25 (A.J. Promerans trans., Basic Books 1962) (1958); Barbara Lipton, *Whaling Days in New Jersey*, NEWARK MUSEUM Q., Spring-Summer 1975, at 3, 3-4; James E. Scarff, *The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment (Part One)*, 6 *ECOLOGY* L.Q. 326, 345 (1977).

13. Scarff, *supra* note 12, at 345; David O. Hill, *Vanishing Giants*, AUDUBON, Jan. 1975, at 56, 85; *see also* KARL BRANDT, *WHALE OIL: AN ECONOMIC ANALYSIS* 50 (1940).

14. D'Amato & Chopra, *supra* note 1, at 29.

15. Scarff, *supra* note 12, at 345; *see* Hill, *supra* note 13, at 79.

16. D'Amato & Chopra, *supra* note 1, at 29; *see also* J.N. TØNNESSEN & A.O. JOHNSEN, *THE HISTORY OF MODERN WHALING* 23-32 (R.I. Christophersen trans., C. Hurst & Co. 1982) (1970).

land-based whaling station in Antarctica in 1904.¹⁷ Norway has become a stalwart among twentieth century whaling nations, along with Japan and Iceland.

The early twentieth century saw the industry become highly efficient at killing whales. Between 1910 and 1914 annual whale catches were in the tens of thousands.¹⁸ World War I provided a brief respite for whales because many vessels in the whale hunts were converted for military use.¹⁹ But the break proved to be short-lived. The "golden years" of whaling were yet to come.

Among the most productive years (or the most destructive, from the whales' perspective) were the 1920s and 1930s.²⁰ Because of the demand for whale oil for cosmetics and as a high-quality lubricant, whale oil production increased almost tenfold between 1920 and 1931.²¹ From 1918 through 1931 there had been a limited attempt to regulate commercial whaling to maintain the availability of sizable numbers of particular species, but the efforts were quite ineffective.²² In 1927, at the Whaling Committee of the International Council

17. BIRNIE, *supra* note 11, at 72; see J.R. Rowland, *The Treaty Regime and the Politics of the Consultative Parties*, in *THE ANTARCTIC LEGAL REGIME* 11, 22-23 (Christopher C. Joyner & Sudhir K. Chopra eds., 1988). See generally TØNNESSEN & JOHNSEN, *supra* note 16, at 178-82. Land stations and "floating factories" were used to facilitate the processing of whales. Despite the inhospitable seas, the Antarctic was a major center for whale harvesting and processing. Fin whales were found in particularly large numbers there. Scarff, *supra* note 12, at 346-47.

18. BIRNIE, *supra* note 11, at 73.

19. Scarff, *supra* note 12, at 347. Despite the reduced hunt, whaling did continue during the war and approximately 10,000 whales were taken in each year of the conflict. *Id.*

20. See DAY, *supra* note 1, at 15; Scarff, *supra* note 12, at 347.

21. Scarff, *supra* note 12, at 347; see also GEORGE SMALL, *THE BLUE WHALE* 14 (1971); SLIPJER, *supra* note 12, at 36-44 (detailing whale oil products). One factor that facilitated this dramatic increase in the production of whale oil was the technological development of the stern slipway by the Norwegians in 1925. TØNNESSEN & JOHNSEN, *supra* note 16, at 265-66. The stern slipway allowed whalers to haul whales on board factory ships in all but the roughest seas. SMALL, *supra*, at 13. This invention enabled factory ships to process whales much more efficiently, and farther from land. *Id.* at 14.

22. D'Amato & Chopra, *supra* note 1, at 30. The first convention for the regulation of whaling was signed on September 24, 1931; however, its scope was very limited. It applied only to baleen whales. Convention for the Regulation of Whaling, Sept. 24, 1931, art. 2, 49 Stat. 3079, 3085, 155 L.N.T.S. 349, 357. "Immature" and "undersized" whales were granted protection but those terms were never defined. *Id.* art. 5. No overall catch quotas were established. DOUGLAS M. JOHNSTON, *THE INTERNATIONAL LAW OF FISHERIES* 399 (1965).

for the Exploration of the Sea, the Norwegian delegate proposed that whaling countries prohibit the further expansion of whaling and institute a licensing system.²³ The 1931 Whaling Convention required states to communicate statistical data about their catches to The International Bureau of Whaling Statistics.²⁴

In 1932, the whaling industry attempted to regulate itself because it was producing more whale products than the market could bear; prices and profits were down sharply.²⁵ The companies that actively engaged in whaling agreed to limit the production of whale oil and to set catch quotas for certain species.²⁶ At this time, Norway and Great Britain, which accounted for ninety-five percent of the world catch, reached a bilateral agreement imposing restraints on their industries.²⁷ The Norwegian government initiated conferences

23. D'Amato & Chopra, *supra* note 1, at 30.

24. *Id.* Article 10 of the 1931 Convention required each member state to obtain:

[T]he most complete biological information practicable with regard to each whale taken, and in any case on the following points:

- (a) Date of taking;
- (b) Place of taking;
- (c) Species;
- (d) Sex; [and]
- (e) Length

Convention for the Regulation of Whaling, *supra* note 22, art. 10(a)-(e), 49 Stat. at 3087, 155 L.N.T.S. at 359. Article 12 required this information to be communicated to the International Bureau for Whaling Statistics in Oslo. *Id.* art. 12, 49 Stat. at 3089, 155 L.N.T.S. at 361. The purpose of the International Bureau for Whaling Statistics was to record accurate data about whale harvesting for future conservation policies. See JOHNSTON, *supra* note 22, at 399.

25. JOHNSTON, *supra* note 22, at 350.

26. Scarff, *supra* note 12, at 350. This was an application of the basic economics principle of supply and demand. A parallel may be drawn between the whaling industry of the 1930s and the modern practice of the OPEC oil cartel, which regularly seeks to remedy price declines by reducing supply. The concern, at this stage in the history of whaling, was clearly for the long-term health of the industry. This will be discussed in greater detail in the next section.

27. *Id.* This agreement between Norway and Great Britain gave the imprimatur of international law to what was being attempted by business practices and the informal agreements of industrialists. The need for the treaty, however, implies the competitive rather than collusive nature of the whaling industry. If market forces alone could have reduced whale catches, they probably would have done so. This agreement would later prove to be an important factor in the decision to establish the International Whaling Commission, and its ultimate failure to manage the finite resource of whales. It should be noted that this factor has nothing at all to do with environmental protection or the "Save the Whales" movement.

that were held in 1937, 1938, and 1939.²⁸ These conferences established the precedent for annual international conferences on whale preservation.

B. The International Whaling Commission

Despite those early, rather timid and ineffective attempts at regulation, the virtually unrestrained slaughter of whales continued. This slaughter led not only to the collapse of whale stocks virtually everywhere in the world, but drove many species to the brink of extinction.²⁹ In late 1946 the United States called for a comprehensive international conference on whaling.³⁰ At that time no comprehensive treaty governed the international law of the sea; it only recognized the territorial sea and the high seas.³¹ The high seas were open to unregulated fishing and whaling. Therefore, any attempt to preserve whale stocks had to be through an international agreement specifically for that purpose.

The IWC was the primary product of the Convention.³² Concern with protecting the interests of whaling states

28. *Id.* For a then-contemporary discussion of these early whaling conferences, see L. Larry Leonard, *Recent Negotiations Toward the International Regulation of Whaling*, 35 AM. J. INT'L L. 90 (1941).

29. D'Amato & Chopra, *supra* note 1, at 32. Among the species that were driven to the brink of extinction were the gray, right, bowhead, and northern humpback whales. Scarff, *supra* note 12, at 346.

30. D'Amato & Chopra, *supra* note 1, at 33. The United States convened the Whaling Conference in Washington, D.C. on November 20, 1946. Scarff, *supra* note 12, at 352. The Conference was convened in the general postwar spirit of international cooperation and the disappointing 1945-1946 whaling season. *Id.* The first discussion of a Washington Conference can be traced to 1944 in a telegram between Secretary of State Cordell Hull and the United States Ambassador to the United Kingdom, John G. Winant. Telegram from the Secretary of State to the Ambassador in the United Kingdom, Jan. 4, 1944, reprinted in 2 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS, 1944, at 933 (1967). In the telegram, Secretary Hull suggested that a Washington Conference would "offer an opportunity of formulating in the near future a program based on sound principles of conservation that would give effective protection to existing stock of whales especially in relation to our national requirements of certain whale oil for industrial and military uses." *Id.*

31. BIRNIE, *supra* note 11, at 265; D'Amato & Chopra, *supra* note 1, at 33. The territorial sea was largely considered an extension of sovereign territory and the high seas were open at the time to unregulated fishing. There was no formal requirement of high seas use with "due regard" as exists under UNCLOS. UNCLOS, *supra* note 4, art. 87(2), 21 I.L.M. at 1287.

32. ICRW, *supra* note 2, arts. III-VII, 62 Stat. at 1717-19, 161 U.N.T.S. at 76-82.

dominated the early days of the IWC, at the expense of whales. Ecologist David Day vividly describes the early days of the IWC:

Like some exclusive big game shooting club, the members of the IWC since 1948 came together once a year before the opening of the killing season. They sat around a big table and smoked cigars, they had drinks in the bar and compared profits and talked of the good old days when the vast herds of great blue whales made life easy. Then they sat down at the table and bargained until they agreed among themselves what the sporting number of whales to be bagged [that] year would be. The quota was based on virtually non-existent science and a lot of wishful thinking. The hunt was a kind of 'gentlemen's agreement' between nations to abide by sporting rules: an exact date for the opening of the season, a ban on the killing of nursing mothers and undersized whales, and an immediate end to the killing when the quota was reached.³³

Day's characterization of the IWC's quota system as a "gentlemen's agreement" was probably correct under an international legal analysis.³⁴ Although multilateral international agreements are often fraught with enforcement problems, one can make a strong argument that the IWC's proclamation, ratified in 1947, and all of its subsequent quota decisions, were never intended to have the full force and effect of a binding law.

Several factors indicate the lack of legal obligation in the Convention. First, there is a liberal provision for member states that object to a quota to "opt out" upon timely notification.³⁵ Thus, any state that chooses to exercise its right to object to the quota is not bound by it.³⁶ Second, there is obvi-

33. DAY, *supra* note 1, at 27.

34. *See id.*

35. ICRW, *supra* note 2, art. V(3), 62 Stat. at 1719, 161 U.N.T.S. at 80-82.

36. *Id.* Although reservations are not uncommon in international law, the reservations permitted here are puzzling. Paragraph 2 of article V specifically states that "[any] amendments of the Schedule . . . shall be such as are necessary to carry out the *objectives and purpose* of this Convention . . ." *Id.* art. V(2)(a), 62 Stat. at 1719, 161 U.N.T.S. at 80 (emphasis added). Reservations to conventions are not usually permitted where they defeat the *object and purpose* of the agreement. *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 19(c), 1155 U.N.T.S. 330, 337 [hereinafter Vienna Convention]. The Vienna Convention was not in force at the time the Whaling Convention was signed and is non-retroactive. It is, however, considered to be declaratory of custom in most areas of

ously no requirement that a state be a member to the Convention in the first instance, nor are members prevented from withdrawing if they give timely notification.³⁷ Finally, even states that are parties to the Convention, and do not object to the quota schedules, may effectively be exempted from them if they grant nationals under their jurisdiction a special permit for "scientific research."³⁸

In fairness to the drafters, there is some evidence that the members of the IWC did intend for the quotas to be binding. The language of a typical quota agreement seems to so indicate. For example, the following quota was set at the twenty-eighth annual meeting of the Convention:

The number of whales taken in the North Pacific Ocean and dependent waters in 1977 shall not exceed the following limits:

Sperm Whales — males	4320	
Sperm Whales — females	2880	
Bryde's Whales	1000	
Minke Whales (Western Stock)	541	
Minke Whales (remainder of the North Pacific)	0	pending a satisfactory

treaty law.

37. ICRW, *supra* note 2, art. XI, 62 Stat. at 1721, 161 U.N.T.S. at 86. *But see* Lyster, *supra* note 8, at 4:

The greater the number of participants in the formulation of a treaty, the weaker or more ambiguous its provisions are likely to be since they have to reflect compromises making them acceptable to every State involved. Wildlife treaties, which are often intended to attract a large number of Parties, are especially exposed to this risk.

Id. Most whaling nations remain members of the IWC so that their voice can be heard. The reservation provision induces dissenter states to stay as members. *See id.* at 9.

38. ICRW, *supra* note 2, art. VIII(1), 62 Stat. at 1719-20, 161 U.N.T.S. at 82. Japan and Norway have frequently invoked this provision to circumvent the current commercial whaling moratorium. Some of the meat of whales captured in scientific whaling may be sold commercially. *See generally* MacKenzie, *supra* note 4, at 22; *DNA Tests for Suspect Whale Trade*, SEA FRONTIERS, Aug. 1994, at 11. The IWC decided in 1994 that whale meat derived from research whaling should not be exported. FORTY-FIFTH REPORT OF THE IWC, *supra* note 4, at 44-45. Previously 49% could be exported. Report of the 46th Annual Meeting of the International Whaling Commission, para. 7 (1994) (unpublished summary report, unofficial distribution of the United States National Marine Fisheries Service, on file with the *Brooklyn Journal of International Law*) [hereinafter NMFS Report].

estimate
of stock size³⁹

Note that the quota provision contains the word "shall,"⁴⁰ which is indicative of legal obligation. Such unequivocal language would tend to indicate that the drafters intended the text to be legally binding.

Furthermore, article X of the Convention requires member states whose representatives signed the instrument to ratify the Convention.⁴¹ The requirements of signatures and ratification have traditionally been expressions of consent to be bound in international law.⁴² The preamble also contains language that provides for neutral inspectors on whaling ships to monitor compliance⁴³ and prosecution for transgressors by the government having jurisdiction over the offense.⁴⁴ In addition, there is the general principle of international law—*pacta sunt servanda*—which provides that every treaty in force is binding upon the parties to it and must be performed by them in good faith.⁴⁵ Finally, there is a basic principle of treaty interpretation that requires a treaty to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty and in their context in light of its object and purpose."⁴⁶

39. Amendments to the Schedule to the International Whaling Convention of 1946, adopted June 25, 1976, ¶ 12, 27 U.S.T. 4015, 4018, 1123 U.N.T.S. 277, 279. Even stricter language is found in some cases, for example, "It is forbidden to take or kill any sperm whale over 45 feet (13.7 metres) in length in the Southern Hemisphere north of 40°S latitude during the months of October to January inclusive." *Id.* ¶ 15(c), 27 U.S.T. at 4019, 1123 U.N.T.S. at 280.

40. *Id.* ¶ 12.

41. ICRW, *supra* note 2, art. X(1), 62 Stat. at 1720, 161 U.N.T.S. at 84.

42. Vienna Convention, *supra* note 36, arts. 12, 14, 1155 U.N.T.S. at 335; Lyster, *supra* note 8, at 5-6. See generally LOUIS HENKIN ET AL., INTERNATIONAL LAW 439-41 (3d ed. 1993).

43. See ICRW, *supra* note 2, sched. 1(a), 62 Stat. at 1723, 161 U.N.T.S. at 90.

44. Paragraph 2 of article IX provides that "[n]o bonus . . . shall be paid to the gunners and crews of whale catchers in respect of any whales the taking of which is forbidden by this Convention." *Id.* art. IX(2), 62 Stat. at 1720, 161 U.N.T.S. at 84. Paragraph 4 requires each government to inform the IWC of each infraction and subsequent punishment. *Id.* art. IX(4).

