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Kazuo Sumi

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# The "Whale War" Between Japan and the United States: Problems and Prospects

KAZUO SUMI\*

## I. PREFACE

Recently, the "whale war" between Japan and the United States has resurfaced over the Japanese research whaling issue. On January 13, 1988, sixteen major environmental groups in the United States filed a lawsuit against the U.S. government "in an attempt to force economic sanctions against Japan's fishing industry for its outlaw whaling."<sup>1</sup> On January 27, Representative Don Bonker introduced a Congressional Resolution to the effect that "the United States should encourage other nations to impose broad economic sanctions against nations which continue to whale in defiance of the international moratorium." In submitting this Resolution to the House of Representatives, he condemned the Japanese and Icelandic research whaling and said as follows: "Under the guise of 'scientific research', these nations plan to hunt and kill over 400 whales per year. This 'research whaling' is, of course, nothing more than a thinly-veiled effort to continue their commercial whaling operations." He justified the Resolution by saying that "unfortunately, we have not worked to develop a unified multilateral front against whaling violations" and that "by encouraging other nations to join with us, we will have a much more effective penalty and spread the burden of enforcement across a larger group."<sup>2</sup>

In response to these movements, on February 10, 1988, Secretary of Commerce, C. William Verity, recommended to the President the imposition of sanctions against Japan for killing whales under a Japanese research program. The Secretary certified Japanese research whaling, as an action that diminishes the effectiveness of the International Whaling Commission's (IWC's) conservation program, under the Packwood-Magnuson Amendment to the Fisherman's Protective Act.<sup>3</sup> Under the Packwood-Magnuson Amendment, certification by the Secretary of Commerce results in an automatic fifty percent reduction in fish allocations in the U.S. 200-mile zone. However, since Japan currently has no quotas in the U.S. 200-mile zone, the sanctions are purely symbolic. Under the Pelly Amendment, the President, upon receipt of certification by the Secretary of Commerce, is authorized to embargo the importation of fish products from the offending country.

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\* Kazuo Sumi is a Professor of International Law, Yokohama City University, Japan.

1. Greenpeace, News Release, Jan. 13, 1988, at 1.

2. Congressman Bonker, Bonker News (Congressional Pamphlet), Jan. 27, 1988, at 1.

3. U.S. DEPARTMENT OF COMMERCE, COMMERCE NEWS 1 (Feb. 10, 1988).

On April 6, 1988, President Ronald Reagan made a decision to impose sanctions against Japan under the Packwood-Magnuson Amendment. But he refrained from imposing trade sanctions against Japan under the Pelly Amendment. As mentioned above, since U.S. allocations of fish to Japanese fishermen in the U.S. 200-mile waters were zero in this year, the decision had no significant impact on the Japanese fishing industry. The aim of the measure taken was to impose political and psychological pressures on the Japanese to deter them from continuing scientific permit whaling. The U.S. diplomatic strategy to deal with the whaling issue attempts to compel the whaling countries to stop commercial whaling by using the Packwood-Magnuson Amendment and the Pelly Amendment as enforcement leverage. However, such a unilateral use or threat of sanctions is of dubious legality under international law.

The research whaling dispute is part of a long-pending whaling question between both countries and is only the tip of the iceberg. In the background of this controversy lies a perception gap concerning the whale and whaling. Owing to differences in dietary customs, religious beliefs, cultural backgrounds and emotional sensibilities, this perception gap remains wide and appears to be growing.

In the great era of American whaling during the eighteenth and nineteenth centuries, Americans hunted the whale solely for its oil. The aim of Commodore Perry's visit to Japan in 1853 was generally to force Japan to open the door to the world, but particularly to re-supply American whaling vessels. However, the discovery of petroleum in Pennsylvania in 1859 marked a turning point in American whaling. Decreased demand for whale oil led to the end of the whaling industry. At present, Americans have no direct economic interests in whaling. For this reason, the United States has evolved its national position on whales along the lines of a protectionist approach.

