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Global Conservation and Management of Marine Mammals

JAMES A. R. NAFZIGER*

Pluralistic efforts to conserve and manage marine mammals are limited. The Third United Nations Law of the Sea Conference offers substantial promise of developing an ecologically sound global regime to overcome these limitations. Professor Nafziger first examines the current, jerry-built regime of municipal legislation, nongovernmental programs, bilateral agreements, regional agreements, and limited global authority. He then discusses the emerging regime under UNCLOS III as an alternative to present fragmented authority. Proposing greater reliance upon the United Nations framework, Professor Nafziger critiques the relevant provisions of the revised negotiating text. Special attention is given to the role of the United States in the emerging regime of marine mammal protection.

EXISTING REGIME

International conservation and management of marine mammals has been jerry-built, and understandably so. Given the divergence of cultural values defining the relationship between humans and marine mammals, it is perhaps remarkable that there is even a semblance of international cooperation. The existing regime of management includes extraterritorial extensions of municipal legislation, nongovernmental programs, bilateral agreements, regional agreements, and limited global authority. The overall effect has been creditable but suffers from five inter-related disadvantages: a lack of coordination among the components; species rather than ecological bases of management; geographical limitations; a lack of reliable and valid scientific data

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upon which to base management decisions; and weak enforcement.

Municipal legislation

Municipal law, though limited, has become more significant since the proliferation of the 200-mile economic and fishery zones during the 1970's.¹ Indeed, the habitats and migratory range of some species of marine mammals now lie largely, if not entirely, within such zones.² Moreover, the much broader reach of coastal State authority has been strengthened by more detailed, scientific processes of municipal management.³ The establishment of the zones has encouraged coastal States to view mammals as part of a larger ecosystem which the States have the responsibility to conserve and manage. The extended jurisdictions may impede

1. *See generally* Savini, Report on International and National Legislation for the Conservation of Marine Mammals, pt. 2, Food and Agriculture Organization (FAO) Circular No. 326, U.N. Doc. FIRD/C326 (1974). For a list of countries that claim 200-mile zones of fisheries jurisdiction, see FOOD AND AGRICULTURE ORGANIZATION, WORLD FISHERIES AND THE LAW OF THE SEA 20 (1979).

The United States has enacted relevant federal, state, and local law. Aside from legislation implementing treaties, the principal federal statute is the Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1407. (Supp. V 1975) [hereinafter cited as MMPA]. *See* Annot., 43 A.L.R. Fed. 599 (1979). The Fishery Conservation and Management Act of 1976, 16 U.S.C. §§ 1801-1882, plays an important role as well, and the Endangered Species of Fish and Wildlife Act, 16 U.S.C. § 1537(b)(1) (Supp. V 1975), plays a lesser role. On "serious management deficiencies" in implementing the latter, see the General Accounting Office report summarized in MARINE MAMMAL NEWS, April 1979, at 1.

Several countries regulate whaling as an incidental element in general fisheries legislation. Otherwise, principal national legislation is limited to several whaling acts (Australia, Bahamas, Brazil, Canada, New Zealand, the United Kingdom), legislation protecting seals (Argentina, Canada, the Soviet Union, Uruguay, the United Kingdom), a law governing Antarctic exploitation of marine mammals (France), restrictions on the importation of whales and whale products (France, New Zealand, the United Kingdom), laws establishing marine sanctuaries (Mexico, Argentina), and legislation reserving revenue from marine mammals to the State (Columbia). *See generally* National Legislation and Treaties Relating to the Territorial Sea, the Contiguous Zone, the Continental Shelf, the High Seas and to the Fishing and Conservation of the Living Resources of the Sea, U.N. Doc. ST/LEG/SER.B/15 (1970); National Legislation and Treaties Relating to the Law of the Sea, U.N. Doc. ST/LEG/SER.B/18 (1976). The Brazilian legislation is summarized in The Guardian, July 25, 1979, at 6. The Argentinian and Uruguayan laws are summarized in U.S. DEPT. OF COMMERCE, THE MARINE MAMMAL PROTECTION ACT OF 1972, ANNUAL REPORT (1979).

2. *E.g.*, the gray whale migrates almost entirely from the Chuckchi Sea and the Bering Sea off the Soviet Union down the Pacific Coast of the United States to winter in the lagoons off Baja California, Mexico. MARINE MAMMAL NEWS, July 1978, at 3.

3. *See* Nafziger, *The Management of Marine Mammals After the Fisheries Conservation and Management Act*, 14 WILLAMETTE L.J. 153 (1978). For an analysis of state regulation under that act, see Comment, *The Fishery Conservation and Management Act of 1976: State Regulation of Fishing Beyond the Territorial Sea*, 31 ME. L. REV. 303 (1980).

conservation and management, however, by isolating large areas previously subject to international authority.⁴ Even if a coastal State is fully committed to internationally acceptable standards and procedures, as is unfortunately not always the case, the extension of national regulatory jurisdiction decentralizes and complicates international decision-making, dispute settlement, and enforcement.

Within its territory, a State may enforce domestic and international regulation by a variety of techniques. A government may prohibit imports of products exported from noncomplying countries or restrict foreign purchases of domestically chartered boats.⁵ Also, recent U.S. legislation curtails fishing by nationals of whaling countries.⁶ To avoid incidental taking of porpoises by

4. Of course, when a coastal State is a party to an international agreement which either fully or partly attempts to conserve and manage marine mammals, the international authority prevails. Scarff, *The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment (Part Two)*, 6 *ECOLOGY L.Q.* 571, 609 (1977).

5. Within U.S. jurisdiction the MMPA provides for the confiscation and forfeiture of all contraband, whether or not it is found on U.S. flag ships; makes unlawful the importation of species whose taking or sale is prohibited under U.S. or foreign law; and requires nations exporting fish products to the U.S. to furnish certification, based on "reasonable proof," that national methods used in taking fish conform to the MMPA and regulations issued pursuant thereto. 16 U.S.C. §§ 1371(a)(2), 1372(c), 1376(a) (Supp. V 1975).

The Pelly Amendment to the Fishermen's Protective Act of 1967 states that when the Secretary of Commerce determines that nationals of a foreign country are conducting fishing operations which diminish the effectiveness of the conservation program of an international fishery convention to which the United States is a party, he shall so certify to the President, and the President may then direct the Secretary of the Treasury to prohibit the importation of fish products from the offending country. 22 U.S.C. § 1978(a) (1976). Within 60 days following certification, the President must notify Congress of any action taken pursuant to such certification. If the President takes no action, or if he imposes an import prohibition which does not cover all fish products of the offending country, he is required to inform Congress of his reasons. *Id.* § 1978(b). The term "international fishery conservation" has been interpreted to include marine mammals. See generally *Reauthorization of the Marine Mammal Protection Act of 1972: Hearing on S. 2831 and H.R. 10730 Before the Comm. on Commerce, Science, and Transportation*, 95th Cong., 2d Sess. (1978) [hereinafter cited as *1978 Reauthorization of MMPA*]. On the regulation of foreign purchases of U.S. chartered boats, see 46 U.S.C. §§ 808, 835 (Supp. V 1975); Anderson, Anderson, & Searles, *The Tuna-Porpoise Dilemma: Is Conflict Resolution Attainable?* 18 *NAT. RESOURCES J.* 505, 518 (1978).