45. Vienna Convention, *supra* note 36, art. 26, 1155 U.N.T.S. at 339. See generally HENKIN ET AL., *supra* note 42, at 20-21.

46. Vienna Convention, *supra* note 36, art. 31(1), 1155 U.N.T.S. at 340. The legal rules concerning interpretation of treaties in the Vienna Convention passed without a dissenting vote and may be considered declaratory of existing law. See generally HENKIN ET AL., *supra* note 42, at 475-78.

Despite the fact that the Convention discussed the punishment of infractions, its enforcement mechanism was quite poor. The proof is in the results: "[u]nder the aegis of the IWC during the 1950s and 1960s, more whales were killed than ever before."⁴⁷ It was not until the 1970s that the tide began to turn in favor of whale conservation, when political attitudes toward whales began to change and a new concern for global ecology began to take root.⁴⁸

C. Additional Protective Measures

In the early 1970s the United States began to emerge as a champion of environmental issues and, as a result, marine mammal protection benefited considerably.⁴⁹ In 1972 the U.S. Congress passed the Marine Mammal Protection Act, which protected whales and dolphins within U.S. waters.⁵⁰ In 1973 the United States enacted the Endangered Species Act.⁵¹ The Endangered Species Act not only protects designated endangered species and their habitats, but also closes the U.S. market to whale products.⁵² Also in 1973, the Convention on Trade in Endangered Species of Wild Fauna and Flora (CITES), which the United States championed, was opened for signature.⁵³ It entered into force on July 1, 1975.⁵⁴ CITES closed many international markets to whale products as well as those of many other endangered species.⁵⁵

47. DAY, *supra* note 1, at 29. Day contrasts the numbers of whales caught before the IWC existed with those afterwards. "In 1933, when virtually no restrictions existed, 30,000 whales were killed; in 1962 under the IWC, nearly 67,000 whales were killed." *Id.*

48. See D'Amato and Chopra, *supra* note 1, at 38.

49. See H.R. Con. Res. 54, 99th Cong., 1st Sess. (1985) (providing, in its preamble, a historical analysis of the United States commitment to whale preservation). Although by the 1970s the United States was on the side of the anti-whaling forces on the issue of commercial whaling, it was and remains an advocate for aboriginal whaling. Aboriginal whaling is a native right to whaling that belongs to indigenous peoples, such as the Inuit. See 16 U.S.C. § 1539(e) (1994) (exempting Alaskan natives from the provisions of the Endangered Species Act).

50. Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 86 Stat. 1027 (codified as amended at 16 U.S.C. §§ 1371-1407 (1994)).

51. Endangered Species Preservation Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified at 16 U.S.C. §§ 1531-1544 (1994)).

52. 16 U.S.C. § 1533(c)-(d).

53. CITES, *supra* note 4, 27 U.S.T. at 1087, 993 U.N.T.S. at 243.

54. *Id.*

55. See DAY, *supra* note 1, at 30-31. But see DAVID S. FAVRE, *INTERNATIONAL*

Most importantly, in the early 1970s debate began in the U.S. Congress about fishery conservation that ultimately led to the enactment of legislation which directly addressed the inability of the IWC to effectively regulate whale resources. The Pelly Amendment to the Fisherman's Protective Act of 1967 (Pelly Amendment or Pelly)⁵⁶ enables the Secretary of Commerce to certify to the President any foreign nations for sanctions that "diminish the effectiveness of an international fishery conservation program."⁵⁷ After such certification the President may direct the Secretary of the Treasury to embargo the fish or wildlife products of the offending nation as a punitive measure.⁵⁸ Congress hoped the certification procedure provided in the Pelly Amendment would serve as a threat to potential violators of international fishery conservation agreements.⁵⁹ If the threat of sanctions did not have the desired deterrent effect, then the sanctions themselves, if imposed, would constitute punishment.⁶⁰

The Packwood-Magnuson Amendment to the Fishery Conservation and Management Act of 1976 (Packwood-Magnuson Amendment or Packwood-Magnuson)⁶¹ afforded whales additional protection. Although the Pelly and Packwood-Magnuson Amendments are similar, they also differ in that the latter specifically mentions whales as beneficiaries of the statute.⁶²

TRADE IN ENDANGERED SPECIES: A GUIDE TO CITES 91 (1989) ("[U]nlike other highly visible animals such as the elephant or the big cats, CITES has not been the primary focus point of the international [whaling] debate. . . . CITES has played a supportive role in seeking to protect the whales.").

56. 22 U.S.C. § 1978 (1994). Although the Pelly Amendment clearly applied to whales and addressed the failures of the IWC, its original impetus was the International Convention for the Northwest Atlantic Fisheries, Feb. 8, 1949, 1 U.S.T. 477, 157 U.N.T.S. 157 (entered into force July 3, 1950), and its failure to adequately conserve the Atlantic Salmon. For congressional intent with respect to the protection of whales at the time of the Pelly debate, see 117 CONG. REC. 34,752 (1971) (statement of Rep. Pelly).

57. 22 U.S.C. § 1978(a)(1) (1994).

58. 22 U.S.C. § 1978(a)(4) (1994).

59. See 117 CONG. REC. 34,752 (1971) (statement of Rep. Pelly).

60. 117 CONG. REC. 34,753 (1971) (statement of Rep. Pelly); Melinda K. Blatt, Case Note, *Woe for the Whales: Japan Whaling Association v. American Cetacean Society*, 106 S. Ct. 2860 (1986), 55 U. CIN. L. REV. 1285, 1290 (1987).

61. 16 U.S.C. § 1821 (1994).

62. The Packwood-Magnuson Amendment provides:

The term "certification" means a certification made by the Secretary that nationals of a foreign country, directly or indirectly, are conducting fishing operations or engaging in trade or taking which diminishes the ef-

The penalty provided in the Packwood-Magnuson Amendment is also different—while Pelly involves an embargo of fish or wildlife products, Packwood-Magnuson reduces the allowable catch of fish in U.S. waters (200 nautical mile Exclusive Economic Zone) by the offending nation “by not less than 50 percent.”⁶³

The Pelly and Packwood-Magnuson Amendments effectively became the international enforcement arm of the IWC.⁶⁴ In the early 1980s an organizational change occurred on the IWC that paved the way for the current commercial whaling moratorium.⁶⁵ Specifically, in 1982 the number of states that were members of the IWC grew to thirty-seven.⁶⁶ This number included many small non-whaling states that ostensibly joined at the behest of environmental groups to take a stand against whaling.⁶⁷

In 1982, bowing to environmental group pressure, the IWC passed an indefinite moratorium (zero catch-limit) on all commercial whaling.⁶⁸ This moratorium continued to allow scien-

fectiveness of the International Convention for the Regulation of Whaling.

A certification under this section shall also be deemed a certification for the purposes of section 1978(a) of Title 22.

16 U.S.C. § 1821(e)(2)(A)(i) (1994).

63. 16 U.S.C. § 1821(e)(2)(B).

64. DAY, *supra* note 1, at 94. Day characterizes the Packwood-Magnuson Amendment as the “Save the Whale movement’s most powerful weapon.” *Id.* The sanction applied to any nation that violated IWC regulations, regardless of whether or not they were a member of the IWC. *Id.* In actual practice, however, states have almost never been certified for sanctions by the Secretary of Commerce and the reduction of fishing privileges in American waters has only been imposed once. See Letter to the Speaker of the House and the President of the Senate Reporting on Japanese Whaling Activities, 24 WEEKLY COMP. PRES. DOC. 438 (Apr. 6, 1988). In 1993, in a letter to Congress, President Clinton condemned Norway for its decision to resume harvesting of minke whales, but indicated that sanctions would be imposed only as a last resort. Message to the Congress on Whaling Activities of Norway, 1993 PUB. PAPERS 1684 (Oct. 4, 1993). No sanctions were ultimately imposed. The embargo of fishery products, provided for in the Pelly Amendment, has never been imposed for a violation of an IWC regulation.

65. R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 238 (2d ed. 1988).

66. DAY, *supra* note 1, at 96.

67. CHURCHILL & LOWE, *supra* note 65, at 238; DAY, *supra* note 1, at 96. For a discussion of the ideological transformation of the IWC, see Patricia Birnie, *The Role of Developing Countries in Nudging the International Whaling Commission from Regulating Whaling to Encouraging Nonconsumptive Uses of Whales*, 12 *ECOLOGY L.Q.* 937 (1985).

68. THIRTY-THIRD REPORT OF THE IWC, *supra* note 4, at 20. For a full text of the moratorium, see *id.* at 40. In 1994, the IWC passed a resolution establishing a protective whale sanctuary, as an adjunct to the moratorium, in the waters south

tific whaling and aboriginal whaling. One of the factors that led to the moratorium was a letter from President Ronald Reagan to the 1981 meeting of the IWC. In this letter the President indicated the concern of the U.S. government regarding the insufficient data on whale stocks.⁶⁹ The letter supported the proposal for a moratorium.⁷⁰

Upon the passage of the moratorium, four whaling states, Japan, Norway, Peru, and the former Soviet Union, promptly filed objections.⁷¹ Peru quickly withdrew its objection under the direct threat of U.S. sanctions.⁷² The remaining three were eligible to be certified for sanctions under Pelly and Packwood-Magnuson if they continued their current whaling practices. Under the Whaling Convention, their timely objections allowed these three states to "opt out" of the moratorium.⁷³

Japan, seeking to avoid sanctions by the United States, entered into a series of negotiations with the Reagan Administration to exempt it from the reach of the Pelly and Packwood-Magnuson Amendments.⁷⁴ They were largely successful in

of 40 degrees south latitude. See FORTY-FIFTH REPORT OF THE IWC, *supra* note 4, at 27-29, 45-46.

69. President's Message to the International Whaling Commission, 1981 PUB. PAPERS 634 (July 17, 1981).

70. *Id.*

71. INTERNATIONAL WHALING COMMISSION, THIRTY-FOURTH REPORT OF THE INTERNATIONAL WHALING COMMISSION 29 (1984).

72. *Id.* Peru withdrew its objection in 1984 when the United States threatened to impose trade sanctions. DAY, *supra* note 1, at 87. It gave up whaling operations entirely in 1986. *Id.* at 81.

73. ICRW, *supra* note 2, art. V(3), 62 Stat. at 1719, 161 U.N.T.S. at 80-82.

74. Secretary of Commerce Malcolm Baldrige, in an exchange of letters with Minister Yasushi Murazumi, Charge d'Affaires ad interim of Japan, promised that the United States would refrain from certifying Japan under Pelly and Packwood-Magnuson if Japan agreed to harvest only a finite number of sperm whales (a zero-quota was in effect) and cease all commercial whaling operations by 1988. *American Cetacean Soc'y v. Baldrige*, 604 F. Supp. 1398, 1404 (D.D.C.) (referring to a document entitled "Summary of Discussions on Commercial Sperm Whaling in the Western Division Stock of the North Pacific, Nov. 1-12, 1984, Washington, D.C."), *aff'd*, 768 F.2d 426 (D.C. Cir. 1985), *rev'd sub nom. Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986) (5-4 decision). The executive side-agreement with Japan was seen by American conservation groups as a frustration of not only the IWC moratorium, but also a derogation of executive duty under what they believed was mandatory language, compelling certification under Pelly and Packwood-Magnuson. *Id.* at 1401. These conservation groups brought an action in federal court seeking a writ of mandamus to compel Secretary Baldrige to certify Japan. *Id.* at 1400. Judge Charles R. Richey of the District Court in the Dis-

eliminating any real economic or political pain as a result of continuing their destructive whaling practices.

The resulting litigation highlighted a flaw in the scheme to use domestic legislation to enforce IWC regulations. The Supreme Court held in *Japan Whaling Ass'n v. American Cetacean Society* that the language of Packwood-Magnuson and Pelly providing for sanctions was discretionary and non-mandatory.⁷⁵ That case also proved that there is no substitute for real international cooperation where the protection of a delicate resource such as marine mammals is concerned.

Whales and other marine mammals also receive some protection from the High Seas Driftnet Fisheries Enforcement Act, enacted in 1992.⁷⁶ This Act is the implementing legislation of a United Nations General Assembly resolution calling for an end to large-scale pelagic driftnets.⁷⁷

trict of Columbia granted the mandamus. In so doing, he held that the language contained in Packwood-Magnuson was mandatory and nondiscretionary concerning the duty of the Secretary of Commerce to certify for sanctions those nations that "diminish the effectiveness of" an international fishery agreement or whaling convention agreement. *Id.* at 1411 (citing 22 U.S.C. § 1978(a)(1)). The court of appeals affirmed. *American Cetacean Soc'y v. Baldrige*, 768 F.2d 426 (D.C. Cir. 1985). The opinions of the lower courts, however, were not adopted by the Supreme Court. *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986).

75. 478 U.S. at 222. The Supreme Court reversed the circuit court's decision, concluding that the language of the statute regarding the level of discretion vested in the Secretary of Commerce was unapparent. Where "a statute is silent or ambiguous with respect to the question at issue, our longstanding practice is to defer to the 'executive department's construction of a statutory scheme it is entrusted to administer . . .'" *Id.* at 233 (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)). In the dissenting opinion, Justice Marshall criticized the opinion for allowing the executive branch to impose a penalty not authorized by the statute, *id.* at 245 (Marshall, J., dissenting), and possibly frustrating the intention of Congress in the process, *id.* at 246 (Marshall, J., dissenting). Neither the majority opinion nor the dissenting opinion alluded to the fact that the actions of the executive, standing alone, could be construed as defeating the object and purpose of the IWC moratorium. See generally Blatt, *supra* note 60, at 1293; Erin K. Flory, Comment, *Construing the Pelly and Packwood-Magnuson Amendments: The D.C. Circuit Court Harpoons Executive Discretion*, 61 WASH. L. REV. 631, 637-39 (1986); Leich, *supra* note 4, at 434-38.

76. High Seas Driftnet Fisheries Enforcement Act, Pub. L. No. 102-582, 106 Stat. 4900 (codified at 16 U.S.C. §§ 1826a-1826c (1994)). The practice of large-scale driftnet fishing is particularly dangerous to large marine mammals which get caught in the nets and cannot free themselves to get to the surface to breathe. In these cases, the death of marine mammals is considered "incidental" to the ordinary fishing operations. Although largely abated, the incidental deaths of marine mammals is still tolerated in the context of certain fishing activities. See *infra* note 174.

77. *Large-Scale Pelagic Drift-Net Fishing and its Impact on the Living Marine*

The difficulties of enforcement presented by quotas and the moratorium underscores a problem central to international law. Absent a strong central authority, states will comply only to the extent that they perceive it is in their self-interest to do so. The destruction of whales is a classic example of the "tragedy of the commons."⁷⁸ It is naive to think that countries that employ large numbers of their citizens in the whaling industry will be persuaded by a long-term "save the whales" argument. Yet, in tracing the history of whaling one can discern a clear trend from the wanton destruction of a very special resource with virtually no expressions of concern, to a nearly universal attitude today that killing whales is simply wrong.