On the other hand, the Japanese have been heavily dependent upon the whale as a source of food and for other purposes from days immemorial. The fact that many whale bones have been excavated from Japanese archaeological mounds demonstrates that whale meat and bones were used by the ancient Japanese. The whale is mentioned in many parts of the "Manyoshu," the oldest anthology of poems in Japan, which was compiled at the end of the eighth century. For the Japanese people, the whale is not only a food source, but also a basis of culture. All parts of the whale have been used most effectively, and have become part of the daily life of the Japanese and contributed to the formation of a unique traditional culture. To cite one example, baleens of the right whale have been used as an essential part of "Bunraku," Japan's traditional puppet theater. However, nowadays, it is difficult to obtain them because the catch of this species is completely prohibited.

Since the introduction of the idea of a moratorium on commercial whaling in the international fora by the United States, confrontation between the whaling countries and the anti-whaling countries, especially between Japan and the United States, has been generated due to divergent

views on the moratorium. It culminated in the adoption of the moratorium decision at the 34th Annual Meeting of the International Whaling Commission (IWC) in 1982.

It goes without saying that if the existence of a whale species is truly endangered, whaling should be stopped. Even before the moratorium decision, pelagic fleet hunting of all the large whales such as the blue, fin, right, humpback and gray whales had been prohibited. The Scientific Committee of the IWC has pointed out that while the bowhead whale is most endangered, the minke whale, which was the only target of commercial whaling in the Antarctic, is far from any possibility of extinction. Stocks of the minke whale are considered to have increased to sufficient numbers to enable a non-endangering catch. In the paper presented in 1975 to the Scientific Committee by Dr. K. Radway Allen, an Australian scientist, it was reported that "the overall estimate for the initial Antarctic population of exploitable size minke whales appears to be in about the range of 40-60 thousand."<sup>4</sup> In such a situation, it is rational to make optimum utilization of these resources.

There is considerable doubt whether the moratorium decision is rational. While it applies even to the minke whale species which is in no actual danger of extinction, a truly endangered species, the bowhead whale, is exempted from its application. Decision-makers in the United States have instigated the taking of an emotional approach to this delicate and intricate problem instead of increasing the understanding of dietary, cultural and ethical differences. In 1972, Dr. Robert M. White, U.S. Commissioner to the IWC, said that "a critical element in changing the attitude of the IWC has been the advocacy of strong whale conservation measures by non-governmental organizations."<sup>5</sup>

The resignation in 1972 of Dr. J. L. McHugh, who was the predecessor of Dr. White and Chairman of the IWC, symbolized the U.S. policy change. It was a truly unhappy moment in the history of the IWC. Dr. McHugh gave the following warning: "There is a danger that overzealous and uninformed people will continue to promote the notion that whaling continues unchecked and that a total moratorium is the only answer." He also stated that:

Most people think that 'whales are an endangered species,' as I read in an article not too long ago. This view ignores the fact that, of the approximately 100 different kinds of Cetacea, less than 20 are being taken commercially, and less than 10 of these have been overharvested to the point at which they can be considered 'endangered' according to any reasonable interpretation of the meaning of that term. Overharvesting of no marine resource can be condoned, but the fact remains that the Whaling Commission has declared a morato-

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4. K. Radway Allen, *An Assessment of Antarctic Minke Whale Stocks*, Int'l Whaling Comm'n Rep., No. 26 (1976).

5. *International Decisions to Decide the Fate of Whales*, CONSERVATION NEWS, Vol. 36, No. 27, 5 (Feb. 1, 1972).

rium on certain whale species, has set catch limits on other overharvested stocks which should allow them to increase while still being taken commercially, and has set limits on the catch of others which should allow a catch to be taken indefinitely at levels of maximum sustainable yields. A total moratorium is not only irrational and unnecessary, but impossible to achieve. Continued pressure for total cessation of all whaling could well be counterproductive, by destroying the Commission just when it has finished resolving most of its major problems. It is to be hoped that reason will prevail, and that all efforts will be directed toward supporting the International Whaling Commission and strengthening it in every possible way.<sup>6</sup>

The subsequent history of the IWC demonstrates what Dr. McHugh pointed out. It is particularly unhappy and dangerous that decision-makers intentionally mislead the general public with fabricated information. At present, most of the goodwilled people in the world, especially in the United States, seem to be caught in two kinds of "whale traps" set by decision-makers and the news media. Mrs. Janice S. Henke, American cultural anthropologist, speaks of such a "whale trap": "[t]he current American belief is that all whales are severely endangered, and that even in the face of this, they are all still being ruthlessly hunted."<sup>7</sup>