6. Act of Aug. 15, 1979, Pub. L. No. 96-61, 93 Stat. 407. This legislation provides for the U.S. government to reduce the allowable allocation to foreign countries whose nationals "directly or indirectly, are conducting fishing operations or engaging in trade or taking which diminishes the effectiveness of the International Convention for the Regulation of Whaling." *Id.* Yet poor drafting of the legislation has created a highly complex series of contingencies and review procedures which

fishermen outside U.S. jurisdiction, the U.S. requires letters of compliance by foreign governments whose nationals may wish to market tuna in the United States.⁷ All such municipal legislation should satisfy international obligations.⁸

The extraterritorial reach of U.S. legislation is limited to the regulation of nationals on the high seas.⁹ *United States v. Mitchell* confirmed the presumption against extraterritorial extension of United States statutes by reversing the conviction of a national who had taken marine mammals in violation of the Marine Mammal Protection Act of 1972 (MMPA) but within the territorial waters of the Bahamas.¹⁰ *Mitchell* also confirmed that under the MMPA international controls were to be effected "by the usual methods of negotiation, treaty, and convention."¹¹ More generally, the court established that, at least in the absence of legislative intent to the contrary, the "traditional method of resolving [environmentally related] differences in the international community is through negotiation and agreement rather than through the imposition of one particular choice by a state imposing its law extraterritorially."¹² The court noted the authority of the United Nations Resolution on Permanent Sovereignty over Natural Re-

would seem unnecessarily to engage the federal bureaucracy. Even worse, a foreign country's allocation could be reduced by at least 50% in the event two or more of its nationals, without any encouragement or even approval of their government, are found to be "conducting fishing operations or engaging in trade or taking which diminishes the effectiveness" of the whaling convention. *Id.*

7. MMPA, 16 U.S.C. § 1371(a)(2). The following countries have been certified to be "in substantial compliance" with United States standards and techniques: Canada, Ecuador, Mexico, the Netherlands Antilles, 42 Fed. Reg. 56,715 (1977); Nicaragua, *id.* at 64,121; Bermuda, Panama, 43 Fed. Reg. 1093, 3566 (1978); Costa Rica, *id.* at 5521; Venezuela, *id.* at 31,144-45; New Zealand, *id.* at 36,263; Senegal, Spain, *id.* at 40,025. In addition, the U.S. has been moderately successful in encouraging other States to join regional and international organizations for conservation and management. Scarff, *supra* note 4, at 604.

8. The MMPA is "deemed to be in addition to and not in contravention of the provisions of any existing international treaty . . . which may otherwise apply to the taking of marine mammals." 16 U.S.C. § 1383. In regulating the taking of marine mammals, the Secretary is directed to consider inter alia, existing international obligations of the United States. *Id.* § 1373(b)(2). Restrictions under the MMPA are subject to obligations "[e]xpressly provided by an [existing] international . . . agreement to which the United States is a party." *Id.* § 1372(a)(2). This language, however, was intended to refer only to the North Pacific Fur Seal Convention. S. REP. NO. 863, 92d Cong., 2d Sess. (1972), reprinted in [1972] U.S. CODE CONG. & AD. NEWS 4156.

9. MMPA, 16 U.S.C. § 1372(a)(1), (2). See also Comment, *supra* note 3.

10. 553 F.2d 996, 1004 (5th Cir. 1977). For analysis of this decision, see 18 NAT. RESOURCES J. 409 (1978); Comment, *Extraterritorial Application of Federal Wildlife Statutes: A New Rule of Statutory Interpretation*, 12 CORNELL INT'L L.J. 143 (1979).

11. 553 F.2d 996, 1005 (5th Cir. 1977).

12. *Id.* at 1002.

sources.¹³ Extraterritorial proscription stops, therefore, at territorial boundaries. Given the prerogatives of sovereignty, international disagreement over acceptable standards, and the inefficiency of prosecution as a sanction, extraterritorial proscription is of limited importance.

Nongovernmental Efforts

An often neglected dimension of international authority is the work of nongovernmental organizations (NGO's).¹⁴ Within the sphere of marine mammal protection, NGO's draw attention to problems, gather information, marshal public opinion, draft legislation, lobby for enactment, support scientific investigation, and provide expert data and testimony at all levels of decision-making. Although these organizations do not have binding authority, some have played an important role in bringing law to bear on problems of international concern. The International Union for the Conservation of Nature and Natural Resources (IUCN) has a special status; governmental agencies adhere to its resolutions and it enjoys special consultative relations with intergovernmental organizations.¹⁵ Moreover, the IUCN provides scientific expertise and administrative services to support several international agreements.¹⁶

Bilateral Agreements

Bilateral cooperation is a vital element in today's largely hori-

13. *Id.* This resolution recognizes and defines the control of a sovereign state over natural resources in its territory. G.A. Res. 1803, 17 U.N. GAOR 1193-94 (1962).

14. Significant NGO's include Greenpeace, Friends of Animals, the Committee for Humane Legislation, The Earth Co-existence Organization, The Sierra Club, The Fauna Preservation Society, the International Society for the Protection of Animals, Friends of the Earth, Project Jonah, The Audubon Society, Whale Centers International, The World Federation for the Protection of Animals, The Whale Protection Fund, The World Wildlife Fund, The American Cetacean Society, The Human-Dolphin Communication Foundation, and the Cousteau Society. On the role of the Earth Co-existence Organization in marshalling awareness of mercury poisoning of porpoises sold in Japan for human consumption, see *Christian Sci. Monitor*, Nov. 10, 1978, at 1, col. 1; *Christian Sci. Monitor*, Nov. 13, 1978, at 3, col. 3.

15. See Organization of American States, Inter-American Council for Education, Science and Culture, Report to XXIII Regular Meeting of CICYT, Washington, D.C., July 10-14, 1978, on the Meeting of Experts on Conservation of Marine Mammals and their Ecosystems, Sept. 12-16, 1977, Puerto Madryn, Chubut, Argentina, OEA/Ser. J/XI, CICYT/doc. 183, at 26 (1978) [hereinafter cited as OAS Report].

16. *Id.*

zontal regime. Even when there is multilateral protection, as with the gray whale,¹⁷ local problems such as harm from tourists and oil spills may challenge existing regulation.¹⁸ The most efficient solution may involve new measures of cooperation limited to those states most immediately involved. Just as human beings are often more responsive and cooperative on a one-to-one basis, so bilateral measures may be especially effective.

The United States missed a critical opportunity to encourage marine mammal protection and ecological management when it entered into a series of bilateral Governing International Fishery Agreements which enable foreign nationals to fish within the newly established 200-mile economic zone.¹⁹ "Boiler plate" language in most of the agreements established some protection but could have been more detailed, explicit, and demanding.²⁰ Of course, even the "boiler plate" language makes an ecological con-

17. Regulations pursuant to the International Convention for the Regulation of Whaling have prohibited the commercial taking of all gray whales. In 1978, however, that species had made such a comeback in numbers that it was taken out of the "protection" category and placed in the "sustained management" category. MARINE MAMMAL NEWS, July 1978, at 3. A recent census confirms the comeback. 4 MARINE MAMMAL NEWS, Feb. 1979, at 4.

18. See Stevens, *Return of the Whales: Sportive or Harried?* Christian Sci. Monitor, July 27, 1978, at 4, col. 3.

19. Agreement on Fisheries off the United States Coasts, Aug. 2, 1976, United States-Poland, 28 U.S.T. 1681, T.I.A.S. No. 8524; Agreement on Fisheries off the United States Coasts, Sept. 15, 1976, United States-China, 28 U.S.T. 1903, T.I.A.S. No. 8529; Agreement on Fisheries off the United States Coasts, Oct. 5, 1976, United States-East Germany, 28 U.S.T. 1973, T.I.A.S. No. 8527; Agreement on Fisheries off United States Coasts, Nov. 23, 1976, United States-Romania, 29 U.S.T. 387, T.I.A.S. No. 8825; Agreement on Fisheries off the United States Coasts, Nov. 26, 1976, United States-Russia, 28 U.S.T. 1848, T.I.A.S. No. 8528; Agreement on Fisheries off the United States Coasts, Dec. 17, 1976, United States-Bulgaria, — U.S.T. —, T.I.A.S. No. 9045; Agreement on Fisheries off the United States Coasts, Jan. 4, 1977, United States-South Korea, 28 U.S.T. 1753, T.I.A.S. No. 8526; Agreement on Fisheries off the United States Coasts, Feb. 15, 1977, United States-European Economic Community, 28 U.S.T. 3787, T.I.A.S. No. 8598; Agreement on Fisheries off the United States Coasts, Feb. 16, 1977, United States-Spain, 28 U.S.T. 1631, T.I.A.S. No. 8523; Agreement on Fisheries off the United States Coasts, March 18, 1977, United States-Japan, 28 U.S.T. 7508, T.I.A.S. No. 8728; Agreement on Fisheries off the United States Coasts, April 22, 1977, United States-Cuba, 28 U.S.T. 6770, T.I.A.S. No. 8689; Agreement on Fisheries off the United States Coasts, Aug. 26, 1977, United States-Mexico, 28 U.S.T. 781, T.I.A.S. No. 8852.