III. THE EVOLUTION OF POLICY

A. *Why Save Whales?*

At the heart of the policy debate between the pro-whaling forces and those that oppose whaling are questions about whales themselves. If the commercial interests of whalers are to be superseded by environmental concerns, then opponents of whaling should be prepared to articulate solid reasons for the preservation of whales. The trend toward whale protection has been considerable. Indeed, one can argue that the "burden of proof" is now on the whalers to show that their commercial interests are superior to the rights of whales and other marine mammals to live in peace. Nevertheless, proponents of ending the killing of whales present an excellent argument that whales deserve protection from man because they are highly intelligent, sentient beings who are capable of communication.⁷⁹

The large brain size of whales and other marine mammals is often cited to prove their intelligence.⁸⁰ Another factor that

Resources of the World's Oceans and Seas, G.A. Res. 215, U.N. GAOR 2d Comm., 46th Sess., 79th plen. mtg., Supp. No. 49, at 147, U.N. Doc. A/46/49 (1991). The resolution called for a reduction and ultimate moratorium on large-scale driftnet fishing on the high seas by December 31, 1992. *Id.* ¶ 3(c).

78. See Garrett Hardin, *Tragedy of the Commons*, 162 SCIENCE 1243, 1244 (1968). Fisheries are a common property natural resource. Because of this common property nature there is a tendency for fish stocks to be harvested above biologically optimum levels. See CHURCHILL & LOWE, *supra* note 65, at 224-26.

79. D'Amato & Chopra, *supra* note 1, at 21-22; see DAY, *supra* note 1, at 152. The mental powers of whales and dolphins have been the subject of much study since World War II. *Id.*

80. See, e.g., DAY, *supra* note 1, at 152. The brain size of some species of

indicates intelligence is that killer whales and other toothed species hunt in a systematic and cooperative way,⁸¹ demonstrating their mental abilities by successfully hunting other highly intelligent marine mammals such as seals and porpoises.⁸² This implies the evolutionary maxim of "survival of the fittest" in that only the most intelligent whales could out-smart a similarly intelligent species.⁸³

Perhaps the best evidence of cetacean intelligence is their ability to communicate.⁸⁴ Research has indicated that each pod of killer whale communicates in its own dialect.⁸⁵ The basis for this conclusion was a comparison of the sounds of whales in captivity with those of the members of their native pods.⁸⁶ Whale pods are social units that are indicative of community.⁸⁷

In addition to civilian research, the U.S. Navy has observed that four species of whales vocalize in the low frequency bands that the Navy records with its Integrated Undersea Surveillance System (IUSS).⁸⁸ The IUSS records data from a network of underwater acoustical sensors placed across the

whale is six times larger than a human brain. *Id.*

81. See Glen Martin, *Killer Culture*, DISCOVER, Dec. 1993, at 110, 113. Although humpback whales and others are not toothed, they are widely considered to be intelligent. The study of humpback whale songs has provided our best insight into the mental capacities of whales. ERICH HOYT, *ORCA: THE WHALE CALLED KILLER* 45 (rev. ed. 1990). Humpbacks are intelligent enough to memorize the order of sounds, as well as modifications they hear going on around them. *Id.* Moreover, they can store this information for at least six months. *Id.*

82. Martin, *supra* note 81, at 113.

83. *Id.* Survival of the fittest, or the smartest, was dramatically demonstrated when Icelandic killer whales fed on herring until the local herring industry appealed to the U.S. Navy to intervene. HOYT, *supra* note 81, at 165. The killer whales promptly changed their diet to exclude herring! *Id.* "Orca learns — and learns quickly." *Id.* at 166.

84. Martin, *supra* note 81, at 113. It is now well settled that toothed whales use communication to hunt. See HOYT, *supra* note 81, at 43; see also Alexandra Morton, *Life Among the Whales*, SMITHSONIAN, Nov. 1994, at 46, 48. Biologist Alexandra Morton spent 15 years following pods of killer whales in the wild. *Id.* at 47.

85. Morton, *supra* note 84, at 48.

86. *Id.*; HOYT, *supra* note 81, at 46 ("[O]rca calves probably mimic their pod-mates to perpetuate a set of signals unique to their social group, by which they could recognize one another at a distance.").

87. HOYT, *supra* note 81, at 12, 151; D'Amato & Chopra, *supra* note 1, at 22.

88. Lisa M. FitzGerald, *Eavesdropping on Ocean Sounds*, SEA FRONTIERS, May-June 1994, at 8.

seafloors of the northern Pacific and Atlantic oceans.⁸⁹ The Navy's goal with IUSS is to isolate and distinguish biological and geological noise so that it can better pursue its missions.⁹⁰ The data about whale communication is being shared with civilian researchers to understand better the meaning of whale whistles and songs.⁹¹

Another argument for whale preservation is the fragility of their life cycle. Specifically, they have low birth-rates and long gestation periods.⁹² Normally only one calf at a time is born to a mother and the gestation period is usually one year.⁹³ The gestation period for sperm whales is sixteen months.⁹⁴ Calves are born quite large and the interval between successive births may be a year in some species and as long as three years in others.⁹⁵ In many large species the females do not become re-impregnated until their young are weaned.⁹⁶ For this reason these whales rarely reproduce more than once every two years.⁹⁷ Since the large whales have a life expectancy of from thirty to forty years, a female can give birth to between ten and twelve calves at most during her lifetime.⁹⁸ The low birth-rate is also attributable to the low natural death rate of whales:⁹⁹ unlike many species that can reproduce rapidly, nature compensated the whale's low birth rate with a low death rate.

Any policy debate of this issue must balance the reasons for protecting whales with the benefits derived from the products of whaling. After all, if whale oil were found to contain powerful medicinal properties that could cure cancer or heart

89. *Id.*

90. *Id.* The key Navy mission that utilizes IUSS is anti-submarine warfare. *Id.*

91. *See id.*

92. *See* GLOBAL MARINE BIOLOGICAL DIVERSITY 40 (Elliot A. Norse ed., 1993). The slow reproduction of marine mammals is specifically enumerated as a reason for the implementation of the High Seas Driftnet Fisheries Enforcement Act, Pub. L. No. 102-582, § 2(a)(2), 106 Stat. 4900 (1992).

93. William E. Schevill, *Cetacea*, in THE ENCYCLOPEDIA OF THE BIOLOGICAL SCIENCES 205, 207 (Peter Gray ed., 1961).

94. *Id.*

95. *Id.*

96. 3 VAN NOSTRAND'S SCIENTIFIC ENCYCLOPEDIA 3323 (Douglas M. Considine ed., 8th ed. 1995).

97. *Id.*

98. *Id.*

99. *Id.*

disease, it would change policy objectives considerably. Unfortunately for the whaling industry, no such benefit has yet been discovered. People can consume whale meat directly, but the common uses of whale products include chicken feed, cattle fodder, fertilizer, car wax, shoe polish, lipstick and other cosmetics, margarine, and cat and dog food.¹⁰⁰ Perhaps the strongest argument for the continuation or resumption of commercial whaling is that it provides employment for citizens in those few countries that maintain the industry. If it is morally repugnant to kill whales, the fact that people earn a living killing whales should not decide the argument. Our modern society provides a panoply of other jobs. Indeed, as is suggested later on, whale-watching has become a booming tourist attraction. It is an example of how the economic displacement of a whaling ban could be effectively addressed.

Even if policy makers ultimately determine that whales are not deserving of affirmative steps to protect them, then the natural question remains: Do they simply have the right to be left alone by human beings? Does the answer to this question change when we consider the man-made problems of pollution and depleted food supplies that challenge whales' existence before they ever face the harpoon?¹⁰¹ The answer to this question may be emerging in international law, and may be found in an examination of the changes of attitudes and policies toward whales over time.

B. The Emergence of Whale Protection as a Moral and Juridical Concept

If a race of human beings was hunted and slaughtered we would clearly define and condemn such an act as genocide. Such acts would trigger fundamental rights granted in human rights treaties and invoke parallels to the Nazi Holocaust and other atrocities. D'Amato and Chopra posit the following query: "To be sure, whales are not human, but are they 'less' than human?"¹⁰² As one traces the attitudes toward whales from

100. Joan McIntyre, *Let Us Act*, in *MIND IN THE WATERS* 224 (Joan McIntyre ed., 1974).

101. Patricia Chisholm, *Prince of the Tides: Nations Squabble over the Fate of Whales*, *MACLEAN'S*, June 14, 1993, at 50, 50.

102. D'Amato & Chopra, *supra* note 1, at 27.

the early days of the first hunts up through the modern environmental movement, a ring of morality seems to grow louder in the background.¹⁰³ As a result of this trend, whales may indeed be acquiring "right-holder" status in international law.¹⁰⁴ Apart from whatever protection they may receive from treaties and statutes, their right to life may be emerging as customary law.¹⁰⁵

One cannot consider the issue of whether or not whales are acquiring their own set of rights in international law in a vacuum. Instead, we must analyze it in the context of the "rights of nature" in general. The whaling issue is a particularly meaningful one to explore this concept, because whales have received so much attention and the volume of the debate is so loud. In their natural element they are beautiful, huge yet graceful. If whales are in fact acquiring legal rights then they are in the forefront of non-human species to do so. Certainly a debate over the rights of cockroaches would not resonate as loudly.

A review of the international environmental instruments of the last century show a step-by-step development toward a recognition of the intrinsic rights of nature.¹⁰⁶ Specifically, they show a trend toward biocentrism, which is the intrinsic rights of living things.¹⁰⁷ Biocentrism can be contrasted with anthropocentrism, the latter concept assuming a superiority of

103. *Id.* at 23-28.

104. *Id.* at 51.

105. *Id.* at 28. For a description of the necessary elements of customary international law, see Statute of the International Court of Justice, June 26, 1945, art. 38(1)(b), 59 Stat. 1055, 1060, 3 Bevans 1153, 1187 [hereinafter I.C.J. Statute]. See generally *The Paquete Habana*, 175 U.S. 677 (1900); *North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.)*, 1969 I.C.J. 4 (Feb. 27). There are two distinct elements that constitute customary international law. First, there must be a "general practice" and second, that practice must be accepted as law (*opinio juris*) in the international community. I.C.J. Statute, art. 38(1)(b).

106. See Susan Emmenegger & Axel Tschentscher, *Taking Nature's Rights Seriously: The Long Way to Biocentrism in Environmental Law*, 6 GEO. INT'L ENVTL. L. REV. 545, 568 (1994).

107. *Id.* at 576-79. It is prohibitive to reproduce here the exhaustive list of treaties examined by the authors to show the various stages of the development of biocentrism. However, at the earliest end of the spectrum, where virtually no rights of nature are recognized, is the first Convention for the Regulation of Whaling, *supra* note 22, 49 Stat. at 3079, 155 L.N.T.S. at 349. At the latter end, showing a high degree of biocentrism, is the Convention on Biological Diversity, *opened for signature* June 5, 1992, U.N. Doc. DPI/130/7, *reprinted in* 31 I.L.M. 818 (1992) [hereinafter Biodiversity Convention].

human interest in nature.¹⁰⁸ Anthropocentrism is a utilitarian concern; that is, nature has rights only to the extent human beings ultimately benefit from a recognition and protection of those rights.¹⁰⁹ Since the theory of biocentrism recognizes the intrinsic value of all living things, it can serve as a starting point to discuss the rights of certain orders or species in international law.¹¹⁰

There is nothing under a biocentrism perspective that precludes natural competition between species. An advocate of biocentrism would likely admit that the extinction of some species through natural selection may be inevitable. However, he or she would demand that the rules of the game be fair.¹¹¹ The logical conclusion that flows from the theory of biocentrism may be that the holder of rights can take recourse to the legal system when those rights are violated.¹¹² If so, novel questions of civil procedure will arise as to who will have standing to assert those rights.

C. The Rights of Whales: A Claim of Custom

D'Amato and Chopra have analyzed the history of whaling and divided the progressive acquisition of whales' rights into five preliminary stages. Through their analysis, they suggest the existence of a sixth stage: that whales may be acquiring an entitlement to live and be left alone under customary international law.¹¹³ Their comprehensive analysis appears to be the best such survey attempted on the development of customary law toward recognizing the rights of whales and is worthy of review. It is useful to evaluate each stage in conjunction

108. Emmenegger & Tschentscher, *supra* note 106, at 557; Anthony D'Amato, *Do We Owe a Duty to Future Generations to Preserve the Global Environment?*, 84 AM. J. INT'L L. 190, 195 (1990). Simply put, anthropocentrism is the primacy of human interest over any others. Any rights that any other living thing may enjoy are derived from the benefit that humans receive from that thing.

109. Emmenegger & Tschentscher, *supra* note 106, at 557-59. An example of anthropocentrism would be the early stages of IWC regulation. Calves and nursing mothers were protected to help assure a sizable catch limit for the following season, not because the whales themselves had intrinsic value which gave rise to rights.

110. *Id.* at 572-73, 579.

111. *Id.* at 577.

112. *Id.* at 587; see also Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

113. D'Amato & Chopra, *supra* note 1, at 23.

with the anthropocentrism to biocentrism progression discussed above.¹¹⁴

Before World War I whaling was in the "Free Resource Stage."¹¹⁵ In this stage, the killing of whales was unconstrained. The prevailing view was virtually undisputed: whales were simply there for the taking.¹¹⁶ Anthropocentrism governed our thoughts of nature at this time.¹¹⁷

Between 1918 and 1931 the industry entered a "Regulation Stage" in which there was some attempt to control the practice through loose restrictions and a licensing system.¹¹⁸ Since the concern at this stage was only for the health of the industry, it is difficult to distinguish this stage from the previous one.

From 1931 to 1945 many states observed that the depletion of whale stocks would cripple a valuable industry, thus commencing a "Conservation Stage."¹¹⁹ The biological truism that a successful parasite never kills its host comes to mind in this stage. The measures the whalers adopted only reflected a desire to avoid the *industrial* crisis that would result if whale stocks were depleted, and the catastrophe if important species became extinct.

The next stage, "Conservation becomes Protection," from 1945-1977, saw the rise of the "Save the Whales" environmental movement.¹²⁰ This stage saw the growth of the idea that whales deserve protection as an important part of nature and

114. See generally Emmenegger & Tschentscher, *supra* note 106, at 546-91. The analysis of Emmenegger and Tschentscher is a macro, almost philosophical, review of the evolution of environmental attitudes. Although they do refer tangentially to the whaling issue at several points, and in fact refer to the D'Amato and Chopra article, *id.* at 554 nn.29 & 30, they are not particularly concerned with any one individual order or species. The analysis of D'Amato and Chopra, however, seems to support their thesis. Whales may be the best example of the philosophical development of "anthropocentrism to biocentrism."

115. D'Amato & Chopra, *supra* note 1, at 28-29.

116. *Id.* It was noted in the last section that commercial whaling rose as an industry in this stage. See *supra* notes 18-19 and accompanying text.

117. Emmenegger & Tschentscher, *supra* note 106, at 550.

118. D'Amato & Chopra, *supra* note 1, at 30.

119. *Id.* at 30-32. Although actual measures of conservation were introduced, the concern was still for the long-term health of the industry. *Id.* at 30.