Another recent "whale trap" is the belief that Japan is conducting commercial operations under the guise of scientific whaling. Mr. Russell E. Train, who served as chairman of the U.S. delegation to the U.N. Stockholm Conference and head of the U.S. delegation to the IWC, recently made a speech at the National Press Club as follows: "Japan is proceeding with commercial whaling and calling it 'science' . . . Here we are, 16 years later, at what may be the final, crucial decision point."<sup>8</sup>

This is a deplorable misunderstanding. His speech reveals that his real intention lies in stopping commercial whaling by all means. However, according to the common definition of "commercial", Japan is, in fact, not currently participating in "commercial" whaling. In 1984, Japan accepted the moratorium decision on commercial whaling by the IWC under strong U.S. diplomatic pressure. According to this decision by the Government of Japan, the last remaining whaling company, *Nippon Kyodou Hogeï Co.*, was dissolved on November 27, 1987. As a result, Japanese scientific permit whaling is now being conducted by the Institute of Cetacean Research, which was established on October 30, 1987 and succeeds the predecessor institute, the Whale Research Institute. The Institute of Cetacean Research is a non-profit organization. Its aims are to conduct research and study on various aspects of cetaceans and other marine mammals. Its research activities, including the research cruises to

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6. J. McHUGH, THE ROLE AND HISTORY OF THE INTERNATIONAL WHALING COMMISSION 334-35 (W. Schevill, ed. 1974).

7. J. S. Henke, The Whale Trap: An American Perspective, AMERICAN SCHOLARS QUESTION WHALING BAN, Japan Whaling Association 6 (1987).

8. R. Train, Statement at the National Press Club 2 (Jan. 13, 1988).

the Antarctic, are carried out under contract with the Japanese Government. It can not engage in commercial activities.

Certainly, whales taken under special permits will be processed after conducting scientific investigations, and whale meat and by-products will come into the market. However, the sale of the meat and by-products is not for avaricious business purposes, but for supporting research efforts, especially for financing the research cruises to the Antarctic. Under contract with the Japanese Government, it is conditioned that any profit resulting from the sale of whale products should revert back to the research program.

In 1990, the moratorium decision by the IWC is scheduled for review. Japan is waiting in strong expectation for the findings of the Comprehensive Assessment by the IWC. In order to make contributions to the review work, the Japanese Government decided to continue the survey of the resource state of whales, especially of the minke whale, in the Antarctic. For that purpose, at the 39th Annual Meeting of the IWC, Japan presented a research program.<sup>9</sup> Under the program, it was planned to take 1,650 minke whales in the Antarctic during the four years from 1987/88 to 1990/91. Since the sampling was designed for two years out of the four year period, the proposed annual sample size was 825 minke whales and 50 sperm whales. However, in the IWC, the anti-whaling countries were strongly opposed to the Japanese research program. Upon the proposal of the United Kingdom, the IWC adopted a resolution recommending that Japan refrain from issuing the special permit until the uncertainties identified are resolved.<sup>10</sup> Japan raised legal questions on the validity of this resolution.

In October 1987, Japan announced that she would proceed that season with a "Feasibility Study" to see whether the original program would be viable. A modified plan proposed to reduce the maximum sample size to 300 minke whales and to exclude the catch of sperm whales.<sup>11</sup> Subsequently, Japan continued to make efforts to increase understanding of the need for scientific whaling. The Japanese Government requested a Special Meeting of the Scientific Committee to consider the "Feasibility Study." The Special Meeting was held on December 15-17, 1987 at Cambridge, England, under the Chairmanship of Mr. R. L. Brownell, Jr. (U.S.A.). However, participating scientists could not reach an agreement on the problem. Under these circumstances, the Japanese Government decided to send a research cruise to conduct the feasibility study. On December 23, 1987, a research vessel, *Daisan Nishinmaru*, departed Japan

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9. Government of Japan, The Program for Research on the Southern Hemisphere Minke Whale and for Preliminary Research on the Marine Ecosystem in the Antarctic (1987).