The Reciprocal Fisheries Agreement Between the Government of the United States of America and the Government of Canada, Feb. 24, 1977, 28 U.S.T. 5571, T.I.A.S. No. 8648, fails to even mention marine mammals. Article VIII(4) of the agreement seems to void the application of protective measures under municipal legislation, except as they relate to size limits, seasons, areas, gear, and bycatch of existing fisheries: "Fishery conservation and management regulations other than those referred to in paragraph 2 above and those required for the implementation of this Agreement, shall not be applied by either party to vessels and nationals of the other fishing in its zone pursuant to this Agreement." 28 U.S.T. 5571, 5576.

20. See, e.g., the agreements cited *supra* note 19.

nection that is missing from most bilateral agreements on marine resources.

Bilateral cooperation between the United States and Mexico can be seen as a model of cooperation. In the initial informal talks on marine mammals, the two countries agreed upon a set of Basic Principles of Conservation and Management which provide that species conservation plans, to be jointly developed by the two countries, would reflect that:

5. Habitat such as breeding areas, migratory routes, hauling out areas and general health of the ecosystems of importance to marine mammals must be preserved so as to assure that stocks remain or are restored to optimum levels.

6. The incidental killing or serious injury of marine mammals in the course of commercial fishing operations is wasteful and therefore a goal of the two countries should be to reduce the incidental kill or incidental serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate.²¹

Regional Agreements

Regional agreements may relate specifically to marine mammals. Other regional agreements, such as those relating generally to wildlife or living resources, to maritime pollution, or to fisheries, may relate indirectly yet still substantially affect marine mammals. The United States is a party to several regional agreements related directly or indirectly to marine mammals. These agreements include the Antarctic Treaty,²² the Convention for the Conservation of Antarctic Seals,²³ the Interim Convention on

21. See Basic Principles of Conservation and Management, attached to Minutes of the Informal Talks on Marine Mammals Between Mexico and the U.S., Jan. 12, 1978, Mexico City, at 1-2. See also *MARINE MAMMAL NEWS*, Sept. 1978, at 6.

22. Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780. The Antarctic Treaty protects all seals while on that part of the fast ice which is considered part of the Antarctic continent. Parties to the treaty adopted interim Guidelines for the Voluntary Regulation of Antarctic Pelagic Sealing, which became effective in 1968 and were the basis for the Convention for the Conservation of Antarctic Seals. Done June 1, 1972, 29 U.S.T. 441, T.I.A.S. No. 8826.

23. Done June 1, 1972, 29 U.S.T. 441, T.I.A.S. No. 8826. The Department of Commerce explained the purpose of this Convention:

To safeguard all species of Antarctic seals and to ensure that, if commercial sealing begins on floating ice of the Southern Ocean, the taking of any species will be subject to strict limitations to prevent overexploitation or damage to their ecosystem. Measures adopted under the Antarctic Treaty of 1959 provide only for the protection of seals and other animals around the shoreline of the Antarctic Continent, but not on floating ice. The convention of 1972 may be applicable to crabeater, leopard, Ross, southern elephant, southern fur seals, and Weddell seals south of latitude 60°. The

Conservation of North Pacific Fur Seals,²⁴ Agreement on the Conservation of Polar Bears,²⁵ and the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere.²⁶ In addition, the International Council for the Exploration of the Seas (ICES), has a committee which discusses the latest scientific data concerning marine mammals in the North Atlantic.²⁷

The United States is also a party to the following regional fishery agreements, the first of which has recently resulted in substantial attention to marine mammals: the Convention for the Establishment of an Inter-American Tropical Tuna Commission,²⁸ the International Convention for the Conservation of Atlantic Tunas,²⁹ the International Convention for the High Seas Fisheries of the North Pacific Ocean,³⁰ and the Amended Agreement for the

Ross, southern elephant, and southern fur seals are protected species, and no taking is permitted.

U.S. DEP'T OF COMMERCE, THE MARINE MAMMAL PROTECTION ACT OF 1972: ANNUAL REPORT 25, 74 (1979) [hereinafter cited as 1979 ANNUAL REPORT].

Under the Seal Convention, pelagic sealing is prohibited; quotas are to be set for taking crabeater seals, Weddell seals, and leopard seals; open and closed seasons are to be set for different geographical areas; and reporting is to be done annually. *Id.*

24. Feb. 9, 1957, 8 U.S.T. 2283, T.I.A.S. No. 3948 (as amended and extended). This convention (1) prohibits the United States, Canada, Japan, and the Soviet Union from pelagic sealing in the North Pacific (except for indigenous sealing by primitive methods), (2) requires the Soviet Union and the United States to regulate the hunting of herds on their territory, (3) requires those countries to compensate Canada and Japan for their losses from the Pelagic prohibition by delivering to them a percentage of the skins taken, and (4) establishes a joint scientific research and consultation program. 1979 ANNUAL REPORT, *supra* note 23. On the current concern that the convention may ironically lead to the demise of fur seals, see MARINE MAMMAL NEWS, Aug. 1979, at 4. *But see* MARINE MAMMAL NEWS, Feb. 1980, at 4, (summary of efforts to improve the protection of fur seals and to facilitate study by the North Pacific Fur Seal Commission of the proposed adoption of the management concept of sustainable population).

25. *Done* Nov. 15, 1973, 27 U.S.T. 3918, T.I.A.S. No. 8409. This Convention prohibits Canada, Denmark, Norway, the U.S.S.R., and the United States from taking polar bears (with several important exceptions) and obligates the parties to "take appropriate action to protect the ecosystems of which polar bears are a part." *Id.* art. II. Note that polar bears are included within the definition of "marine mammals" in the MMPA. 16 U.S.C. § 1362(5).

26. *Done* Oct. 12, 1940, 56 Stat. 1354, T.S. No. 981. This agreement marshalls scientific expertise for the development of regional cooperation and the establishment of national parks, reserves, and monuments.

27. *Done* Sept. 12, 1964, 24 U.S.T. 1080, T.I.A.S. No. 7628. On the work of the Scientific Committee, see OAS Report, *supra* note 15, at 36.

28. May 31, 1949, 1 U.S.T. 230, T.I.A.S. No. 2044.

29. *Done* May 14, 1966, 20 U.S.T. 2887, T.I.A.S. No. 6767.

30. May 9, 1952 [1953] 4 U.S.T. 380, T.I.A.S. No. 2786. The Commission established under this Convention, to which the United States, Canada, and Japan are parties, has announced the establishment of an ad hoc committee on marine mammals, principally to address the problem of the incidental taking of Dall's porpoise in United States (Alaskan) waters by Japanese gill netters. The new committee, which will include a representative from each of the three member States, will report directly to the Commission. MARINE MAMMAL NEWS, Nov. 1978, at 4.

Establishment of the Indo-Pacific Fisheries Council.³¹ The United States withdrew from the International Convention for the Northwest Atlantic Fisheries³² (with jurisdiction over harp and hood seals), but became a party to its successor, the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries.³³

Regional programs of marine mammal conservation and management not only are geographically restricted but are typically species-oriented. Even where an agreement assumes broader ecological competence—as with the Convention for the Establishment of an Inter-American Tropical Tuna Convention (IATTC)³⁴—it is apt to address only a highly specific biological interaction. IATTC measures relate only to the specific problem of porpoise-yellowfin tuna interaction.³⁵

31. *Approved* Nov. 23, 1961 13 U.S.T. 2511, T.I.A.S. No. 5218.

32. *Done* Feb. 8, 1949, 1 U.S.T. 477, T.I.A.S. No. 2089.

33. *Done* Oct. 24, 1978, cited in 19 INT'L LEGAL MATERIALS 830-31 (1980) *reproducing* DEP'T ST. BULL., Apr. 1980, at 76-78 (not yet in force for the United States).

34. May 31, 1949, 1 U.S.T. 230, T.I.A.S. No. 2044.

35. On the tuna-porpoise controversy and its resolution within United States jurisdiction, see U.S. DEP'T OF COMMERCE, FINAL ENVIRONMENT IMPACT STATEMENT: PROMULGATION OF REGULATIONS AND PROPOSED ISSUANCE OF PERMITS TO COMMERCIAL FISHERMEN ALLOWING THE TAKING OF MARINE MAMMALS IN THE COURSE OF YELLOWFIN PURSE SEINING OPERATIONS FROM 1978 THROUGH 1980 (1977); Fox, *Tuna/Dolphin Program—Five Years of Progress*, OCEANS, May 1978, at 57; Nafziger & Armstrong, *The Porpoise-Tuna Controversy: Management of Marine Resources After Committee for Humane Legislation, Inc. v. Richardson*, 7 ENV'T L. 223 (1977).