120. *Id.* at 32. Protection is different from conservation in that its goal is to provide for the survival and longevity of whales as a part of nature and not for the purpose of supporting an industry. *Id.* at 32-40. Emmenegger and Tschentscher probably would conclude that anthropocentrism became biocentrism for whales during this stage. See Emmenegger & Tschentscher, *supra* note 106, at 550.

not merely as a consumer product, as well as the first awareness of ecological concerns in IWC decisionmaking.¹²¹

From 1977 to 1982 was the "Protection Stage."¹²² During this period UNCLOS became finalized and allowed for states to declare up to 200 nautical miles of Exclusive Economic Zone (EEZ).¹²³ Thus, many nations were able to pass protective legislation covering huge segments of the ocean.¹²⁴

The next stage, the "Preservation Stage," ran from 1982 to 1990.¹²⁵ Preservation is a movement to ban whaling because it is morally wrong.¹²⁶ The argument of the anti-whaling forces had evolved from "killing whales is bad for the global environment" to "it is immoral to kill such magnificent creatures."¹²⁷ As more non-whaling states joined the IWC, they passed the moratorium in 1982.¹²⁸ Some states even seemed

121. D'Amato & Chopra, *supra* note 1, at 38. It is helpful to remember from the last section that several new, non-whaling states joined the IWC during this stage.

122. *Id.* at 40.

123. UNCLOS, *supra* note 4, arts. 55-75, 21 I.L.M. at 1280-86. Article 57 provides that "[t]he exclusive economic zone shall not extend beyond . . . the baselines from which the breadth of the territorial sea is measured." *Id.* art. 57, 28 I.L.M. at 1280.

124. D'Amato & Chopra, *supra* note 1, at 40; *see also* UNCLOS, *supra* note 4, arts. 56, 65, 73, 21 I.L.M. at 1280, 1282, 1284. Article 56 grants the coastal state jurisdiction with regard to "the protection and preservation of the marine environment." *Id.* art. 56(1)(b)(iii), 21 I.L.M. at 1280. Article 65 recognizes:

[T]he right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in [articles 55-75]. States shall co-operate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study.

Id. art. 65, 21 I.L.M. at 1284. Article 73 provides that:

The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention.

Id. art. 73(1).

125. D'Amato & Chopra, *supra* note 1, at 45.

126. *Id.* at 45-48. Preservationists are the stalwarts of the "Save the Whales" movement and differ from conservationists and protectionists in that they are not likely to make trade-offs and insist on nothing less than a permanent ban on whaling. *Id.* at 45.

127. *See id.* at 140-48.

128. THIRTY-THIRD REPORT OF THE IWC, *supra* note 4, at 20.

to take a perverse pride in renouncing their prior sins.¹²⁹

The sixth and final stage represents the current status of whaling. It can be titled the "Emerging Entitlement Stage."¹³⁰ Because of the 1982 moratorium, virtually all commercial whaling had ceased by the beginning of this stage. The moratorium remains in effect today.¹³¹ At the 1994 meeting of the IWC, only two nations, Japan and Norway, were reported to be actively engaged in commercial whaling operations.¹³² In addition to the moratorium, the IWC established a sanctuary in the waters south of forty degrees south latitude.¹³³ (See Appendix for a map of the sanctuary.) The IWC also passed a resolution which declared that member states cannot export any of the meat derived from scientific whaling.¹³⁴

D'Amato and Chopra suggest a conclusion that may be drawn from the review of their five stages and their implications about a sixth: the preservation of whales is emerging as a key principle of customary international law.¹³⁵ They assert that attitudes and policies of the vast majority of governments now reflect a belief that whale preservation is necessary.¹³⁶ That is, there is a growing sense of legal obligation toward whales because it is the "right, proper and natural" policy to adopt.¹³⁷ Indeed most nations today strenuously oppose com-

129. D'Amato & Chopra, *supra* note 1, at 47-48; see also DAY, *supra* note 1, at 19. In 1978 Australia declared whaling morally wrong. Day credits them with being the first state to do so. *Id.* The tiny nation of Seychelles followed in 1979. *Id.* at 96. D'Amato and Chopra point to similar statements from Brazil, India, and Oman in this stage. D'Amato & Chopra, *supra* note 1, at 47-48.

130. D'Amato & Chopra, *supra* note 1, at 48-54.

131. FORTY-FIFTH REPORT OF THE IWC, *supra* note 4, at 45.

132. *Id.* at 1. Norway is currently harvesting minke whales under its reservation to the Convention and the scientific whaling exception. *Id.* Japan's operations are under the scientific whaling exception. See *id.* Iceland withdrew from the IWC in 1992. Jay Johnson, *Iceland Notifies Intent to Withdraw from the International Whaling Commission*, 2 Y.B. INT'L ENVTL. L. 212, 212 (1991). Although Iceland withdrew from the IWC in protest over the moratorium, government officials have stated that if the country resumes commercial whaling, it will rejoin the IWC. *More Whale Hunts*, NEW SCIENTIST, June 25, 1994, at 11.

133. FORTY-FIFTH REPORT OF THE IWC, *supra* note 4, at 28. The vote for the sanctuary was 23 in favor, 1 against (Japan), and 6 abstentions. *Id.* See Appendix *infra* p. 360 for a map of the sanctuary.

134. *Id.* at 44-45. Previously, 49% of whale meat could be exported. NMFS Report, *supra* note 38, para. 7.

135. D'Amato & Chopra, *supra* note 1, at 49-51. For a review of the requirements of customary international law, see sources cited *supra* note 105.

136. *Id.* at 48-50.

137. *Id.* at 50.

mercial whaling. Anyone who reads the annual reports of the IWC since the moratorium decision can see that the organization, which started as a "whalers' club," is now firmly on the side of the whales. Surely one can discern the clear trend toward whale preservation, but does this solid trend rise to the level of *opinio juris* that is necessary to establish customary international law?

Several factors exist that would tend to undercut the argument that whale preservation has emerged as an international custom which binds all states to follow. First, the IWC moratorium is subject to annual review.¹³⁸ One of the purported reasons for the moratorium in 1982 was the poor scientific data available on whale stocks.¹³⁹ Thus, should the available data on whale stocks be grounded on better scientific evidence, and indicate that the population of certain species of whales has sufficiently recovered, the states concerned could consider a motion to repeal the moratorium.¹⁴⁰ As whale census numbers improve, so do the arguments of whaling nations that it is now safe to resume limited whaling.¹⁴¹ Not only is Norway currently harvesting minke whales, but since 1993 it has annually requested the IWC to reconsider the moratorium based upon the scientific evidence of plentiful minke populations.¹⁴²

Another factor that would tend to indicate a lack of *opinio juris* is the United States' long-time support of aboriginal whaling.¹⁴³ At the 1994 meeting, the United States asked for and received a large increase in its quota of bowhead whales for the Alaskan Inuit tribe,¹⁴⁴ which strongly indicates that

138. See THIRTY-THIRD REPORT OF THE IWC, *supra* note 4, at 21.

139. *Id.* at 20; see also President's Message to the International Whaling Commission, 1981 PUB. PAPERS 634 (July 17, 1981).

140. *More Whales, More Questions*, SEA FRONTIERS, Mar.-Apr. 1994, at 12. New whale counting methods such as line-transect surveys, photo identification, and acoustics have indicated that the number of most whale species have increased. In addition to modern, hi-tech methods of ascertaining whale populations, scientists also look to old ships' logs and historical records to find descriptions of whale numbers at specific navigation points. "For example, such records suggest that 100 years ago about 5,000 beluga whales lived in the St. Lawrence River and estuary; today there are only about 500." *Id.*

141. *Id.*

142. See, e.g., FORTY-FIFTH REPORT OF THE IWC, *supra* note 4, at 48; see also David Swinbanks, *Whaling Meeting Expected to Leave Issue Unresolved*, NATURE, May 6, 1993, at 9. The scientific committee of the IWC has determined that minke whales now exist in sufficient numbers. *Id.*

143. See, e.g., 16 U.S.C. § 1539(e) (1994).

144. FORTY-FIFTH REPORT OF THE IWC, *supra* note 4, at 21-22; see *id.* at 52.

U.S. support for aboriginal whaling will not end anytime soon. In addition to undermining a claim of *opinio juris*, U.S. support for aboriginal whaling arguably creates a contradiction with its role as a key whale advocate on the IWC.¹⁴⁵ It allows the Japanese and Norwegians to exploit arguments that coastal villages in their countries have the same degree of "cultural dependence" on the minke whale as Inuits do on the bowhead.¹⁴⁶

An additional factor that indicates a lack of *opinio juris* is the unfortunate fact of pirate whaling.¹⁴⁷ Pirate whaling can involve governments that outwardly oppose whaling so as not to incur the wrath of protective measures but then tacitly support illicit whaling operations by their nationals.¹⁴⁸ If governments have knowledge of illegal whaling activity by their nationals and do not investigate or prosecute the conduct, it is hard to contend that these governments are acting in a manner consistent with the thesis that whale preservation has

Aboriginal and scientific whaling were specifically excluded from the 1982 moratorium. See *supra* note 68 and accompanying text.

145. See Stephen M. Hankins, Comment, *The United States' Abuse of the Aboriginal Whaling Exception: A Contradiction in United States Policy and a Dangerous Precedent for the Whale*, 24 U.C. DAVIS L. REV. 489, 522 (1990). Hankins argues that if the United States intends to continue its support of aboriginal whaling for the Inuits it should at least be prepared to supply competent scientific evidence that the bowhead whale stocks can support the hunt. See *id.* at 495. In fact, the bowhead remains a protected species. *Id.* at 520.

146. *Id.* at 494. At the 1994 IWC meeting Japan requested, but was denied, an interim quota of 50 minke whales for its "community-based" whalers. FORTY-FIFTH REPORT OF THE IWC, *supra* note 4, at 18. D'Amato and Chopra dismiss aboriginal whaling as a counterclaim to their thesis that whales have an entitlement to life. D'Amato & Chopra, *supra* note 1, at 57-61. They argue that Inuits should be compensated for the near extinction of the bowhead at the hands of commercial whalers, and be given a reasonable alternative as a means of subsistence. *Id.* at 60. The statements of the United States government and its record on the IWC, however, indicate that support for aboriginal whaling is a mainstay of United States policy on whaling. Message to the Congress on Whaling Activities of Norway, 1993 PUB. PAPERS 1684 (Oct. 4, 1993); see 16 U.S.C. § 1539(e) (1994).

147. See DAY, *supra* note 1, at 78-85.

148. See *id.* at 80-81. Day points to Japanese-controlled, illicit whaling operations in Chile, Peru, Taiwan, South Korea, and the Philippines in the 1970s and early 1980s. The underground industry was driven by the lucrative black market in Japan for whale meat. *Id.* at 80. Although current information on pirate whaling is sparse, a recent news story revealed that the meat of some protected species has been discovered in Japanese markets. *DNA Tests for Suspect Whale Trade*, *supra* note 38, at 11. A similar report indicated that a Norwegian export company was caught smuggling whale meat to South Korea. *Norwegians Found Smuggling Whale Meat*, EARTH ISLAND J., Winter 1993, at 6.

become customary international law. Such conduct is also relevant to the first element of international custom; that is, a general practice of promoting the preservation of whales may be lacking where those states have knowledge of illegal whaling operations but fail to act to prevent them.

D. The Problem of Persistent Objectors

The strongest reason to conclude that whale preservation is not yet customary international law is perhaps the most obvious. Although small in number, there are strong dissenters to such a claim. There is no requirement in international law that every state must show the general practice or evidence the *opinio juris*. Certainly, however, a large majority of states should do so.¹⁴⁹ Most states do in fact oppose whaling, have made public pronouncements to that effect, and act in accordance with that belief. However, the small minority of states that do not are not quiet about it. Japan, Norway, and Iceland have been most vocal and visible on the IWC and in the world arena in attempting to preserve, not the rights of whales, but the rights of whalers.¹⁵⁰ Moreover, these states are important in the debate as their positions go a long way to defeat the claim of custom at the threshold. Thus, the arduous dissent of these few states, by itself, could arguably prevent the formation of customary law in the first instance.

Even if the large number of anti-whaling states were seen as sufficient to create the right of whales to live in peace under customary international law, another rule of law exists that renders the question practically moot: the problem of persistent objectors.¹⁵¹ Even if commercial whaling was adjudicated to be illegal under international custom, it is well settled that persistent objectors to that custom are not bound by it.¹⁵²

149. IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 5 (4th ed. 1990). To establish customary international law, "[c]omplete uniformity is not required, but *substantial uniformity* is" *Id.* (emphasis added).

150. MacKenzie, *supra* note 38, at 22.

151. BROWNIE, *supra* note 149, at 10. "[A] State may contract out of a custom in the process of formation. Evidence of objection must be clear and there is probably a presumption of acceptance which is to be rebutted. Whatever the theoretical underpinnings of the principle, it is well recognized by international tribunals, and in the practice of states." *Id.* (footnotes omitted).

152. *See id.*; see also *Fisheries (U.K. v. Nor.)*, 1951 I.C.J. 116, 131-38 (Dec. 18) (United Kingdom held to have acquiesced to Norway's system of straight baselines

Specifically, Japan, Norway, and Iceland would be deemed persistent objectors, not obligated to obey the customary protection of whales. The likely scenario for the assertion of a violation of customary international law in this case would be that an anti-whaling state, at the behest of environmental groups, would seek adjudication and enforcement against Japan or Norway. These respondent states need only raise their well-documented status as persistent objectors to rebut the presumption of acceptance of the purported custom.¹⁵³

There is no question that today the dominant policy of the IWC and most of its member states is that of whale preservation. Whales are seen as deserving protection because they are intelligent, sentient beings that communicate and live in social units. Except for some very notable exceptions, the practice of commercial whaling has ceased to exist. The 1982 IWC moratorium remains in effect. Both international and domestic legal instruments provide substantial protection to whales and other marine mammals.

D'Amato and Chopra present a compelling case regarding the progression of the rights of whales and the evolution in their status over time.¹⁵⁴ But strong countervailing arguments exist that force the neutral observer to conclude that the preservation of whales as an integral part of nature has not yet passed into the body of customary international law. Specifically, the *opinio juris* that the preservation of whales is obligatory has not yet been obtained. Of course, there is no requirement that *opinio juris* rise to a level of moral obligation, as opposed to merely a legal one. However, such a finding of morality might be necessary, practically speaking, to establish enforceable rights for a non-human species. Even if such status were attained, the practical consequences for whale protection

where it did not file a formal protest). The acquiescence of the United Kingdom in the *Fisheries* case can be contrasted with the consistent voting record and strenuous protests of Japan and Norway to the preservation of whales.

153. BROWNIE, *supra* note 149, at 10. The use of the persistent objector rule to escape obligations of customary international law may increase in the future because of the importance of multilateral conventions in the formation of international custom. See David A. Colson, *How Persistent Must the Persistent Objector Be?*, 61 WASH. L. REV. 957, 957 (1989). David Colson suggests that multilateral conventions provide an easy opportunity for a state to register its objection. *Id.* at 958. Colson notes, however, that the more isolated a state becomes on a particular issue, the more vigorous it must be in affirming its objector status. *Id.* at 969.

154. D'Amato & Chopra, *supra* note 1, at 28-50.

at the policy level are negligible. This is particularly true given the persistent objector rule and the likelihood that key objectors will begin whaling operations as soon as it makes commercial sense to do so. The states against whom the custom most needs to be enforced would be exempt.

In sum, the changing status of whales over time signifies an evolution toward a policy of preservation. However, provisions of some recent treaties may hinder that policy.