10. Int'l Whaling Comm'n, 39th Mtg./Chairman's Rep., appendix 4 (1987).

11. Government of Japan, The Research Plan for the Feasibility Study on 'The Program for Research on the Southern Hemisphere Minke Whale and for Preliminary Research on the Marine Ecosystem in the Antarctic'(1987).

for the Antarctic. In the meantime, upon request of the United Kingdom, the IWC asked the member countries to vote by post on the Japanese modified plan. On February 15, the Secretariat of the IWC announced that the U.K. resolution to ask for cessation of Japanese scientific permit whaling was adopted by 19 votes in favor, with 6 against and 2 abstentions.

Today, the anti-whaling countries do not seem to be active in collecting data and information necessary for the Comprehensive Assessment. Rather, they appear to be expecting to maintain uncertainties of the resource state in order to continue the moratorium. However, it should be recalled that the International Decade of Cetacean Research (IDCR) was initiated by U.S. proposal. In 1975, the IWC adopted a resolution proposed by the U.S. Commissioner recommending that "member nations give assistance through vessels, personnel or additional funds as contributions to any part of the IDCR proposals, but particularly, in the areas of stock monitoring and stock identification in the Southern Hemisphere."<sup>12</sup> According to this resolution, the First IDCR started in the 1978/79 season. In the context of the IDCR minke whale assessment cruises, Japan provided, without any compensation, ships to be used by scientific teams from the United States, England, Canada, Australia, the Soviet Union, South Africa and other countries. From the 1984/85 season, cetacean research projects have moved to the Second IDCR. Japan has spent \$15 million on Antarctic minke whale research over the last nine years. This research is at present the only source of information on the resource state of whales in that area. In 1987, the Scientific Committee reconfirmed that there was value in retaining the concept of the IDCR during the period of the Comprehensive Assessment and that the IDCR would continue after 1990.<sup>13</sup>

Although the United States was the proponent of the IDCR, it has made no substantial contribution to it. On the contrary, it has played the role of an obstructionist. Instead of promoting scientific research activities, its sole recourse has been the coercive weapon of political and economic sanctions. Data and information on the resource state of whales are essential for rational management. So far the most useful materials for scientific research on whales have been obtained from commercial operations. In a paper presented to the IWC, American scientist W. E. Schevill says as follows:

The cessation of commercial whaling would cut off the supply of much of the data and we would need to make a major effort to compensate for this as much as possible. The abundance and distribution of data could be replaced to some extent by special sightings and collection cruises, by development of remote sensing techniques and by advanced marking techniques. Similarly new techniques will enable some of the biological data to be obtained from free-living animals but

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12. Int'l Whaling Comm'n, 27th Mtg./Chairman's Rep., para. 13 (1975).

13. Int'l Whaling Comm'n, 39th Mtg./Chairman's Rep., para. 17 (1987).

it will be difficult if not impossible to replace the large statistically valuable samples available through the commercial fishery. Special scientific sampling cruises could collect only very much smaller samples.<sup>14</sup>

The Scientific Committee of the IWC itself also expressed concern about the lack of information as a result of the moratorium on commercial whaling. In 1972, it stated as follows: "The absence of commercial catching operations would make it impossible to obtain certain kinds of information which are essential for continuing assessment of whale stock. There is in fact a need for a substantial increase in all kinds of research activity related to whales."<sup>15</sup>

The need for scientific research of whale stocks has also been emphasized by the Food and Agriculture Organization of the United Nations (FAO). At the 34th Annual Meeting of the IWC in 1982, the following was pointed out by the FAO observer:

The major issues facing the IWC now concern the continuation of whaling as an industry. The main threat has come from the industry itself through the depletion of the stock from excess catches. Here, the past record of the Commission (IWC) has caused concern such that none of the baleen whales (other than minke) now support significant industries. The present record is better. Where commercial whaling is still being carried on, the catches are, by and large, within the productive capacity of the stock and should be sustainable indefinitely. However, this depends on having adequate scientific advice. It is therefore disturbing that the Commission's Scientific Committee seems to be finding it increasingly difficult to provide such advice as a result of the failure of some countries to make all relevant data fully available to the Committee. If there is a deterioration in the free exchange of data, the risk of wrong decisions and over-exploitation will obviously increase. It is also disturbing that some analysis of available data, which have been requested by the Scientific Committee, have not been carried out even when the information is available.<sup>16</sup>

In defending Japanese scientific permit whaling, Dr. J. A. Gulland, Professor of the Imperial College of Science and Technology, in Great Britain, says as follows: "The Japanese propose to take 1,600 minke whales in the Antarctic over the next two years. This is a small, but reasonably adequate, sample for providing important scientific information (e.g., on age composition) that cannot be obtained in any other way. It represents a harvesting rate of around 0.1 percent per year from a population which numbers at least half a million, and probably over one million."<sup>17</sup>

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14. W. E. Schevill and Radway Allen, *Expanded Cetacean Research*, Int'l Whaling Comm'n, Rep. no. 24 (1974).