For an optimistic assessment of measures to reduce the incidental taking of porpoises to zero mortality, see Erdheim, *The Immediate Goal Test of the Marine Mammal Protection Act and the Tuna/Porpoise Controversy*, 9 ENV'T L. 283 (1979). For recent pessimistic forecasts, based upon a reassessment of the numbers and recruitment rates as well as the related regulations and quotas, see Stevens, *Porpoise-Count Controversy May Yet Dock U.S. Tuna Fleet*, Christian Sci. Monitor, Oct. 16, 1979, at 18, col. 1, and MARINE MAMMAL NEWS, Sept. 1979, at 1.

A leading marine mammalogist, emphasizing the need for constant reassessment of data, refinement of sampling techniques, and correction of sampling errors, underscored the expense and difficulty of achieving valid and reliable data on porpoise recruitment and population. "In respect to marine life, we are one hundred years behind our knowledge of wildlife living on land." Interview with Professor Bruce Mate, Marine Science Center, Oregon State University, Newport, Oregon (Nov. 14, 1979).

The advantage of establishing one international organization to manage both tuna harvest and the porpoise protection is argued in Comment, *Dolphin Conservation in the Tuna Industry: the United States Role in an International Problem*, 16 SAN DIEGO L. REV. 665, 695 (1979).

In 1976 the Commission began to address this problem. It agreed to maintain tuna production at near current levels and yet maintain porpoise stocks at or above levels that would insure their long-term survival. The Commission authorized a program beginning in 1979 for porpoise research with emphasis on (1) the

The Antarctic presents an opportunity for regional environmental management. The promising nutritional frontier of krill production, in particular, demands careful attention to the use of that food resource by wildlife, including mammals.³⁶ Effective resource management of krill is, however, severely handicapped by a lack of reliable scientific data.

Even though the United States has been committed to marine mammal protection and expresses concern for the problems of habitat and environmental interaction, the government has only partially succeeded in ensuring that regional agreements take satisfactory account of ecological considerations.³⁷ Indeed, it was very late in the negotiations leading to the adoption of the International Convention for the High Seas Fisheries of the North Pacific Ocean that the Marine Mammal Commission learned by accident that the talks were underway.³⁸ It is astonishing that apparently neither the Department of State nor the Department of Commerce had notified the Commission, as they are required to do.³⁹ Insufficient bureaucratic communication remains an obstacle to the effective implementation of both municipal and international efforts to conserve and manage marine mammals.

Global Authority

A leading specialist in the international management of marine mammals has commented that "[i]nternational law applies only to those who ratify the relevant instruments."⁴⁰ Treaties, then,

recruitment and training of scientific technicians who will collect data from vessels at sea on the stocks of porpoise in the eastern Pacific and (2) workshops to evaluate and disseminate porpoise saving techniques and gear technology.

36. See Barnes, *The Emerging Antarctic Living Resources Convention* in PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 272 (1979); Scully, *The Marine Living Resources of the Southern Ocean*, 33 U. MIAMI L. REV. 341 (1978); Llano, *Ecology of the Southern Ocean Region*, 33 U. MIAMI L. REV. 357 (1978); Alexander, *Legal Aspects: Exploitation of Antarctic Resources, A Recommended Approach to the Antarctic Resource Problem*, 33 U. MIAMI L. REV. 371 (1978); El-Sayed & McWhinnie, *Antarctic Krill: Protein of the Last Frontier*, OCEANUS, Spring 1979, at 13; 5 ENV'T'L POL'Y & L. 4 (1979). See summary of testimony of the Marine Mammal Commission, *Report No. 95-1195 of the House Comm. on Merchant Marine and Fisheries on H.R. 12668*, 95th Cong., 2d Sess. 5 (1978).

37. For a criticism of the federal government's record in implementing the MMPA provisions on the incidental taking of small cetaceans, see Comment, *Dolphin Conservation in the Tuna Industry: The United States Role in an International Problem*, 16 SAN DIEGO L. REV. 665, 704 (1979).

38. MARINE MAMMAL NEWS, April 1978, at 1. *But see* MARINE MAMMAL NEWS, Feb. 1980, at 4 (summary of efforts to strengthen protection of fur seals by North Pacific Fur Seal Commission).

39. See 16 U.S.C. § 1402(a)(4), (5) (1976).

40. Holt, *Commentary: Changing Attitudes Toward Marine Mammals*, OCEANUS, Spring 1978, at 2, 7.

largely define the existing international regime. Yet, it is important to note the ancillary role of customary law.

Under customary international law, living resources of the sea, including marine mammals, are a part of the "common heritage of mankind."⁴¹ Similarly, the domestic public trust doctrine has crept into the vocabulary of international wildlife protection.⁴² Crystallization of these concepts, in a general way, is reflected in the Principles of the Stockholm Declaration on the Human Environment⁴³ and texts emerging from UNCLOS III.

The Stockholm Declaration, which is not legally binding on the United States or other signatories, nevertheless best evidences emerging custom. The conference which adopted the Declaration attempted to "strengthen the international whaling commission, to increase international research efforts, and as a matter of urgency to call for an international agreement . . . for a ten-year moratorium on commercial whaling."⁴⁴ Although not legally binding, that resolution does manifest a global consensus on marine mammal protection that must be taken into account. As comprehensive treaties on marine mammal conservation and management take shape, repeated practice may transform draft provisions into new customary law.⁴⁵

The U.S. is a party to two of the three major global agreements bearing directly on marine mammal conservation:⁴⁶ the Convention on International Trade in Endangered Species of Wild Fauna and Flora,⁴⁷ which offers rather little protection of marine mam-

41. See G. SMALL, *THE BLUE WHALE* 162 (1971); Holt, *supra* note 40, at 5; G.A. Res. 2749, 25 U.N. GAOR, Supp. (No. 28) 24, U.N. Doc. A/8028 (1970); U.N. Doc. A/6695 at 102 (1971).

42. See, e.g., Nanda & Ris, *The Public Trust Doctrine: A Viable Approach to International Environmental Protection*, 5 *ECOLOGY L.Q.* 291 (1976).

43. G.A. Res. 2994, 27 U.N. GAOR, Supp. 30, U.N. Doc. A/PV2112 (1972).

44. Report of the U.N. Conference on the Human Environment, Recommendation 33, U.N. Doc. A/Conf.48/14 and Corr.1 (1972), reprinted in 11 *INT'L LEGAL MATERIALS* 1416, 1434 (1972).

45. See H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS: MATERIALS AND TEXT* 258-62 (2d ed. 1976).

46. Also, the Convention on Fishing and Conservation of the Living Resources of the High Seas seeks to conserve all living marine resources, including marine mammals. Done Apr. 28, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285. The agreement has, however, done very little to protect (or conserve and manage) marine mammals. See Dobra, *Cetaceans: A Litany of Cain*, 7 *B.C. ENV'TL AFF. L. REV.* 165, 174 (1978).

47. Done March 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249.

This Convention, which entered into force on July 1, 1975, provides additional protection for the following marine mammals under the jurisdiction

mals; and the International Convention for the Regulation of Whaling,⁴⁸ which offers more protection of cetaceans at least. The United States is not, however, a party to the Convention on the Conservation of Migratory Species of Wild Animals.⁴⁹ The U.S. has actively participated in marine mammal-related activities of several specialized agencies of the United Nations, particularly the Committee on Marine Resources Research of the Food and Agriculture Organization, the United Nations Environment Programme (UNEP) and Environment Fund, and several bodies of the United Nations Educational, Scientific, and Cultural Organization.⁵⁰ UNEP and the Intergovernmental Maritime Consultative Organization have adopted instruments and taken initiatives to

of NMFS: Appendix I—blue whale, bowhead whale, gray whale, humpback whale, right whales, certain stocks of fin and sei whales, Ganges River dolphin, Caribbean monk seal, Hawaiian monk seal, Mediterranean monk seal, and northern elephant seal; Appendix II—certain stocks of fin and sei whales, southern elephant seal, Amsterdam Island fur seal, Galapagos fur seal, Guadalupe fur seal, Southern (South American) fur seal, and South African fur seal. Trade is more strictly controlled for Appendix I animals than for Appendix II animals. The U.S. Management Authority for the Convention (U.S. Department of the Interior) controls the import, export, re-export, and introduction from the sea of convention animals through a system of permits and enforcement. . . .