IV. THE POSSIBLE IMPACT OF RECENT TREATIES ON WHALE PRESERVATION

During the Cold War, global bipolarity dominated international affairs, and national security was the primary objective.¹⁵⁵ But since the fall of the Soviet Union, any perceptive student of foreign affairs has observed that the promotion of international trade, specifically the elimination of trade barriers, has become a much higher priority on the world agenda. The recent ratification of the Uruguay Round Agreements of the GATT (Uruguay Round)¹⁵⁶ and NAFTA¹⁵⁷ are both intended to reduce global trade barriers and further the concept of free trade.

Some scholars have suggested that there is an inherent conflict between the goals of free trade and environmental protection.¹⁵⁸ States which have minimal environmental pro-

155. See Kenneth Waltz, *The Emerging Structure of International Politics*, INT'L SECURITY, Fall 1993, at 44, 44-45.

156. General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 [hereinafter Uruguay Round Final Act]. The GATT was first signed in 1947 and endorsed the concept of free trade in the original text. GATT, *supra* note 5, 61 Stat. at A3, 55 U.N.T.S. at 188. The term "Round" refers to multi-year negotiating sessions convened for the purpose of removing trade barriers and furthering the goals of the original 1947 instrument. The "Uruguay Round" simply refers to the most recent session, begun in Punta del Este, Uruguay in September 1986. These negotiations were concluded on April 15, 1994. The Uruguay Round Final Act was signed by 111 countries, including the United States, in Marrakesh, Morocco. It modified the provisions of GATT and established the World Trade Organization (WTO) to resolve disputes. The United States implemented the Uruguay Round with the Uruguay Round Agreements Act, 19 U.S.C. §§ 3501-3624 (1994).

157. NAFTA, *supra* note 6, 32 I.L.M. at 296. NAFTA is a regional trade agreement reducing trade barriers among the United States, Canada, and Mexico.

158. Kelly J. Hunt, Comment, *International Environmental Agreements in Conflict with GATT—Greening GATT After the Uruguay Round Agreement*, 30 INT'L

tection laws will have a natural competitive advantage. As a result, most states, particularly developing states, will have an incentive to water down their laws to attract foreign investment. The multinational corporate investors will seek out the least restrictive, and least expensive, regulatory climate in which to produce goods for the world market.

Equally important, the use of unilateral trade sanctions to compel environmental objectives probably violates free trade obligations. This conflict may be unavoidable in the area of whale preservation. Because the United States uses its domestic legislation to compel compliance with the regulations of the IWC with the threat of trade sanctions,¹⁵⁹ and it represents the world's largest market, it is at the forefront of this controversy.

In addition to the GATT and NAFTA, UNCLOS may contain provisions that render the unilateral imposition of trade sanctions on offending states a violation of the Convention's dispute settlement procedure.¹⁶⁰ Although UNCLOS is not a trade treaty, its comprehensive treatment of all aspects of the law of the sea may preclude a state from exercising unilateral trade sanctions, not provided for in the Convention, to compel compliance with an environmental objective.¹⁶¹

Several provisions in these three agreements may adversely impact the ability of the United States, or other like-minded members of the IWC, to use trade sanctions as a weapon to compel compliance with a policy of protecting whales.

A. *The General Agreement on Tariffs and Trade*

The question of whether or not provisions of the GATT will interfere with whale preservation in the next century is uncertain.¹⁶² However, a comprehensive treaty such as GATT that

LAW. 163, 163 (1996); David J. Ross, Note, *Making GATT Dolphin-Safe: Trade and the Environment*, 2 DUKE J. COMP. & INT'L L. 345, 345 (1992). Conflict between environmental protection and free trade is likely in the future. *But see* David Palmeter, *Environment and Trade: Much Ado About Little?*, J. WORLD TRADE, June 1993, at 55, 55-56 (positing that the conflict between the environment and free trade is minimal).

159. See 16 U.S.C. § 1801 (1994); 22 U.S.C. § 1978 (1994).

160. UNCLOS, *supra* note 4, arts. 286-287, 21 I.L.M. at 1322-23.

161. See Richard J. McLaughlin, *UNCLOS and the Demise of the United States' Use of Trade Sanctions to Protect Dolphins, Sea Turtles, Whales, and Other International Marine Living Resources*, 21 ECOLOGY L.Q. 1, 5 (1994).

162. See Steve Charnovitz, *Environmental Trade Sanctions and the GATT: An*

lowers trade barriers signals a move toward multilateralism that implies a disdain for unilateral measures to further environmental goals.¹⁶³ Several commentators have observed that the use of domestic environmental laws to impose trade barriers smacks of protectionism and hampers the effectiveness of trade treaties.¹⁶⁴ The 1947 GATT provides in article III, "National Treatment on Internal Taxation and Regulation," that:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution, or use.¹⁶⁵

Another relevant provision is article XI, "General Elimination of Quantitative Restrictions," which provides:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.¹⁶⁶

The Uruguay Round includes a provision which addresses the "Rules of Origin" of goods:

[R]ules of origin shall not themselves create restrictive, distorting, or disruptive effects on international trade. They shall not pose unduly strict requirements or require the

Analysis of the Pelly Amendment on Foreign Environmental Practices, 9 AM. U. J. INT'L L. & POL'Y 751, 775-90 (1994). The vagueness of the GATT provisions, and the lack of authoritative rulings, make it impossible to provide a definitive answer to the question of the consistency of GATT with the Pelly Amendment. *Id.* at 775.

163. *See id.* at 805. *See generally* 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 (1991).

164. Steve Charnovitz, *The Regulation of Environmental Standards By International Trade Agreements*, 16 Int'l Env'tl. Rep. (BNA) 631, 631-33 (Aug. 25, 1993).

165. GATT, *supra* note 5, art. III(2), 61 Stat. at A18, 55 U.N.T.S. at 206.

166. *Id.* art. XI(1), 61 Stat. at A32-33, 55 U.N.T.S. at 224-26. Paragraph 2 of article XI specifically enumerates three exceptions to the general rule in ¶ 1, but these do not include any mention of trade measures to protect the environment. *Id.* art. XI(2)(a)-(c), 61 Stat. at A33, 55 U.N.T.S. at 226.

fulfilment of a certain condition not related to manufacturing or processing, as a prerequisite for the determination of the country of origin.¹⁶⁷

The United States has enacted legislation implementing the Uruguay Round.¹⁶⁸ When the United States passed the implementing law it included a provision which specifically reserved the right to maintain its existing environmental protective legislation.¹⁶⁹ It provides that "[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect."¹⁷⁰ It goes on to provide "[n]othing in this Act shall be construed . . . to amend or modify any law of the United States, including any law relating to . . . the protection of human, animal, or plant life or health,¹⁷¹ [and] the protection of the environment."¹⁷²

One can certainly foresee how a state in the future might incur sanctions under the Pelly Amendment and claim that the embargo of its fish products violates the "Rules of Origin," "National Treatment on Internal Taxation and Regulation," or the "General Elimination of Quantitative Restrictions" provisions.

In fact, in 1991 Mexico made such a claim against the United States arising under articles III and XI of the GATT.

1. The Tuna-Dolphin Decision¹⁷³

In the Tuna-Dolphin dispute, the United States used the Marine Mammal Protection Act to exclude Mexican tuna from the U.S. market when it was discovered that Mexican tuna fishermen were incidentally killing large numbers of dolphins

167. Uruguay Round Final Act, *supra* note 156, art. 2(c), available in Westlaw, GATT database, 1994 WL 761483, at *424-25.

168. Uruguay Round Agreements Act, 19 U.S.C. §§ 3501-3624 (1994).

169. 19 U.S.C. § 3512(a)(2)(A)(ii).

170. 19 U.S.C. § 3512(a)(1).

171. 19 U.S.C. § 3512(a)(2)(A)(i).

172. 19 U.S.C. § 3512(a)(2)(A)(ii).

173. *United States — Restrictions on Imports of Tuna, Report of the Panel*, GATT Doc. DS 21/R (Sept. 3, 1991), reprinted in GATT, BASIC INSTRUMENTS & SELECTED DOCUMENTS 155 (37th Supp. 1989-90) [hereinafter *Panel Decision*]. Another Mexican claim under article XIII was not reached. *Id.* para. 5.19.

with purse-seine nets in the Eastern Tropical Pacific.¹⁷⁴ Mexico claimed that the U.S. action was really a protectionist measure on behalf of the U.S. tuna industry and not marine mammals.¹⁷⁵ The United States contended that the use of the Marine Mammal Protection Act to exclude the tuna was a lawful application of a "product or process" standard permitted under article III of the GATT.¹⁷⁶ The United States also responded that the purpose of the action under the Marine Mammal Protection Act was the protection of marine mammals and not tuna fishermen.¹⁷⁷ It further argued that all tuna fishermen who sought to sell their tuna in the United States, including domestic fishermen, were subject to substantially the same product and process standards in a non-discriminatory manner.¹⁷⁸

Last, the United States contended that even if its action violated articles III and XI, the enforcement of the Marine Mammal Protection Act was authorized by article XX of the GATT, titled "General Exceptions," which provides that:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . . (b) necessary to protect human, animal or plant life or health;¹⁷⁹ [or] . . . (g) relating to

174. *Id.* paras. 2.7-.8; see Ross, *supra* note 158, at 345. Since the Tuna-Dolphin Decision, the problem of incidental death of cetaceans by purse-seine nets has abated substantially but not disappeared. FORTY-FIFTH REPORT OF THE IWC, *supra* note 4, at 34; INTERNATIONAL WHALING COMMISSION, FORTY-FOURTH REPORT OF THE INTERNATIONAL WHALING COMMISSION 25 (1994) [hereinafter FORTY-FOURTH REPORT OF THE IWC]. In 1993 the incidental mortality of cetaceans and dolphins by purse-seine nets was reported to be reduced by 43% since 1991. See M.A. Hall & C. Lennert, Inter-American Tropical Tuna Commission, *Incidental Mortality of Dolphins in the Eastern Pacific Ocean Tuna Fishery in 1992*, in FORTY-FOURTH REPORT OF THE IWC, *supra*, at 349, 349.

175. *Panel Decision*, *supra* note 173, para. 3.58.

176. See *id.* paras. 3.17-18. The term "product and process" standards generally refers to the right of the importing state to set a minimum standard of quality for imports. It is easier to understand its application to a manufacturing or agricultural process rather than a method of fishing.

177. *Id.* para. 3.17.

178. *Id.* para. 3.19.

179. GATT, *supra* note 5, art. XX(I)(b), 61 Stat. at A61-62, 55 U.N.T.S. at 262.

the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.¹⁸⁰

Although the GATT Council did not adopt the finding,¹⁸¹ the GATT panel hearing Mexico's claim held that the United States' application of the Marine Mammal Protection Act in fact violated articles III¹⁸² and XI¹⁸³ of GATT. It further held that the U.S. action was not "necessary" under article XX(b)¹⁸⁴ and that neither XX(b) nor XX(g) could be applied extrajurisdictionally.¹⁸⁵ The Panel noted that to permit the application of such standards extrajurisdictionally would allow the unilateral imposition of the conservation policies of one treaty member upon all others.¹⁸⁶

The Panel actually addressed the issue of whether or not the Pelly Amendment is inconsistent with the GATT.¹⁸⁷ It noted that since the statute gave U.S. authorities discretion to refrain from taking any trade measure at all, it could not by itself be considered in conflict with the GATT.¹⁸⁸ Environmental groups had frowned upon the decision in *Japan Whaling Ass'n v. American Cetacean Society*,¹⁸⁹ that found Pelly to be discretionary in the first place. This finding by the GATT panel may realize their worst fears about the continuing rocky relationship between marine mammal protection and free trade.

While the GATT panel's Tuna-Dolphin decision is the only

180. *Id.* art. XX(I)(g), 61 Stat. at A62, 55 U.N.T.S. at 262. For a full discussion of the parties' positions with respect to the role of article XX(I)(b) and (g), see *Panel Decision*, *supra* note 173, paras. 3.27-56.

181. Mexico decided not to present the finding of the Panel to the GATT Council because of concern for its possible detrimental impact on the NAFTA negotiations. Ross, *supra* note 158, at 353-54.

182. *Panel Decision*, *supra* note 173, paras. 5.14-16. Paragraph 5.15 of the decision held that a state may not discriminate against another state's product based upon its method of production. Thus, the United States action violated article III of the GATT. *Id.* para. 5.15.

183. *Id.* paras. 5.17-18.

184. *Id.* para. 5.28; see *id.* para. 5.24.

185. *Id.* para. 5.32.

186. *Id.*

187. *Id.* para. 5.20.

188. *Id.*

189. 478 U.S. 221 (1986). For a discussion of this case, see *supra* note 74 and accompanying text.

real evidence to date of a legal tension between free trade and the goal of cetacean protection, it does not augur well for future conflicts of this kind. The ultimate goal of GATT is reduced trade barriers worldwide.¹⁹⁰ If the Pelly Amendment were to be applied to embargo the fish products of states that use cetacean-hazardous fishing methods, a future GATT panel would probably decide such action to be illegal.

The most likely application of Pelly is in fact more remote than in the Tuna-Dolphin decision; it would most likely be applied against a state that resumes commercial whaling. In such case, the sanctions of Pelly would be even more attenuated from the environmentally destructive conduct that it sought to punish, even more so than the embargo of tuna whose harvesting was actually responsible for the death of dolphins. There would be no recourse to arguments of product-or-process standards. In such a case, a future GATT panel might be even less inclined to hold in favor of Pelly sanctions.

2. The United Nations Conference on Environment and Development

Any future interpretation of the GATT that involves a conflict between free trade and the environment will be influenced by the United Nations Conference on Environment and Development, the "Rio Conference,"¹⁹¹ which considered issues relating to trade and the environment with a discussion of GATT provisions and principles.¹⁹² The Rio Conference en-

190. See GATT, *supra* note 5, art. XI(1), 61 Stat. at A32-33, 55 U.N.T.S. at 224-25.

191. REPORT OF THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT, U.N. Doc. A/Conf.151/26/Rev.1, U.N. Sales No. E.93.I.8 (1992) [hereinafter UNCED REPORT]. The Conference was held in Rio de Janeiro from June 3 to June 14, 1992. *Id.* at 2. It adopted three non-legally binding agreements: the Rio Declaration on Environment and Development, which is a statement of 27 principles; Agenda 21, which is an 800-page document setting out the objectives and activities on 40 subject areas; and a statement of forest principles. *Id.* The Conference opened for signature two binding treaties: the Biodiversity Convention, *supra* note 107, 31 I.L.M. at 818, and the United Nations Framework Convention on Climate Change. The Conference is most frequently cited for Agenda 21, which calls for "[i]nternational cooperation to accelerate sustainable development in developing countries, and related domestic policies." UNCED REPORT, *supra*, at 14. All documents related to the Conference can be located on the Internet at <<gopher://gopher.undp.org:70/00/unconfs/UNCED/English/a21_02>>.

192. UNCED REPORT, *supra* note 191, at 18, 20-22.

dorsed the concept of "sustainable development" (economic development that the environment can safely support) and expressed confidence that it would be promoted through more liberal trade.¹⁹³ It cautioned, however, that unilateral trade restrictions to promote environmental goals should be avoided.¹⁹⁴ It produced the following declaration:

States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problem of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. *Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided.* Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.¹⁹⁵

While the concept of sustainable development need not be antithetical to whale protection, the primacy of unrestricted trade over unilateral environmental protective measures largely eviscerates the key purpose of Pelly. The idea of international consensus for a problem like cetacean protection is a good one to the extent it can be reached. Such a desire for consensus strengthens the hand of the IWC as a multilateral organization. However, it weakens those states that choose to enforce its provisions extrajurisdictionally through their domestic laws.