15. Int'l Whaling Comm'n, *Report of the Scientific Committee* at 38 (1972).

16. Int'l Whaling Comm'n, 34th Annual Mtg./Statement by FAO Observer (1982).

17. THE TIMES, July 7, 1987, at 17.



It should be noted that without necessary and adequate data, the Comprehensive Assessment in 1990 will fail to achieve its objective. Decision-making of the IWC based on emotional and unscientific grounds will undermine its credibility.

## II. DEVIATION OF THE IWC FROM ITS ORIGINAL OBJECTIVES

The International Convention for the Regulation of whaling (ICRW), which was signed in Washington on December 2, 1946 and entered into force on November 10, 1948, established "a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks." Its main objectives are "to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry" (Preamble).

As reflected in the use of the word "whaling", the ICRW is not only concerned with whale protection, but also represents a compromise among diverse interests, especially between rational management of whale resources and economic development by whaling industries. In this sense, it is based on the concept of ecodevelopment or sustainable development.

Under the ICRW, the International Whaling Commission (IWC) was created as a single-management authority. It is composed of all member countries. The IWC has two main subsidiary organs: the Scientific Committee and the Technical Committee.

The ICRW authorizes the IWC to study whales, whale stocks and whaling practices (article IV). The IWC is also authorized to amend a Schedule. The Schedule forms an integral part of the ICRW (article I). It is a living document, which is changed from time to time in such matters as annual whaling quotas, the whaling seasons and regulations governing permissible whaling methods (article V, paragraph 1). A three-quarters majority vote of member countries is required for amendment of the Schedule (article III, paragraph 2). Amendments become effective with respect to the member countries 90 days following notification of the amendment by the IWC to each member country.

With respect to such amendments, the ICRW provides for an objection procedure. Under this procedure, any of the member countries may lodge an objection to a Schedule amendment within 90 days of being notified of the amendment. If such an objection is filed in a timely manner, the objecting country is not bound by the amendment (article V, paragraph 3). In this sense, the right of a member country to present an objection is absolute and unqualified. This provision was inserted in the ICRW by a U.S. proposal during its drafting process.

Under the ICRW, the IWC itself has no enforcement powers against the non-member countries or against the member countries who, by objecting, choose not to be bound by a given IWC determination. Certainly, this is a great weakness of the IWC, but it is not unique. No international fishery organization has power to enforce regulations, and none can make

regulations contrary to intentions of the member countries.

The history of the IWC, particularly up to the mid-60's, was not necessarily a credit to this organization and its member countries. However, in 1963, the IWC decided to forbid whaling of the humpback whale, and in the following year, the catching of the blue whale was prohibited. In 1971, the IWC introduced the International Observer Scheme, under which all member countries actively whaling undertook to exchange observers appointed by the IWC. It was in 1972 that the Blue Whale Unit (BWU)<sup>18</sup> was abolished and was superseded by separate limits for individual species, although it was too late. At the 27th Annual Meeting in 1975, the IWC introduced a new management scheme called the New Management Procedure (NMP),<sup>19</sup> which is the existing management system.

Although the accomplishments of the IWC have been substantial in resource management, they have been exposed to strong criticism by extremist environmentalists. Events took on an ominous tone in 1972, when the United States put forward a ten-year moratorium on commercial whaling at the United Nations Conference on the Human Environment held in Stockholm. Since then, IWC's annual meetings have turned into a forum where two opposing camps confront each other with mutually antagonistic management concepts.

At the instigation of environmental groups, and under the initiative of the United States, the IWC decided, at the 34th Annual Meeting in 1982, to impose a five-year moratorium on all commercial whaling beginning in 1986. This amendment to the Schedule was adopted by 25 votes in favor, with seven against and five abstentions.