1979 ANNUAL REPORT, *supra* note 23, at 73.

For comments on the Convention, see McCloskey, *Lives and Deaths of the Great Whales: A Report on the International Whaling Commission*, 3 ENV'TL POL'Y & L. 114, 116 (1977):

The International Treaty on Trade in Endangered Species does not appear to offer effective means of protecting endangered whale species. It contains a clause called 'introductions from the sea' that applies to whaling. It leaves enforcement of those provisions to the importing country alone. Not only has Japan not ratified the treaty, and therefore is not bound by it, but if she does ratify, those provisions would be subject only to Japan's enforcement. And if this weren't enough immunity from Convention regulations on trade in whale products, the Convention contains a ninety-day reservation or objection clause, so that any member nation can simply reserve with respect to whales within ninety days of listing in Appendix.

48. Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849, 161 U.N.T.S. 72. The Department of Commerce has capsulized the activity of the IWC:

The IWC was established under a convention signed in Washington, D.C., in December 1946. The membership includes all countries that catch significant numbers of whales except Chile, Peru, Portugal, and Spain. The IWC . . . has acted to bring world whaling under control by prohibiting the taking of some species, sharply reducing the authorized catches of species and stocks, and implementing an international observer plan for checking compliance with quotas and regulations at land stations on factory ships. The IWC now regulates the harvest of Bryde's, fin, minke, sei, and sperm whales. An IWC subcommittee has been established to review problems relating to cetaceans. The blue, bowhead, gray, humpback, and right whales are completely protected, except for some hunting by aborigines.

1979 ANNUAL REPORT, *supra* note 23, at 73.

49. *Done*, June 21, 1979, at Bonn *reprinted in* 19 INT'L LEGAL MATERIALS 15 (1980).

50. For an excellent summary of these and related international activities, see OAS Report, *supra* note 15, at 19.

prevent pollution of the sea, to the advantage of living resources including marine mammals.⁵¹

Of these global measures, by far the best known and most important is the International Whaling Convention.⁵² The International Whaling Commission (IWC), particularly under its New Management Procedure,⁵³ has emerged during the past decade as a strong organization offering effective protection of some species of large cetaceans.⁵⁴ The organization nevertheless has several limitations.⁵⁵ First, the IWC has authority only over its members. Although membership has recently come to include most whaling countries and concerned non-whaling countries,⁵⁶ whalers have contravened IWC resolutions by establishing "flags of convenience" for their vessels in non-member countries and "joint ventures" with entities of non-member countries.⁵⁷ Second, the IWC is highly species-oriented, generally confining its activities to large cetaceans (whales). Although the IWC is now concerned not only with whales but also with smaller cetaceans (dolphins and porpoises), the organization has so far developed very little authority to control taking of the latter, especially within the 200-mile exclusive economic zones.⁵⁸ Moreover, the IWC possesses

51. *Id.*

52. Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849, 161 U.N.T.S. 72.

53. For a description of this procedure see Hain, *The International Regulation of Whaling*, MARINE AFF. J., Sept. 1975, at 42-44.

54. See MARINE MAMMAL NEWS, April 1978, at 2. In its 1979 meeting the IWC took several important steps. First, by a vote of 18-2 with three abstentions, it prohibited commercial factory ship whaling (primarily by the Soviet Union and Japan) of pelagic sperm whales. Second, it sharply reduced the whaling quotas for the 1979-1980 season. Third, a technical committee of the IWC decided to prohibit whaling in the Indian Ocean for a period of 10 years. INTERNATIONAL WHALING COMMISSION, 29TH REPORT (1979). See 1979 Amendments to the Schedule of the International Convention for the Regulation of Whaling, 44 Fed. Reg. 76, 536 (1979) (to be codified in 50 C.F.R. § 351).

55. See generally F. MCHUGH, THE ROLE AND HISTORY OF THE INTERNATIONAL WHALING COMMISSION IN THE WHALE PROBLEM (1974); M. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW 303 (1977); FRIENDS OF THE EARTH, 1978 WHALE MANUAL 18 (1978).

56. China, North Korea, and Somalia remain nonmembers, and Panama withdrew effective June 30, 1980. U.S. DEPT OF STATE, TREATY AFFAIRS STAFF, OFFICE OF THE LEGAL ADVISOR, TREATIES IN FORCE 382 (1980).

57. Holt, *supra* note 40, at 7.

58. MARINE MAMMAL NEWS, July 1978, at 3. Comment, *supra* note 37, at 695. The IWC's species rather than ecological basis is the most important example of a pervasive problem in the management of marine mammals. Despite growing awareness of the ecological imperatives, international conservation and management of living marine resources remains overly specific. That is, existing measures specialize in either fish or marine mammals or quite often sub-groupings or

no authority over marine mammals other than cetaceans.⁵⁹ Third, IWC's schedules and related decisions are based upon a loose articulation of values and allow substantial annual takings of cetaceans.⁶⁰ Fourth, the process of obtaining the scientific data upon which the schedules and other decisions are based is often sluggish and unreliable.⁶¹ Fifth, the IWC has only limited powers of monitoring and enforcement.⁶² Finally, the IWC historically served as a "club" for a few States to manage a global resource for their own benefit. Even today, the IWC cannot be a comprehensive regime of conservation as long as it must respond to claims for utilization. Efforts to develop the IWC into a more comprehensive International Cetacean Commission have failed.⁶³

The IWC was somewhat weakened by a temporary lapse of leadership by the United States at a time when the organization was increasing its authority over whaling activities. Against the advice of the IWC's Scientific Committee, the Carter administration insisted upon an allowed catch for its Eskimo nationals of bowhead whales, perhaps the most endangered species of all.⁶⁴ The United States thereby abandoned its longtime commitment to both a moratorium on whaling and an acceptance of collective scientific judgment. The United States delegation distinguished

single species of either. The problem is that biological interaction, fundamental to effective regulation, is overlooked. This may occur even within a single municipal regime committed to ecological management of marine mammals; it is a fortiori troublesome on the international level.

Fortunately, within the United States, the elaborate mechanism for fisheries conservation and management has been interpreted to incorporate the MMPA by reference, so that domestic regional management plans must take account of marine mammal-fish relationships. See Nafziger, *supra* note 3, at 185.

59. See Act of Dec. 2, 1946, 62 Stat. 1716, art. V.

60. *Id.* Moreover, the schedules are subject to "objections" through which member states can avoid the decisions altogether. *Id.*

61. See FRIENDS OF THE EARTH, *supra* note 55, at 18. The 1978 Report of the IWC's Scientific Committee, with specific reference to the relatively well-researched sperm whale, found "substantial scientific uncertainty on both the population estimates, and the validity of the assumptions on the population response." Storro-Patterson, *Political Science in Tokyo*, OCEANS, March-April 1979, at 63. Given such uncertainty, the only safe quota may be zero. It simply is "not possible to set quotas, any quota, without risk to population." *Id.* On the problem of secrecy within IWC deliberations as a restraint on effective use of scientific findings, see MARINE MAMMAL NEWS, July 1979, at 1.

62. Act of Dec. 2, 1946, 62 Stat. 1716, art. IX and schedules, including observer schemes. See Scarff, *supra* note 4, at 357.

63. A Working Group of IWC is preparing the draft of a new convention to replace the existing one. See OAS Report, *supra* note 15, at 23. On problems of renegotiation, see MARINE MAMMAL NEWS, Dec. 1979, at 4. For more radical proposals for a comprehensive IWC scheme, see A. KOERS, INTERNATIONAL REGULATION OF MARINE FISHERIES 268 (1973).