3. The Uruguay Round

The principal achievement of the Uruguay Round of GATT is the establishment of the World Trade Organization (WTO).¹⁹⁶ The WTO expands the existing dispute settlement mechanism of the GATT treaty and has exclusive authority to interpret the agreement by a three-fourths vote.¹⁹⁷ Although

193. *Rio Declaration on Environment and Development*, in UNCED REPORT, *supra* note 191, princs. 1, 4, 16.

194. *Id.* princ. 12.

195. *Id.* (emphasis added).

196. Uruguay Round Final Act, *supra* note 156, art. 1, 33 I.L.M. at 1144.

197. *Id.* art. 9(2), 33 I.L.M. at 1148. Each member of the GATT is represented on the WTO. *Id.* art. 4, 33 I.L.M. at 1145-46.

the scope and power of the WTO to limit domestic attempts at unilateral enforcement of environmental agreements through trade measures is yet to be determined, it is logical to conclude that the WTO will follow the key principles espoused in the Tuna-Dolphin Decision and the United Nations Conference on Environment and Development.

On the other hand, the Uruguay Round also included a Decision on Trade and Environment, which recognized the need to coordinate the often competing policies underlying free trade and protecting the environment.¹⁹⁸ It stated the intention to establish a Committee on Trade and Environment as a subset of the WTO.¹⁹⁹ This may indicate a greater appreciation for environmental issues and the need to take them into account when developing trade policies.

B. The North American Free Trade Agreement

On January 1, 1994 NAFTA entered into force between the governments of Canada, Mexico, and the United States.²⁰⁰ It contains free trade provisions very similar to the GATT but appears to be somewhat more environmentally conscious.²⁰¹ Although the protection of whales is not mentioned in NAFTA, article 104(1)(a) states that in any conflict between NAFTA and CITES,²⁰² CITES "shall prevail to the extent of the inconsistency, provided that where a Party has a clear choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of

198. *Decision on Trade and Environment*, in *LAW & PRACTICE OF THE WORLD TRADE ORGANIZATION* 53, 53-55 (1996).

199. *Id.*

200. NAFTA, *supra* note 6, art. 2203, 32 I.L.M. at 702; see Tim Golden, *Tariffs Drop as Trade Agreement Kicks in with New Year's Arrival*, N.Y. TIMES, Jan. 1, 1994, at 1.

201. For example, article 1114 of NAFTA states, "Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns." NAFTA, *supra* note 6, art. 1114, 32 I.L.M. at 642 (emphasis added). For a complete and current discussion of the impact of the GATT and NAFTA on the environment, see Jennifer Schultz, *The GATT/WTO Committee on Trade and the Environment—Toward Environmental Reform*, 89 AM. J. INT'L L. 423 (1995).

202. CITES, *supra* note 4, 27 U.S.T. at 1087, 993 U.N.T.S. at 243.

this Agreement."²⁰³ Although less pervasive than the WTO, NAFTA also creates its own dispute settlement mechanism to interpret the Agreement.²⁰⁴

Before the treaty entered into force, the parties negotiated a side-agreement on the environment which obligates the parties to effectively enforce their own environmental laws.²⁰⁵ It also established a Commission for Environmental Cooperation.²⁰⁶ The obligation to enforce their own environmental laws is subject to article 37 which provides that "[n]othing in this Agreement shall be construed to empower a Party's authorities to undertake environmental law enforcement activities on the territory of another Party."²⁰⁷ President Clinton described the environmental regime established by the side-agreement as "ground-breaking" in that it provides for trade sanctions against any country that fails to enforce its own environmental laws.²⁰⁸

The United States implementing legislation of NAFTA contains provisions identical to those in the implementing legislation of the Uruguay Round,²⁰⁹ which declares the supremacy of any other law of the United States over any inconsistent provision of the Agreement.²¹⁰ It goes on to provide that "[n]othing in this Act shall be construed . . . to amend or modify any law of the United States, including any law regarding . . . the protection of human, animal, or plant life or health,²¹¹ [or] the protection of the environment"²¹²

203. NAFTA, *supra* note 6, art. 104(1)(a), 32 I.L.M. at 297-98.

204. *Id.* arts. 2001-2022, 32 I.L.M. at 693-94.

205. North American Agreement on Environmental Cooperation, Sept. 14, 1993, Can.-Mex.-U.S., art. 5, 32 I.L.M. 1480, 1483-84; *see* President's Remarks at the Signing Ceremony for the Supplemental Agreements to the North American Free Trade Agreement, 1993 PUB. PAPERS 1485, 1488 (Sept. 14, 1993).

206. North American Agreement on Environmental Cooperation, *supra* note 205, art. 8, 32 I.L.M. at 1485.

207. *Id.* art. 37, 32 I.L.M. at 1493.

208. President's Remarks at the Signing Ceremony for the Supplemental Agreements to the North American Free Trade Agreement, 1993 PUB. PAPERS 1485, 1488 (Sept. 14, 1993).

209. Uruguay Round Agreements Act, 19 U.S.C. § 3512(a)(1) (1994) ("No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstances, that is inconsistent with any law of the United States shall have effect.").

210. North American Free Trade Agreement Implementation Act, 19 U.S.C. § 3312(a)(1) (1994).

211. 19 U.S.C. § 3312 (a)(2)(A)(i).

212. 19 U.S.C. § 3312 (a)(2)(A)(ii).

Because NAFTA only affects the United States, Canada, and Mexico, it will probably never be directly involved in the whale preservation debate. However, should a problem arise similar to that of the Tuna-Dolphin controversy, Mexico would have the cumulative strength of the legal regime of NAFTA as well as the GATT on its side. The fact that the United States enacted identical provisions in both the Uruguay Round of GATT²¹³ and NAFTA,²¹⁴ reserving the right to protect the environment, strongly indicates that the United States is not about to give up the option of unilateral enforcement anytime soon. Despite the disdain for unilateral environmental trade sanctions under both the GATT and NAFTA, Pelly appears to be alive and well in U.S. law and policy.

The consideration of NAFTA is important to the whaling debate for three reasons. First, it signals the importance of free trade objectives in the post-Cold War world. Second, it exemplifies the trend toward multilateralism to resolve disputes that affect international trade. Third, its environmental side-agreement demonstrates that environmental concerns can be addressed and integrated into a trade treaty where the parties are willing to do so.

The evaluation of the GATT and NAFTA highlights a potential obstacle to whale protection. The retention of U.S. power, under domestic law, to protect the environment may edify anti-whaling advocates, but the potential conflict will remain so long as trade sanctions under Pelly remain the primary enforcement mechanism of IWC regulations. Furthermore, the United States' willingness to impose sanctions will probably continue to decline as the global policy of free trade increases, especially if it consistently loses before various tribunals.

Whether or not a treaty-based "free trade" defense to an action under Pelly will be raised in the future remains to be seen. However, if the United States wishes to continue its role as whale protector, it may need to develop enforcement strategies that do not run afoul of such solid treaty obligations as those established in the GATT and NAFTA. In any case, the trend toward multilateral dispute resolution of trade issues

213. 19 U.S.C. § 3512.

214. 19 U.S.C. § 3312.

dilutes the United States' ability to unilaterally influence the outcome of any future controversy.

*C. The 1982 United Nations Convention on the Law of the Sea*²¹⁵

On November 16, 1994, UNCLOS entered into force.²¹⁶ Until recently, the United States objected to the deep sea-bed regime in Part XI of the convention.²¹⁷ On July 28, 1994, the United States voted at the United Nations General Assembly in favor of a resolution endorsing a new agreement that substantially amended ("fixed") the deep sea-bed regime.²¹⁸

One of the major accomplishments of UNCLOS is its comprehensive dispute settlement provisions.²¹⁹ Where the State Parties are unable to resolve a dispute on their own, the convention provides for Compulsory Procedures Entailing Binding Decisions.²²⁰ A state may bring a claim against another State Party in any of the following fora: (a) the International Tribunal for the Law of the Sea (constituted in accordance with Annex VI); (b) the International Court of Justice; (c) an arbitral tribunal (constituted in accordance with Annex VII); or (d) a special arbitral tribunal (constituted in accordance with Annex VIII).²²¹ Any of these tribunals has jurisdiction over a dispute concerning the interpretation or application of

215. UNCLOS, *supra* note 4, 21 I.L.M. at 1261.

216. *Report of the Secretary General*, U.N. GAOR, 49th Sess., Agenda Item 35, at 7, U.N. Doc. A/49/631 (1994); Jonathan I. Charney, *The Marine Environment and the 1982 United Nations Convention on the Law of the Sea*, 28 INT'L LAW. 879, 879 (1994). The Convention entered into force one year after the 60th state deposited its instrument of ratification with the United Nations Secretary General. See UNCLOS, *supra* note 4, art. 308(1), 21 I.L.M. at 1327.

217. President's Statement on the United States Actions Concerning the Conference on the Law of the Sea, 1982 PUB. PAPERS 911, 911-12 (July 9, 1982). President Reagan stated that most of the provisions of the Convention represented significant accomplishments, but the deep sea-bed regime did not serve America's interest regarding mineral exploration. *Id.* at 911.

218. *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, G.A. Res. 48/263, U.N. GAOR, 48th Sess., 101st plen. mtg., Agenda Item 36, U.N. Doc. A/RES/48/263 (1994); see Charney, *supra* note 216, at 880-81 (1994).

219. UNCLOS, *supra* note 4, arts. 279-299, 21 I.L.M. at 1322-26. Article 279 requires States Parties to resolve their disputes by peaceful means. *Id.* art. 279, 21 I.L.M. at 1322. Article 280 allows parties to choose their own means of peaceful dispute settlement. *Id.* art. 280.

220. *Id.* arts. 286-296, 21 I.L.M. at 1322-24.

221. *Id.* art. 287, 21 I.L.M. at 1322-23.

UNCLOS.²²² They also have "jurisdiction over any dispute concerning the interpretation or application of an international agreement *related to* the purposes of this Convention, which is submitted to it in accordance with the agreement."²²³ Any decision which a competent tribunal renders is final and binding on the Parties.²²⁴

The comprehensive nature of UNCLOS almost guarantees that state actions which diminish the effectiveness of an IWC regulation will come under its purview.²²⁵ Several substantive provisions of UNCLOS are particularly relevant. A concerned state may invoke these if an issue of whale preservation arises in the future. Specifically, article 65 (Marine mammals) mentions cetaceans as deserving of special protection in the EEZ:

Nothing in this Part restricts the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall co-operate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study.²²⁶

Article 120 extends this protection to the high seas.²²⁷ In addition, article 64 (Highly migratory species) requires the coastal state and other states whose nationals fish in the region (EEZ) for the highly migratory species listed in Annex I²²⁸ to cooperate directly or through the appropriate interna-

222. *Id.* art. 288(1), 21 I.L.M. at 1323.

223. *Id.* art. 288(2) (emphasis added).

224. *Id.* art. 296, 21 I.L.M. at 1324.

225. *Id.* art. 288(2), 21 I.L.M. at 1323. Article 288(2) even appears to allow the chosen tribunal to interpret the Whaling Convention if submitted in accordance with a claim under UNCLOS. *Id.* See generally McLaughlin, *supra* note 161.

226. UNCLOS, *supra* note 4, art. 65, 21 I.L.M. at 1282.

227. *Id.* art. 120, 21 I.L.M. at 1291 ("Article 65 also applies to the conservation and management of marine mammals in the high seas.").

228. *Id.* art. 64, 21 I.L.M. at 1282; *id.* Annex I, 21 I.L.M. at 1329. Annex I enumerates seven families of cetaceans: *Physeteridae*, *Balaenopteridae*, *Balaenidae*, *Eschrichtiidae*, *Monodontidae*, *Ziphiidae*, and *Delphinidae*. The problem of highly migratory species is analogous to the central problem of whale protection. It exemplifies the conflict between the conservation goals of a coastal state and freedom of fishing on the high seas. It is most acute in those species of fish that migrate and swim between the EEZ of a state and the high seas or the EEZs of two states.

tional organizations with a view to ensuring conservation and promoting the objective of optimum utilization.²²⁹ Article 192 obligates states to protect and preserve the marine environment.²³⁰

Another major accomplishment of UNCLOS is its provisions concerning marine pollution. The prevention of pollution is extremely important to the entire marine ecosystem. Toxins and other pollutants not only harm marine mammals directly, but also endanger their food supply and habitat. Article 194 requires states to prevent, reduce, and control pollution of the marine environment.²³¹ Article 1(4) defines "pollution of the marine environment" as "the introduction by man, directly or indirectly, of substances or energy into the marine environment, . . . which results or is likely to result in such deleterious effects as harm to living resources and marine life"²³² Finally, article 87 recognizes fishing as a high seas freedom.²³³ However, as with all high seas freedoms, those engaged in such activities must exercise them with "due regard" for the interests of other states.²³⁴

The protective scheme of the IWC regulations, and any alleged violation thereunder, is directly related to the relevant provisions of UNCLOS. Thus, the dispute settlement provisions mentioned above may preclude the United States from using unilateral economic sanctions to protect whales and other marine mammals.²³⁵ Any state against whom sanctions

See *id.* art. 63, 21 I.L.M. at 1283. When these "straddling stocks" are fished excessively on the high seas, the coastal state often objects and threatens unilateral action, even though articles 63 and 64 call for multilateral solutions. For a discussion of the unilateralism versus multilateralism debate as it relates to straddling stocks, see Edward L. Miles & William T. Burke, *Pressures on the United Nations Convention on the Law of the Sea of 1982 Arising from New Fisheries Conflicts: The Problem of Straddling Stocks*, 20 OCEAN DEV. & INT'L L. 343 (1989). Because of the highly migratory nature of many whale species, the southern ocean sanctuary is not a panacea to protect the whales that summer there, for example.

229. UNCLOS, *supra* note 4, art. 64, 21 I.L.M. at 1282.

230. *Id.* art. 192, 21 I.L.M. at 1308.

231. *Id.* art. 194.

232. *Id.* art. 1(4), 32 I.L.M. at 1271.

233. *Id.* art. 87(1)(e), 21 I.L.M. at 1287.

234. *Id.* art. 87(2). This includes compliance with other applicable treaties. *Id.* art. 87(1).

235. McLaughlin, *supra* note 161, at 41-42. "If the United States becomes a party to the Convention and subsequently imposes unilateral trade sanctions on the fisheries products of another State Party, it is likely that those sanctions will be challenged under the dispute settlement mechanism." *Id.* at 42.

are imposed may claim that the United States did not endeavor to settle the dispute in good faith in accordance with the convention.²³⁶ They may then seek a judgment against the United States for damages suffered as a result of the unilateral sanctions by commencing an action themselves under the dispute settlement procedures. Since the United States is now a party, subject to the advice and consent of the Senate, such a judgment would be binding under article 296.²³⁷ While the preclusive effect of the UNCLOS dispute settlement procedures on unilateral sanctions is problematic, advocates of whale protection may come to rely upon the very articles cited above. First, the substance of the articles regarding marine mammal protection,²³⁸ highly migratory species,²³⁹ and the preservation of the marine environment,²⁴⁰ all seem to favor a policy of cetacean preservation. Thus, the United States or other states seeking to protect whales can avail themselves of the dispute settlement procedures to compel compliance with obligations under the Whaling Convention or UNCLOS.²⁴¹

Although resort to the dispute settlement procedures under UNCLOS may be less efficient and more cumbersome than unilateral trade sanctions,²⁴² it is in the current spirit of

236. UNCLOS, *supra* note 4, art. 300, 21 I.L.M. at 1326. States are required to fulfill their obligations under the Convention in good faith. *Id.*

237. *Id.* art. 296, 21 I.L.M. at 1324. Even though the U.S. Senate has not yet given its advice and consent, UNCLOS is binding on the United States through the provisional application of the Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea, Oct. 7, 1994, S. Treaty Doc. No. 39, 103d Cong., 2d Sess. (1994). Article 7(1)(a) provides for the Agreement to be applied provisionally pending its entry into force by "States which have consented to the adoption in the General Assembly of the United Nations. . . ." *Id.* art. 7(1)(a). Article 7(2) provides "[a]ll such States and entities shall apply this Agreement provisionally in accordance with their national or internal laws and regulations, with effect from 16 November 1994 or the date of signature, notification of consent or accession, if later." *Id.* art. 7(2).

238. UNCLOS, *supra* note 4, arts. 65, 120, 21 I.L.M. at 1282, 1291.

239. *Id.* art. 64, 21 I.L.M. at 1282.

240. *Id.* arts. 192-237, 21 I.L.M. at 1308-16.

241. Charney, *supra* note 216, at 894-95. See generally UNCLOS, *supra* note 4, arts. 279-299, 21 I.L.M. at 1322-26.

242. See McLaughlin, *supra* note 161, at 25. McLaughlin contrasts the relative ease with which the United States can impose trade sanctions with the difficult and often imperfect process of multilateral dispute settlement. He observes that the U.S. preference for unilateral economic sanctions derives from several factors:

First, it provides a method of achieving policy objectives immediately with none of the delays inherent in international bilateral or multilateral negotiations. Second, it is less expensive to implement because the Unit-

multilateralism to do so. Given the almost universal acceptance of the policy of whale preservation discussed in Parts II and III, a state seeking to further that policy through the UNCLOS dispute settlement procedure could expect to achieve some success. An adjudicative body could easily interpret the salient provisions of UNCLOS to give substantive effect to a policy of cetacean protection.

Furthermore, while the use of the Pelly Amendment to embargo fish products may be weakened, the use of the Packwood-Magnuson Amendment to exclude from the EEZ the fishing vessels of those states that diminish the effectiveness of IWC regulations may be enhanced. Although Packwood-Magnuson could not be applied in a punitive way, and the government would need to establish a nexus between the prohibited activity and the goal of whale protection, UNCLOS recognizes the right of the coastal state to enforce its laws and regulations in the EEZ.²⁴³ Specifically, such an exclusion could be justified in terms of protecting and preserving the marine environment,²⁴⁴ the protection of highly migratory species,²⁴⁵ and the protection of marine mammals.²⁴⁶

Article 73 permits the coastal state to undertake a broad range of law enforcement measures in the EEZ. These include boarding, inspection, arrest, and judicial proceedings as necessary to enforce its laws adopted in conformity with the convention.²⁴⁷ However, a blanket exclusion of all fishing vessels, or

ed States is not required to provide trade-offs and incentives to reach agreement. Third, and most importantly, a broad spectrum of U.S. political constituent groups perceive it as the most effective and, in some instances, the only feasible method to get foreign nations to change their behavior.

Id. at 25 (footnotes omitted). The problem of delay inherent in multilateral dispute settlement is abated somewhat by the provisional measures provided for in article 290(6) of UNCLOS, *supra* note 4, art. 290(4)-(6), 21 I.L.M. at 1323.

243. UNCLOS, *supra* note 4, art. 73, 21 I.L.M. at 1284. Article 73 recognizes the right of the coastal state to take enforcement measures "in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone" *Id.* art. 73(1). Denying a state access to U.S. waters for fishing is a relatively small sanction compared with the potential effect of Pelly to deny access to the United States market for fish products.

244. The coastal state has "jurisdiction . . . with regard to . . . the protection and preservation of the marine environment" *Id.* art. 56(1)(b)(iii), 21 I.L.M. at 1280.

245. *Id.* art. 64, 21 I.L.M. at 1282.

246. *Id.* art. 65.

247. *Id.* art. 73(1), 21 I.L.M. at 1284.

even a reduction in a fishing catch allocation of a state merely because that state engages in whaling activity²⁴⁸ probably cannot be justified under UNCLOS. Such actions would be punitive and thus a violation of international norms.²⁴⁹

The legal rationale in UNCLOS that enables states to pass protective legislation in their EEZ would also allow pro-whaling states to permit whaling in their own EEZ. Article 61 permits the coastal state to determine the allowable catch of living resources in its own EEZ based on the best scientific evidence available.²⁵⁰ Thus, Japan and Norway would probably not violate UNCLOS if they are harvesting whales in their own EEZ and can support the size of the catch with scientific evidence that their actions do not rise to the level of over-exploitation.²⁵¹ Since scientists differ on the adverse impact of whaling, and since a key objective of UNCLOS is the "optimum utilization of the living resources in the [EEZ],"²⁵² pro-whaling states could probably justify reasonable exploitation of whales whose numbers are not clearly endangered.

On balance, however, UNCLOS probably enhances the policy of whale preservation more than it hinders it. While unilateral measures are disfavored where multilateral solutions are possible, the substantive provisions of UNCLOS appear to reinforce marine mammal protection. Absent a test case it is difficult to determine whether or not the binding

248. Such reduction or exclusion is authorized by Packwood-Magnuson. 16 U.S.C. § 1821(e)(2)(B) (1994).

249. Where one state attempts to impose its own laws and policies on other states, it is placing itself in a superior position vis-a-vis those other states. Punitive actions against other states smacks of a violation of a basic principle of international law—the equality of states. See J.L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 115-17 (4th ed. 1949). "[N]o state can claim jurisdiction over another . . ." *Id.* at 116. "[T]he rights of one state . . . are as much entitled to be protected by the law as the rights of any other . . ." *Id.* at 117. In addition, the sovereignty and equality of states implies that all states have a uniform legal personality. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 250 (1st ed. 1966).

250. UNCLOS, *supra* note 4, art. 61(1)-(2), 21 I.L.M. at 1281.

251. See *id.* Both Japan and Norway assert that a limited harvesting of minke whales is justified by scientific evidence and that these whales can be found in their adjacent waters. FORTY-FIFTH REPORT OF THE IWC, *supra* note 4, at 29; see also Swinbanks, *supra* note 142, at 9; MacKenzie, *supra* note 4, at 22. But see *infra* notes 269-72 and accompanying text.

252. UNCLOS, *supra* note 4, art. 62(1), 21 I.L.M. at 1281-82 (albeit "without prejudice to article 61").

dispute settlement provisions will further that policy. However, dispute settlement will probably reflect the almost universal acceptance of the objective of whale preservation. Nevertheless, it remains to be seen if this provides a superior, or at least a workable alternative, to the existing tool of unilateral economic sanctions.

V. THE INTEGRATION OF LAW AND POLICY AND THE FUTURE OF WHALING

The previous section demonstrated how the use of unilateral trade measures as an enforcement mechanism to compel compliance with a policy of whale preservation is perhaps becoming unworkable. There is every reason to believe that the policy of free trade will continue to grow as developing countries modernize and former Soviet-bloc states privatize their industries. Furthermore, the GATT, NAFTA and UNCLOS are strong indicators of the increasing desirability of multilateral solutions to accomplish international objectives. As President Clinton, for one, has recognized, the goal of economic growth through free trade is becoming a paramount driving force.²⁵³ In GATT and NAFTA (the GATT more so than NAFTA) the perceptive observer can sense a subtle resistance to, and irritation with, environmental concerns that may interfere with free trade. The conclusion that unilateral economic sanctions to accomplish environmental objectives are undesirable is clear. If the current trend toward unrestricted trade continues, the world community will view unilateral economic sanctions such as those authorized by Pelly, as extreme, and indeed illegal.

How will we further the policy of whale preservation in the next century? The problem is difficult but not dire. Remember that the status of whales evolved to the current level of protection without the imposition of a single sanction under Pelly. In addition, anti-whaling forces only need to influence the policy of a very small number of pro-whaling states. Given the near universal consensus that whale preservation is a worthy goal, it is highly unlikely that those states that have

253. See President's Remarks on Signing the North American Free Trade Agreement Implementation Act, 1993 PUB. PAPERS 2139, 2140 (Dec. 8, 1993); President's Letter to Congressional Leaders on the General Agreement on Tariffs and Trade, 1993 PUB. PAPERS 2180, 2180 (Dec. 15, 1993).

already ended the practice will resume. The task of influencing the policies of the few remaining whaling states is much less formidable today after the years of public relations successes of the "Save the Whales" and other environmental movements. The future policy should involve not only legal remedies, but also political, economic and scientific solutions.

A. Political Measures

Political measures and incentives should be used wherever possible to convince the few remaining whaling states that they should abandon commercial whaling.²⁵⁴ For these arguments to be feasible, however, the pro-whaling community must identify credible alternatives to the economic benefits of whaling. One suggestion is to provide inducements to convert the whaling industry from a "whale-hunting" into a "whale-watching" industry.²⁵⁵ Although there are no guarantees of economic equivalence from one to the other, whale-watching is a growing tourist attraction world-wide.²⁵⁶ Such a conversion requires more of a change of attitude than a technical or industrial modification.

254. Political pressure was unsuccessfully brought to bear against Norway when it applied for admission into the European Community in 1992. David D. Caron, *The International Whaling Commission and the North Atlantic Marine Mammal Commission: The Institutional Risks of Coercion in Consensual Structures*, 89 AM. J. INT'L L. 154, 166-68 (1995); see Norway's Application for Membership: Opinion of the Commission, COM(93)142 final at 19 [hereinafter Norway's Application]. At negotiations for membership in April 1993, Norway was specifically warned that "the issue of whaling . . . will need to be addressed and that . . . this issue will require . . . very careful consideration during the negotiation." Norway's Application, *supra*, at 19; see Peter G.G. Davies, *Legality of Norwegian Commercial Whaling Under the Whaling Convention and Its Compatibility with European Community Law*, 43 INT'L & COMP. L.Q. 270, 271 (1994) (discussing these negotiations). In the wake of Norway's November 1994 vote not to join the European Union, the issue is now moot. Caron, *supra*, at 167.

255. FORTY-FOURTH REPORT OF THE IWC, *supra* note 174, at 23-24, 33-34. A proposal by the U.K. delegate to study the practice of whale-watching as a "sustainable use" of cetacean resources passed into resolution at the 44th annual meeting of the IWC in 1992. *Id.* at 23. A "Working Group on Whale-Watching" had a preliminary exchange of information at the 46th annual meeting. FORTY-FIFTH REPORT OF THE IWC, *supra* note 4, at 32-33. It is necessary to study the impact and possible negative effects of extensive whale-watching on cetacean habitat and behavior.

256. Recreational whale-watching is considered a growing aspect of the tourism industry with global revenues rising an average of 49% each year. FORTY-FOURTH REPORT OF THE IWC, *supra* note 174, at 23.

The United States enjoys good relations with Norway, Iceland, and Japan to emphasize the potential of positive options available. Apart from the IWC, there are many areas of agreement and cooperation that may provide opportunities for meaningful negotiation on the whaling issue.

In addition to incentives to change, states concerned about continued whaling should use diplomatic protests even if the hunting activity is in technical compliance with the Whaling Convention. Whaling states surely cannot enjoy their isolation on this issue, and others should remind them at every opportunity. So too, whaling states have thus far been unconvincing in their claim that whaling is central to their economies or cultures. Political measures could go a long way toward convincing those states it is in their interest to abandon whaling.

Finally, as the global environment becomes a greater concern, the United Nations will likely play an ever-increasing role in its protection. Concerned states should introduce resolutions in the General Assembly calling for a permanent ban on whaling consistent with the goals of the United Nations Conference on Environment and Development.²⁵⁷ In 1982 the United Nations Environment Program made similar statements calling for the whaling moratorium.²⁵⁸ In 1984 it suggested additional programs for the identification, conservation, and management of cetacean resources.²⁵⁹ These political pressures should continue and increase until they prove fully successful.

B. Economic Measures

Concerned states and Non-Governmental Organizations (NGOs) should employ economic incentives as well. While unilateral economic sanctions to punish conduct are disfavored, economic incentives to encourage certain conduct should not run afoul of the trade treaty regime. For example, to expand on the "whale-watching" proposal discussed above, the states of the European Union could establish a European Whale-Watching industry and offer to subsidize Norway's participation for

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

258. U.N. ENVIRONMENT PROGRAM, *Implementation of the Recommendations of the 1972 Conference*, 1982 U.N.Y.B. 998, 998, U.N. Sales No. E.85.I.1.

259. U.N. ENVIRONMENT PROGRAM, *Marine Mammals: Global Plan of Action*, 1984 U.N.Y.B. 650, U.N. Sales No. E.87.I.1.

five years if it agrees to abandon its commercial whaling ambitions. The subsidy contemplated here is to encourage participation in a European Union project (one that happens to be profitable) and not to protect a fledgling domestic industry in the traditional sense of a subsidy. Thus, such a subsidy would not violate the spirit of free trade agreements. The states concerned must make a commitment to absorb the impact of economic displacement caused by the loss of jobs in the whaling sector. Retraining would certainly play a key role. Robust economies like Japan and Norway should be able to absorb this tiny sector with little difficulty, especially if they receive economic and political incentives to do so.

In 1986 the Reagan administration and the Japanese government may have set a precedent for introducing the whaling issue into other areas of international commerce.²⁶⁰ The whaling issue could be added to the agenda at other negotiations where fishery allocations and commercial exploitation of other marine resources are discussed. While this strategy may marginally deprive whales of their special character described in Part III, it provides an additional opportunity to influence the few remaining whaling states.

Finally, if the President of the United States cannot apply the Pelly Amendment to embargo the fishery products of a pro-whaling state for fear of violating U.S. obligations under the GATT, the power of the consumer is not similarly constrained. Consumer boycotts are not only possible, but often highly effective where the public supports an issue to a point of mobilization.²⁶¹ A resumption of commercial whaling may give rise to that level of public outrage if footage of whales being butchered is readily available. Whales have a great public image. The public relates to whales through friendly images in the media and marine life parks, such as Sea World. A well-engineered public relations campaign to encourage the general public to save whales with a boycott of products from Japan or Norway may influence those states to re-evaluate their practices.²⁶² During the Tuna-Dolphin controversy, a similar con-

260. DAY, *supra* note 1, at 128-30. David Day suggests that the administration's real purpose in the use of the whaling issue in the negotiations was to gain leverage with Japan on other aspects of bilateral trade. *Id.* at 128. *See generally* Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221 (1986).

261. *See* Ross, *supra* note 158, at 364-65.

262. DAY, *supra* note 1, at 120. Day describes the use of consumer boycotts in

sumer boycott was regarded as quite successful.²⁶³

C. Scientific Measures

The more scientists learn and teach us about whales, the harder it is to view them as nothing more than a commercial resource. Article 239 of UNCLOS calls upon states and international organizations to promote and facilitate the development and conduct of marine scientific research.²⁶⁴ Part III discussed some scientific research findings that indicate whales are intelligent, sentient, communicative beings. There is much to be learned about whales from non-lethal basic scientific research. Can we understand their method of communication? Is meaningful inter-species communication possible? What can we learn about their social units? Since both Japan and Norway have expressed an interest in "scientific whaling,"²⁶⁵ perhaps they can be convinced of the potential benefits from non-lethal research. Replacing a lethal scientific whaling program with a non-lethal program would alleviate some of the economic displacement that would result from an abandonment of whaling operations.