64. See Nafziger, *supra* note 3, at 203; ENV'T'L CONSERVATION, Spring 1978, at 68; 19 NAT. RESOURCES J. 943, 944 (1979).

subsistence (or aboriginal) whaling from commercial whaling.⁶⁵ This distinction, based upon provisions of the MMPA, may make some historic sense, but it makes no scientific sense. The distinction conforms only minimally with limited IWC deference to the privileges of aboriginal whalers.⁶⁶ The new United States posture, shaped by domestic political pressures,⁶⁷ fortunately seems to have had little effect on the progress within the IWC toward the elimination of all whaling. Indeed, the United States led the 1979 campaign within the IWC to eliminate commercial whaling. Nevertheless, the damage to U.S. credibility and leadership in environmental fora may handicap its influence in the current negotiation of a new international whaling agreement and in environmental efforts outside the IWC.⁶⁸

A 1979 conference produced the Convention on the Conservation of Migratory Species of Wild Animals.⁶⁹ The Convention implements Recommendation 32 of the Action Plan adopted by the Stockholm Conference.⁷⁰ As an "umbrella" arrangement the new Convention will presumably have greatest impact within jurisdic-

65. See MARINE MAMMAL NEWS, July 1978, at 2.

66. The IWC has established a working group on aboriginal whaling. Its mission generally is to regulate all types of whaling, although an earlier convention, the Convention for the Regulation of Whaling, done Sept. 24, 1931, 49 Stat. 3079, T.S. No. 880, 155 U.N.T.S. 349, exempts some forms of aboriginal whaling from its provisions.

67. See MARINE MAMMAL NEWS, March 1979, at 1-2. MARINE MAMMAL NEWS, April 1979, at 4. A United States proposal would allow each member country to implement and enforce its own scheme within the following framework: Aboriginal interests would be allowed to take up to 50% of the net recruitment (increase) in a marine mammal population, when data are available. When data are unavailable, a quota would be based on the best available estimate of the existing population, allowing a take of up to 1% of that number or a "struck and lost" figure of 1.5%, whichever occurs first. This figure would be modified in accordance with the actual aboriginal need, if lower. *Id.*

68. See Patterson, IWC 1978 A MORATORIUM ON MORATORIUMS, OCEANS, Sept. 1978, at 63; Christian Sci. Monitor, July 29, 1980, at 6, col. 3.

69. Done, June 21, 1979, reprinted in 19 INT'L LEGAL MATERIALS 15 (1980).

70. Recommendation 32

It is recommended that Governments give attention to the need to enact international conventions and treaties to protect species inhabiting international waters or those which migrate from one country to another:

(a) A broadly-based convention should be considered which would provide a framework by which criteria for game regulations could be agreed upon and the overexploitation of resources curtailed by signatory countries;

(b) A working group should be set up as soon as possible by the appropriate authorities to consider these problems and to advise on the need for, and possible scope of, such conventions or treaties.

Report of the United Nations Conference on the Human Environment, U.S. Doc.

tions where municipal legislation is rudimentary or nonexistent.⁷¹ The Convention establishes international conservation principles and guidelines to be applied by signatories and to be implemented in some cases by municipal protective measures and international agreements.⁷²

Among the controversies surrounding the Convention is its extension to marine mammals. The United States, with particular reference to gray whales, suggested temporarily excluding marine species.⁷³ Alternatively, the United States delegation suggested that the Convention might be modified to exclude at least certain marine species and "the sea" from the definition of migratory range.⁷⁴ The somewhat ambiguous position of the Department of State on the probable environmental impact of the Convention emphasized that to superimpose it on existing and pending agreements might be counterproductive and prejudicial to the United States position on environmental jurisdiction of coastal States.⁷⁵ Also, the Department of State expressed concern about the Convention's potential impact upon agreement under UNCLOS III.⁷⁶ Yet the Convention states:

1. Nothing in this Convention shall prejudice the codification and development of the law of the sea by [UNCLOS III] nor the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction.
2. The provisions of this Convention shall in no way affect the rights or obligations of any Party deriving from any existing treaty, convention or agreement.
3. The provisions of this Convention shall in no way affect the right of Parties to adopt stricter domestic measures concerning the conservation of migratory species⁷⁷

Although the Convention has been opened for signature, the United States has declined to participate.

EMERGING REGIME

- As a basis for study and negotiation, the protracted Third United Nations Conference on the Law of the Sea (UNCLOS III) has adopted successively five working texts: the Informal Single

A/CONF.48/14 and Corr.1, Recommendation 32, *reprinted in* 11 INT'L LEGAL MATERIALS 1416, 1434 (1972).

71. DEPARTMENT OF STATE, DRAFT ENVIRONMENTAL IMPACT STATEMENT CONCERNING THE CONVENTION ON THE CONSERVATION OF MIGRATORY SPECIES OF WILD ANIMALS PROPOSED BY THE FEDERAL REPUBLIC OF GERMANY at 2 (1979).

72. Convention on the Conservation of Migratory Species of Wild Animals, *supra* note 69, arts. II-V, *reprinted in* 19 INT'L LEGAL MATERIALS 18-21 (1980).

73. DEPARTMENT OF STATE, *supra* note 71, at 17.

74. *Id.* at 58.

75. *Id.* at 65.

76. *Id.*

77. Convention on the Conservation of Migratory Species of Wild Animals, *supra* note 69, art. XII, *reprinted in* 19 INT'L LEGAL MATERIALS 26 (1980).

Negotiating Text (1975),⁷⁸ the Revised Single Negotiating Text (1976),⁷⁹ the Informal Composite Negotiating Text (1977)⁸⁰ and the latter's revised versions (1979 and 1980).⁸¹ The first four texts contained substantially identical language with respect to the conservation and management of marine mammals. Within an exclusive 200-mile economic zone, all the texts have given coastal States "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources" with "due regard to the rights and duties of other States."⁸² On the high seas, "[s]tates shall co-operate with each other in the management and conservation of living resources . . .,"⁸³ and "[a]ll States have the duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas."⁸⁴ The pre-1980 negotiating texts specifically addressed the subject of marine mammals as follows:

Nothing in the present Convention restricts the right of a coastal State or international organization, as appropriate, to prohibit, regulate and limit the exploitation of marine mammals. States shall cooperate either directly or through appropriate international organizations with a view to the protection and management of marine mammals.⁸⁵

Article 65 was apparently intended to enable coastal States to transcend the protective authority of international organizations by allowing them even stricter controls over the taking of marine mammals.⁸⁶ Thus, following the accepted definition of the relationship between coastal State and international jurisdiction, the former would have had to be at least as strict as the latter, but could have been even stricter.⁸⁷ The actual language, however, reserved to coastal States the right to "prohibit, regulate and limit the exploitation of marine mammals."⁸⁸ This could have been read, contrary to the legislative intent, to give coastal States full

78. U.N. Doc. A/Conf.62/WP.8/pts. I-III (1975).

79. U.N. Doc. A/Conf.62/WP.8/Rev. pt. II (1976).

80. U.N. Doc. A/Conf.62/WP.10 (1977).

81. U.N. Doc. A/Conf.62/WP.10/Rev. 1 (1979) [hereinafter cited as ICNT/R]; U.N. Doc. A/Conf. 62/ WP.10/Rev. 2 (1980).

82. ICNT/R, *supra* note 81, art. 56.

83. ICNT/R, *supra* note 81, art. 118.

84. *Id.* art. 117.

85. *See, e.g., supra* note 80, art. 65.

86. *See* Smith, *End-Game at UNCLOS: The Living Resources*, NAT'L PARKS & CONSERVATION, Aug. 1978, at 2, 31.

87. *But see* Comment, *supra* note 37, at 689.

88. *Supra* note 85, art. 65 (pre-1980 version of the UNCLOS III texts).

preemptive discretion to regulate *or not regulate* the taking of marine mammals within their extended jurisdiction.⁸⁹ Thus, unfortunate draftsmanship allowed the possible interpretation that global authority might, depending on coastal State discretion, have had no effective jurisdiction within the 200-mile exclusive economic zones, or that it could in any event have been voided by any coastal State measures that in some way regulated or limited the taking of marine mammals.

As will be discussed later, these deficiencies in the pre-1980 texts have been cured, but remaining deficiencies deserve note.⁹⁰ First, no criteria are provided to determine when it is "appropriate" nor who decides when it is "appropriate" for, respectively, the coastal State or international organizations to take the stipulated measures. Nor is there any assurance of uniform measures among the range States of a given species, despite the obligation of cooperation imposed. Instead, the provisions pose the threat of international conflicts among coastal States and international organizations. Such loose language might provide an easy escape by coastal States from their international obligations. Second, the provisions stipulate no management criteria to take account of scientific, ecological, cultural, aesthetic, and moral values. Third, there are no programmatic obligations, even to gather and exchange scientific information. Fourth, "international organization" and "appropriate international organizations" are not defined. Thus, States might escape their global obligations by joining weak, pro-whaling organizations such as the Permanent Commission for the Exploitation and Conservation of the Marine Resources of the South Pacific, to which Chile, Ecuador, and Peru are parties.⁹¹ Fifth, it remains unclear to what extent, if any, international obligations extend to the territorial and internal waters of ratifying States. There is, however, a weak inference of

89. See Smith, *supra* note 86, at 31.

While the flawed version may have been the result of inadvertence or incompetence, it reflects quite precisely the deep conflict between the desire of some coastal states to exercise unlimited control over their living resources and the insistence by others that they must be conserved for their own sake and the benefit of humanity as a whole.

Id. See also De Klemm, *Conservation and the New Informal Composite Negotiating Text of the Law of the Sea Conference*, 4 ENV'TL POL'Y & L. 2, 14 (1978). But see OAS Report, *supra* note 15, at 24. The interpretation of the international committee which prepared the latter report is that "member states may take measures for the protection of marine mammals inhabiting their Exclusive Economic Zones (EEZ's), or regarding the activities of their nationals with respect to marine mammals, that are more stringent than the measures taken under specific international agreements." *Id.*

90. See generally, De Klemm, note 89 *supra*; McCloskey, note 47 *supra*; Holt, note 40 *supra*.

91. McCloskey, *supra* note 47, at 116.

intended extension to these waters: although the provisions for living resources appear principally in sections dealing with the exclusive economic zone, there is no specific reference of limitation to that zone (unlike other provisions within the same section of the text). Lastly, the collapse of global authority under Article 65 would allow an individual coastal State to "determine the allowable catch of the living resources in its exclusive economic zone."⁹² Each State could "promote the objective of optimum utilization of the living resources in the exclusive economic zone," including marine mammals.⁹³ Therefore, coastal States would be able to regard marine mammals as a food supply and a source of other high and low consumptive satisfaction. To be sure, these coastal State rights would be qualified by the requirement that each State take account of the best scientific evidence available, prevent over-exploitation, cooperate with relevant subregional, regional and global organizations, comply with a modified standard of maximum sustainable yield, protect species associated with harvested species, and contribute and exchange scientific information.⁹⁴ However, the bottom line is clear: coastal States would possess plenary authority to determine allowable catches and to apply the concept of "optimum utilization" even to marine mammals.

Closely related to the above outlined deficiencies is the inclusion of several families of cetaceans within Annex I of the ICNT/R.⁹⁵ Annex I lists "highly migratory species" subject to a rather weak sub-regime of conservation.⁹⁶ The effect is to bring most, but not all, cetaceans within a regime governing the conservation

92. ICNT/R, *supra* note 81, art. 61(1).

93. *Id.* art. 62(1).

94. *Id.* art. 61.

95. *Id.* Annex I.

96. Annex I includes as highly migratory species the following families of the order cetacea: physeteridae, balaenopteridae, balaenidae, eschrichtiidae, monodontidae, ziphiidae, and delphinidae. The only two families not included among the specified families are phocoenidae and platanistidae. The latter generally remains within internal waters, but the family phocoenidae is migratory and one of its members, the Dall's porpoise, is incidentally caught by salmon fishermen (principally Japanese in Alaskan waters). The phocoenidae and delphinidae (primarily dolphin/porpoise and killer whale) are of growing concern to the IATTC. The relationship between regional and global authority otherwise applicable ought to be indicated, at least for those "highly migratory" cetaceans for which regional organizations may have primary management responsibility. Alternatively, cetaceans might be removed altogether from Annex I even though the description "highly migratory species" applies to all or most of them. *Id.*

and management of tuna and other highly migratory species of fish:

1. The coastal State and other States whose nationals fish in the region for the highly migratory species listed in annex I, shall co-operate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of *optimum utilization* of such species *throughout the region*, both within and beyond the exclusive economic zone. In regions where no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region shall co-operate to establish such an organization and participate in its work.⁹⁷

The "optimum utilization" standard seems inappropriate for managing, let alone conserving, marine mammals. Including such language as, "with a view to ensuring conservation and promoting the objective of optimum utilization" might well be fatally permissive. Thus, coastal States would be free to utilize marine mammals to meet food and other consumptive needs.

In order to cure the defects in the initial negotiating texts, several proposals were advanced. A marine scientist proposed that the Annex listing highly migratory species should be amended to delete all references to cetaceans and that Article 65 should be amended as follows:

Protection of Cetaceans and Other Marine Mammals

1. Nothing in the present Convention restricts the right of a coastal State or international organization to prohibit the exploitation of marine mammals. States shall cooperate either directly or through appropriate international organizations with a view to the protection and management of marine mammals, *taking into account the unique scientific, ecological, cultural and esthetic value of marine mammals.*
2. *States whose nationals have an interest in cetaceans shall cooperate to establish an international cetacean commission to advance understanding of cetaceans and to ensure their effective conservation and protection on a global basis, both within and beyond the exclusive economic zone.*⁹⁸

This and similar proposals sought better to convey the legislative intent by providing for exclusive global authority to manage and conserve (rather than "optimally utilize") marine mammals beyond territorial waters.

The United States delegation also sought to cure the deficiencies in the negotiating texts. In order to do so, it was necessary not only to give marine mammals higher priority in the U.S. diplomatic agenda, but also to raise the consciousness of other participants in UNCLOS III. In June 1977, during the sixth session of UNCLOS III, the United States delegation proposed that Article 65 of the negotiating text be amended to read:

Nothing in the present Convention restricts the right of a coastal State or international organization, as appropriate, to prohibit or limit the exploitation of marine mammals. States shall cooperate with a view to the protec-

97. *Id.* art. 64(1) (emphasis added).

98. Pijanowski, *Comments on Fisheries and the Law of the Sea*, MARINE TECH. Soc. J., July-Aug. 1977, at 34, 35-36 (emphasis added).

tion of marine mammals *and to establish an international organization for the protection, conservation and understanding of cetaceans on a global basis.*⁹⁹

Although UNCLOS III took no action on this proposal, the United States President's Special Representative could report some progress just prior to the eighth session in the spring of 1979:

The Conference delegations have shown a keen and growing awareness of the special nature of marine mammals and the need to protect them.

Although the current ICNT affords some general protection for marine mammals, the United States still believes that Articles 65 and 120 should be clarified in the Eighth Session to indicate a State's obligation to impose regulations at least as stringent as those contemplated by the ICNT.¹⁰⁰

The Spring 1979 session of UNCLOS III included two unofficial meetings convened by the United States to discuss improvements in the marine mammal provision.¹⁰¹ The States represented at these meetings unanimously agreed to strengthen provisions for cetacean conservation by international and, where more appropriate, regional organizations.¹⁰²

At the conclusion of the Spring 1979 session, the United States President's Special Representative reported as follows:

A revision of the article on marine mammals is not part of the revised text, but a growing number of countries expressed their support for United States efforts to strengthen conservation and protection of these unique creatures. We view this as a satisfying and desirable development.¹⁰³

99. See Working Papers of the United States Delegation to the Sixth Session, United Nations Conference on the Law of the Sea, June 1977.

100. Richardson, *Introduction*, 16 SAN DIEGO L. REV. 451, 457 (1979).

101. 5 ENV'TL POL'Y & L. 135 (1979).