The IWC and its member states should investigate and

the Save the Whales movement in less than enthusiastic terms. He cautions:

"Save a Whale — Harpoon a Toyota" may seem a viable tactic, but most conservationist groups find blanket [consumer] boycotts extremely difficult to initiate and oversee, and even more difficult to call off once begun. Furthermore, they do not particularly wish to penalize industries just because they happen to be Japanese.

Id.

263. Consumer outrage over the Tuna-Dolphin controversy led to enactment of The Dolphin Protection Consumer Information Act, 16 U.S.C. § 1385 (1994). The Act makes it a civil offense to misrepresent that tuna has been caught in a "dolphin safe" manner where it was harvested on the high seas by a vessel engaged in driftnet fishing or was harvested in the Eastern Tropical Pacific by a vessel using purse-seine nets that encircle dolphins. 16 U.S.C. § 1385(e). For a basic discussion of consumer power as environmental protector, see Ross, *supra* note 158, at 364-65.

264. UNCLOS, *supra* note 4, art. 239, 21 I.L.M. at 1316.

265. FORTY-FIFTH REPORT OF THE IWC, *supra* note 4, at 29. Resolutions were passed asking Japan and Norway to reconsider their research whaling programs. *Id.* Interestingly, article 240 of UNCLOS, titled *General Principles for the Conduct of Marine Scientific Research*, requires that "marine scientific research . . . be conducted in compliance with all relevant regulations adopted in conformity with this Convention including those for the protection and preservation of the marine environment." UNCLOS, *supra* note 4, art. 240(d), 21 I.L.M. at 1316. Does lethal scientific whaling violate this provision?

consider international programs to support non-lethal research. The 1994 resolution declaring the meat and products from research whaling (lethal research) as no longer available for export makes this initiative particularly important.²⁶⁶ The non-lethal study of whales should also include comprehensive research about their entire ecosystem and food supply. Thus, scientists should explore all the potential threats to their existence from non-commercial sources. This relates generally to the global problem of marine pollution. The world community generally would benefit from the findings of such studies.

Furthermore, any state that insists upon engaging in any type of whaling operation, including aboriginal whaling, should be prepared to come forward with competent scientific data that the stocks of the species they are pursuing can readily support the hunt.²⁶⁷ The Scientific Committee of the IWC is currently developing a Revised Management Procedure that will provide a more effective inspection and observation scheme to determine whale populations.²⁶⁸ This will ultimately make it more difficult for whale hunters to harvest an endangered species.

D. Legal Measures

All of the political, economic, and scientific measures listed above have been part of the arsenal of anti-whaling forces, in one form or another, since the whaling debate began. The real challenge in the future will be to effectively operate within the framework of multilateralism which will surely prevail in the next century. As discussed in Part IV, the best such opportunity is the dispute resolution procedure of UNCLOS.²⁶⁹ All states, especially important maritime states like Japan and Norway, have an interest in giving effect to the substantive provisions of UNCLOS. The review of the relevant UNCLOS provisions in Part IV, as well as the current position of the IWC, indicates that cetaceans and other marine mammals

266. FORTY-FIFTH REPORT OF THE IWC, *supra* note 4, at 44-45. Previously 49% of the meat derived from scientific whaling was available for export. NMFS Report, *supra* note 38, para. 7. The resolution also called upon governments to report on smuggling cases. FORTY-FIFTH REPORT OF THE IWC, *supra* note 4, at 45.

267. Hankins, *supra* note 145, at 530.

268. See FORTY-FIFTH REPORT OF THE IWC, *supra* note 4, at 23-27.

269. UNCLOS, *supra* note 4, arts. 279-299, 21 I.L.M. at 1322-26.

deserve special protection. In addition, article 61 allows each coastal state to determine the allowable catch of the living resources in its own EEZ.²⁷⁰ Thus, coastal states can declare huge segments of the ocean "off limits" to whalers. The whaling states will need to rely on the many freedoms and protections of UNCLOS. These states will find it increasingly difficult for them to "pick and choose" among the provisions if they believe that, on balance, they benefit from the regime. The fact that UNCLOS does not permit reservations is important because it requires member states to accept the whole treaty, even those elements that they may not like.²⁷¹

Even if future whaling operations occur only in the EEZ of the whaling state and are in technical compliance with the Whaling Convention (because of the "opt-out" provision), such actions might still be adjudicated to be in violation of UNCLOS. Specifically, article 63 governing straddling stocks,²⁷² and article 64 governing highly migratory species,²⁷³ may be violated unless the species of whale harvested can be found only in the EEZ of that state. Article 116(b) extends these obligations to states that fish on the high seas.²⁷⁴

270. *Id.* art. 61(1), 21 I.L.M. at 1281. It has been observed, however, that the lack of any meaningful definition of the term "conservation" will be a source of controversy in the future. PATRICIA W. BIRNIE & ALAN E. BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT* 119 (1992); *see id.* at 123-24.

271. UNCLOS, *supra* note 4, art. 309, 21 I.L.M. at 1327 ("No reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention."). The Vienna Convention permits a state to formulate a reservation when signing, ratifying, approving or acceding to a treaty unless the reservation is prohibited by the treaty. Vienna Convention, *supra* note 36, art. 19(a), 1155 U.N.T.S. at 336. To some extent, states which become parties to UNCLOS are attempting to circumvent the "all or nothing" strictures of article 309 of UNCLOS by filing "understandings," "declarations," or "interpretations" when they ratify it. Often these amount to de facto "reservations." These "declarations and statements" are permitted by article 310 "provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State." UNCLOS, *supra* note 4, art. 310, 21 I.L.M. at 1327.

272. UNCLOS, *supra* note 4, art. 63, 21 I.L.M. at 1282.

273. *Id.* art. 64.

274. *Id.* art. 116, 21 I.L.M. at 1290. Article 116 provides:

All States have the right for their nationals to engage in fishing on the high seas subject to:

- (a) their treaty obligations;
- (b) the rights and duties as well as the interests of coastal States provided for . . . in article 63, paragraph 2, and articles 64 to 67

These articles require cooperation among the states concerned to ensure conservation of those stocks.²⁷⁵ If the whaling state has opted out of the conservation scheme of the IWC, the appropriate international organization, it may be violating its duty to cooperate in the conservation of those stocks. In other words, simply opting out of the moratorium could be a derogation of the duty under UNCLOS to cooperate in conservation.

Moreover, articles 65 and 120 grant marine mammals, and cetaceans in particular, even greater protection through the appropriate international organization, the IWC.²⁷⁶ Thus, UNCLOS not only seems to further the policy of cetacean protection in a substantive way, but also defers to the expertise of the IWC to do so on a technical level. Therefore, the effect of the "opt-out" provision of the Whaling Convention may be minimized.

In addition to the opportunity provided through UNCLOS, the CITES treaty²⁷⁷ can play a larger role to prevent pirate whaling and eliminate the transport of whale products illegally across international borders. Although CITES has nearly eliminated the overt commercial trade, it is the duty of each member state to eliminate the black market trade by its nationals.²⁷⁸ All states, regardless of whether they are a party to CITES, should aggressively enforce their domestic laws to punish those engaged in the illegal trade of whale products. Pro-whaling states should do so as well, as a display of good faith in the whaling debate. Modern scientific techniques are available: DNA testing may be used to test whether or not whale meat is from an endangered species.²⁷⁹

CITES is specifically enumerated in NAFTA as providing

Id.

275. *Id.* arts. 63-64, 21 I.L.M. at 1282.

276. *Id.* arts. 65, 120, 21 I.L.M. at 1282, 1291.

277. CITES, *supra* note 4, 27 U.S.T. 1087, 993 U.N.T.S. 243.

278. *Id.* art. VIII, 27 U.S.T. at 1101-03, 993 U.N.T.S. at 250-51. Article VIII of CITES requires that "[t]he Parties shall take appropriate measures to enforce the provisions of the present Convention and to prohibit trade in specimens in violation thereof. These shall include measures . . . to penalize trade in, or possession of, such specimens, or both" *Id.* art. VIII(1)(a); see Karl J. Liwo, Note, *The Continuing Significance of the Convention on International Trade in Endangered Species of Wild Fauna and Flora During the 1990's*, 15 SUFFOLK TRANSNAT'L L.J. 122, 125 (1991).

279. *DNA Tests for Suspect Whale Trade*, *supra* note 38, at 11.

obligations which may supersede those in NAFTA itself.²⁸⁰ The United States should embrace this concept in the negotiation of future trade treaties. The Whaling Convention can be incorporated into future trade agreements to suspend free trade obligations in the interest of whale protection.

This is not likely to occur, however, as long as Japan remains such a large trading partner. Similarly, the amendment of existing obligations under the GATT to include the use of unilateral trade sanctions would prove to be a near impossible task. Article 30 of the GATT requires a two-thirds vote of all members to amend any provision of the agreement.²⁸¹ Since unilateral measures to protect the environment are strongly disfavored in the realm of international trade, the possibility of a two-thirds majority of states is most likely unattainable.²⁸² The idea of side-agreements, however, like the states parties achieved with NAFTA, may prove a workable alternative to the problem.

Advocates of whale preservation do not necessarily need to fear multilateral dispute settlement regarding the whaling issue. Multilateral decisions will likely reflect the almost universal consensus that cetaceans deserve special protection. This may not be the case, however, if unilateral sanctions are imposed and later need to be justified before an international tribunal. By burdening international trade, even for a "good cause," the debate would shift—the United States would be the "bad guy."

At the same time, the United States should consider using the unilateral trade sanctions as a last resort. Congress retained the right to do so in both GATT²⁸³ and NAFTA.²⁸⁴ An important difference exists, however, between the use of unilateral sanctions to further a multilateral goal and a purely domestic one. The use of a unilateral trade sanction to further a multilateral agreement, such as the Whaling Convention, is less of an assault to multilateralism than when it is applied pursuant to a purely domestic statute such as the Marine Mammal Protection Act or the Endangered Species Act. None-

280. NAFTA, *supra* note 6, art. 104(1)(a), 32 I.L.M. at 297-98.

281. GATT, *supra* note 5, art. XXX(1), 61 Stat. at A74, 55 U.N.T.S. at 282.

282. See Ross, *supra* note 158, at 358-60.

283. 19 U.S.C. § 3512(a)(2)(B) (1994).

284. 19 U.S.C. § 3312(a)(2)(B) (1994).

theless, other states that value unrestricted trade would no doubt disapprove of such an action. In the final analysis it is reduced to a question of values: Does our interest in protecting whales equal our goal of economic growth through free trade? If no workable alternative to trade sanctions can be implemented, we must address this question.

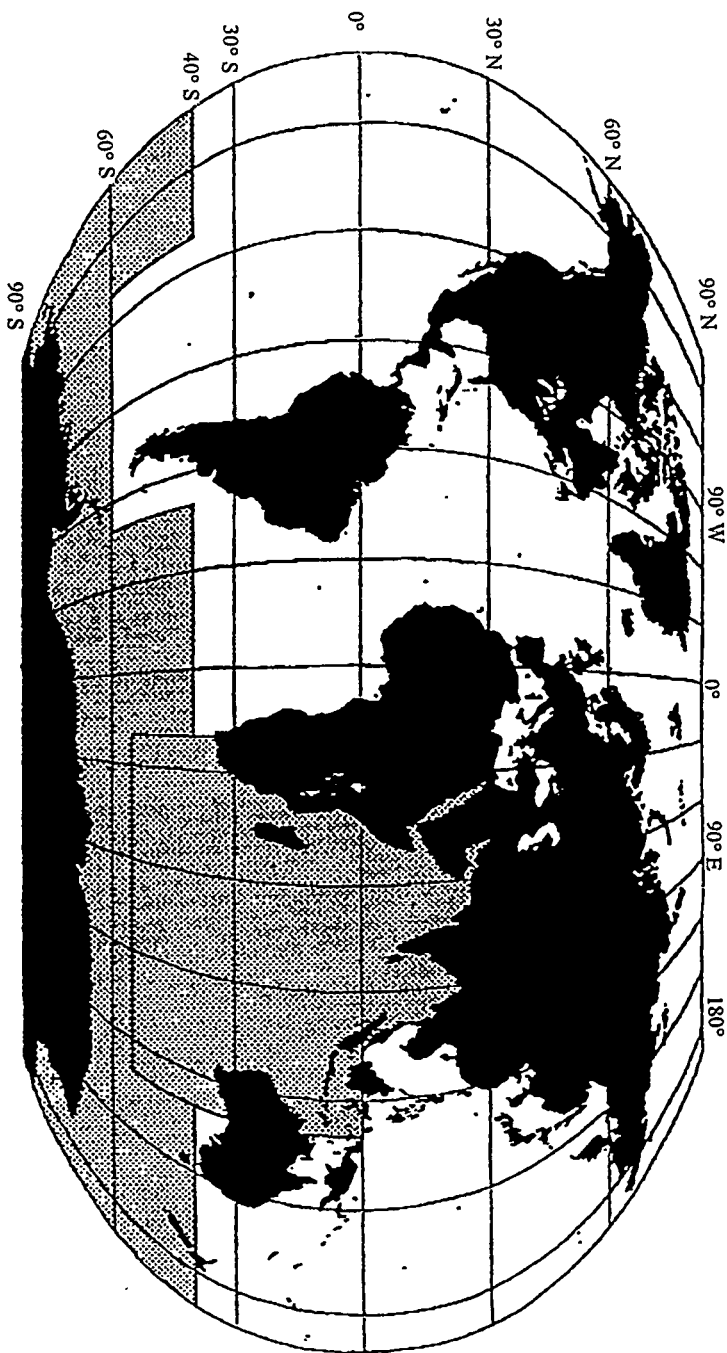
VI. CONCLUSION

Despite a long history of commercial whaling and weak international attempts to regulate it, whales have progressively gained protection in international and domestic law. Although the protection of whales has not yet achieved the status of customary law, binding all states, a clear trend exists in that direction. Should the few remaining whaling states decide that the constant battle in the international arena is not cost-effective for them, they will likely abandon their commercial whaling industries. If so, the anti-whaling forces will finally have won the war.

Until then, the United States and other members of the IWC must endeavor to find enforcement mechanisms that do not run afoul of obligations in free trade agreements. The use of unilateral trade sanctions to compel compliance with IWC regulations is becoming unworkable. We should negotiate future trade treaties in contemplation of trade sanctions to further the policy of whale preservation. All states that seek to protect whales should not only aggressively enforce their domestic laws but also work with the world community to accomplish this goal. The best such opportunity to address this problem between and among states is through the UNCLOS dispute settlement procedure.

Although the right of whales to swim the oceans freely, unmolested by human beings has not yet been achieved, the anti-whaling forces should feel increasingly pleased. They have changed the terms of the debate from regulation to protection to preservation. The next century will provide challenges to the policy of preservation, but with those challenges will come further opportunities to protect whales in international law. While the world community has not yet guaranteed that whales have a right to roam the world's oceans without risk of being hunted, it is moving in that direction.

Appendix



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