102. *Id.* The Committee III Chairman concluded that "further progress has been made to broaden the areas of agreement and that the basis for a reasonable compromise offering us a substantially improved prospect of consensus has been set." *Id.*

103. Department of State Press Release (No. 113), Press Conference by Ambassador Elliot L. Richardson, Geneva, at 2 (April 27, 1979). A more detailed official summary of the United States delegation appears in U.S. Delegation Report, Eighth Session of the Third United Nations Conference on the Law of the Sea, Geneva, March 19-April 27, 1979, at 36:

[Marine mammals] not being one of the 'hardcore' issues designated as such by the Conference, was nonetheless the focus of two unofficial meetings (approximately 20 States) convened by the U.S. The objective of these meetings, attended by all affected interests, was to seek improvement in the language of Article 65 of the ICNT to make clear that there is a minimum conservation standard for marine mammals both within and without the economic zone. The meetings showed that there was substantial unanimity for proposed changes reflecting such a conservation objective. Also discussed was the need for textual improvements with respect to cooperation in an appropriate international organization for the conser-

The United States delegation was instrumental in extending formal dispute-settlement procedures within the UNCLOS III framework to living marine resources, including marine mammals.¹⁰⁴

At a resumed eighth session of UNCLOS III in July-August 1979, on the initiative of the United States delegation, a compromise was agreed upon for approval as part of the final text of UNCLOS III.¹⁰⁵ The ninth session acquiesced in the compromise version. It reads as follows:

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*. In this connection, States shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study.¹⁰⁶

The effect of these amendments is: (1) to underscore that coastal States and international organizations (within what limits?) may impose only those conservation measures which further protect marine mammals; (2) to clarify that measures "to prohibit, limit or regulate" are disjunctive; (3) to narrow the special concern for marine mammals to "this part" of the Convention; (4) to narrow international authority over marine mammals to one of "competence" rather than "right"; (5) to require international cooperation in conserving, rather than more specifically protecting, marine mammals; and, with respect to cetaceans, (6) to work through appropriate international organizations without necessarily establishing new authority to conserve, manage, and study

vation of cetaceans. Discussions in this area focused on the need to accommodate appropriate regional organizations for the conservation of stocks where those stocks need not be addressed on a global scale. A great deal of progress was made in the direction of a final accommodation, and it is anticipated that a final solution will be reached at the resumed session.

104. See Smith, *supra* note 86, at 2. But see, Kutner, *The Genocide of Whales: A Crime Against Humanity*, 10 LAW. AMERICAS 784, 795 (1978).

105. U.S. Delegation Report, Resumed Eighth Session of the Third United Nations Conference on the Law of the Sea, New York, July 15-Aug. 24, 1979, at 37. That report concludes that "the proposed draft commanded the support of a large majority of those States which participated in the consultations and formed a good basis for a final outcome." *Id.* The United States delegation to UNCLOS III seems to have exaggerated the strength of Article 65 as a means of comprehensively conserving and managing marine mammals. The delegation reported that the revised version represents "a sound framework . . . with needed emphasis on international cooperation" that has the result of "strengthening the protection for marine mammals, including whales, that had long been sought by the United States and environmentalists." Even though neither the United States delegation nor the environmentalists really got the sound framework they had sought, the revised text nevertheless provided a workable framework for a comprehensive regime of marine mammal conservation and management. U.S. Delegation Report, Ninth Session of the Third United Nations Conference on the Law of the Sea, New York, Feb. 27-April 4, 1980, at 33.

106. U.N. Doc. A/Conf.62/WP.10/Rev.3 (1980) (emphasis added).

marine mammals. As against the pre-1980 texts, the first two revisions strengthen the protective regime, the next three appear to restrict the protective regime, and the last revision seems to strengthen the role of international organizations in respect of cetaceans but weaken it in respect of other marine mammals. The role of regional organizations is not specified.

CONCLUSION

The United States clearly has played a major role in the creation of a comprehensive regime, within the UNCLOS III framework, for the conservation and management of marine mammals. But this country has enormous legal and economic leverage to do much more. Decision makers increasingly realize that a marine mammal program must be comprehensive in both a global and an ecological sense.¹⁰⁷ Nevertheless, United States diplomatic efforts remain timid and in the instance of the bowhead whale, disappointing. This country has proceeded conservatively not only in applying sanctions but also in establishing its diplomatic priorities.¹⁰⁸

107. See, e.g., *Marine Mammal Protection: Hearing and Markup on H.Res. 1065 Before the Subcomm. on Asian and Pacific Affairs of the House Comm. on International Relations*, 95th Cong., 2d Sess. 37 (1978) [hereinafter cited as *Hearing on H.Res. 1065*].

108. The United States delegation to UNCLOS III seems to have been split on the question of what priority to give in the negotiations to the protection of marine mammals. On the one hand, the Deputy Representative would have given very little priority to marine mammals. He contends that their conservation is "being handled" by the IWC and IATTC, that an "umbrella provision" within UNCLOS III is most appropriate, and that "[b]ecause of the danger of the issue becoming a political football for the use of nations who may not have a real interest in solving the problem, no more detailed effort [in UNCLOS III] has been undertaken." See Clingan, *The Changing Global Pattern of Fisheries Management*, 10 LAW. AMERICAS 658, 676 (1978). On the other hand, Special Representative Richardson seems to have been inclined to give higher priority to marine mammals, writing that they are of "no less importance" than major species of fish. Richardson, *United States Interests and the Law of the Sea*, 10 LAW. AMERICAS 651, 655 (1978).

The Marine Mammal Commission's statement of accomplishments and future objectives reflects a full commitment to the implementation of the international objectives of the MMPA. *Statement by Marine Mammal Commission, Departments of State, Justice, and Commerce, The Judiciary, and Related Agencies Appropriations for 1979: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 95th Cong., 2d Sess. 177, 188 (1978) [hereinafter cited as *Appropriation Hearings*]. One of the Commission's five objectives for fiscal year 1979 was "to continue to participate in and make recommendations on the role of the United States in international negotiations affecting the welfare of marine mammals." *Id.* at 186. It proposed to do this by giving emphasis to (1) negotiating a convention on the conservation of Antarctic living resources ("Of all current international ne-

Even with the revisions of the text initiated by the United States delegation in June 1977, and adopted by the ninth session of UNCLOS III in 1980, many of the problems noted earlier will remain. It is said that the handwriting may be on the wall: the world is not yet ready for comprehensive, ecological management of marine mammals.¹⁰⁹ There is, however, a basis for optimism. The UNCLOS III text and other international agreements evidence a substantial willingness of States to cooperate in the management and conservation of fish resources, in which States have a far deeper stake than in marine mammals. Also, there is substantial progress toward the elimination of whaling,¹¹⁰ zero mortality of porpoises taken incidental to fishing,¹¹¹ and greater international cooperation in the exchange of scientific information.¹¹² There are even reports of changes in cultural values involving marine mammals, as among the Japanese.¹¹³ These hopeful signs, from a conservationist standpoint, heighten not only the prospects of international legal efforts, but also the likelihood that the world may be ready for a global authority to conserve and manage all living marine resources.

The best hope for effective conservation and management of marine mammals lies in the current provisions of the UNCLOS III text despite their limitations. International efforts toward, for example, the creation of cetacean sanctuaries could well be implemented within the framework of a global agreement based upon the UNCLOS III text.¹¹⁴ At the same time, coastal States must adopt strong, consonant legislation, viewing themselves as agents

gotiations affecting marine mammals, this is probably the most critical"); and (2) concluding a bilateral agreement with Mexico and using this as a model for similar agreements with other countries. *Id.*

109. "It seems clear that we're not going to see an international marine mammal protection act." Statement of William Aron, National Oceanic and Atmospheric Agency, quoted in *MARINE MAMMAL NEWS*, April 1978, at 2; cf. Scarff, *supra* note 4, at 613.

110. See note 48 *supra*. Note also that one of the world's two largest whaling countries, the Soviet Union, has announced its intention to phase out its entire whaling operation within five years. *L.A. Times*, Dec. 17, 1978, pt. V, at 4, col. 1.

111. *MARINE MAMMAL NEWS*, April 1978, at 2; Salisbury, *U.S. tuna fleet doing better, less porpoises*, *Christian Sci. Monitor*, June 8, 1979 at 9, col. 1.

112. See, e.g., papers of the Scientific Consultation of Marine Mammals, Aug. 31-Sept. 9, 1976, Bergen, Norway, Advisory Committee on Marine Resource Research, Food and Agriculture Organization of the United Nations, U.N. Doc. ACMRR/MM/SC/82 (1976).

113. *Hearing on H. Res. 1065, supra* note 107, at 16. The Japanese government, responding to diplomatic pressures, has agreed to prohibit imported whale products from non-members of the IWC. *Christian Sci. Monitor*, July 10, 1979, at 24, col. 2. But the American public may be tolerant of commercial whaling so long as it does not endanger any species of whale. *MARINE MAMMAL NEWS*, Dec. 1979, at 3.

114. See De Klemm, *Cetacean Sanctuaries: A First Step*, 5 *ENV'TL POL'Y & L.* 89 (1979).

of the emerging global authority. Conservation and management will then continue to profit from pluralistic efforts subject to a global, ecologically comprehensive regime within the United Nations framework.