However, it should be noted that the moratorium decision was adopted without any recommendation of the Scientific Committee. It is clearly contrary to the ICRW's provision that amendments of the Schedule "shall be based on scientific findings" (article V, paragraph 2(b)). Moreover, it can not meet the following requirements in the same provision:

These amendments of the Schedule (a) shall be such as are necessary to carry out the objectives and purposes of this Convention and to provide for the conservation, development and optimum utilization of the whale resources; and (d) shall take into consideration the interests of the consumers of whale products and the whaling industry (article

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18. In the ICRW, the following formula was used as a basis for setting catch limits in the Antarctic: one blue whale equals two fin whales which equals two and a half humpback whales which equals six sei whales. It encouraged the depletion of larger whales.

19. Under this scheme, all stocks of whales are classified into one of the following three categories according to the state of resources: 1) An Initial Management Stock; 2) A Sustained Management Stock; 3) A Protection Stock. The three categories are established by determining how much the present stock level has fallen in comparison with the initial stock level when whaling was started. Before the adoption of the moratorium decision by the IWC, whaling was permitted for the former two classifications.

V, paragraph 2).

The adoption of the moratorium decision marked a major turn-about in the IWC on the whaling issue, bringing a shift from a conservationist approach (i.e., wise use of living resources) to a protectionist approach (i.e., absolute prohibition of the catching). This shift has caused various serious problems, especially concerning compatibility with the ICRW's provisions and the validity of the IWC's decisions. At present, overemphasis of a protectionist approach prevails in the IWC.

In this context, there are six problems that should be discussed:

1. There is considerable deviation of the IWC's activities from the original objectives and purposes of the ICRW. The moratorium decision is not compatible with the requirement of "the orderly development of the whaling industry." In addition, resolutions for putting restrictions on scientific permit whaling are incompatible with the provision of article VIII paragraph 1 of the ICRW.<sup>20</sup> From the viewpoint of *lex lata*, a member country has the absolute right to issue a special permit for the research take of whales. This is clear from the expression "[n]otwithstanding anything contained in this Convention" in article VIII.

2. The moratorium decision is not based on scientific grounds. Its decision-making processes reveal that scientific advice was not as influential as political, economic and emotional motivations. Politics appears to have played a truly significant role in decision-making of the IWC at the cost of scientific considerations. There is no international fishery organization other than the IWC in which so little respect has been paid to the views of the Scientific Committee. It should be recalled that the Scientific Committee, which convened on June 19-23, 1972, just after the Stockholm Conference, expressed the view that "a blanket moratorium can not be justified scientifically."<sup>21</sup>

3. The underlying premise of the moratorium seems to be that whales are being threatened with extinction for the sake of the commercial whaling industry. This is an unfortunate misconception. All whale species are not on the brink of extinction. Some whale species are increasing in numbers. This is especially true of the minke whale.

In 1971, the Scientific Committee reported that preliminary esti-

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20. Art. VIII, para. 1 of the ICRW is as follows: "Notwithstanding anything contained in this Convention, any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted."

21. Int'l Whaling Comm'n, *Report of the Scientific Committee*, para. 38 (1972).

mates of population size and maximum sustainable yield (MSY) of minke whales in the Antarctic were 150,000-200,000 and 5,000, respectively, and that "the stock is essentially unexploited."<sup>22</sup> In the following year, the IWC established a catch limit of 5,000 minke whales for the Antarctic.<sup>23</sup> In 1973, the MSY of minke whales was estimated to be 5,000-12,230. However, the Scientific Committee emphasized the importance of a conservative approach. As a result, the IWC adopted a catch quota of 5,000.<sup>24</sup> Afterwards, however, it became clear that the past estimates were too low. For that reason, in 1974, the IWC decided on a catch limit of 7,000 minke whales as a maximum safe quota.<sup>25</sup> In 1979, the Scientific Committee, stating that "since this stock has been increasing in response to reduction of other whale stocks, it does not fit into the Commission's present classification scheme," recommended that "catch limits be based on replacement yield." Along this line of recommendation, the IWC decided on a total catch limit of 8,102.<sup>26</sup>

Just before the total ban on commercial whaling, it was only the minke whale that Japan hunted with pelagic fleets in the Antarctic. The catch number of the last expedition in the 1986/87 season was only 1,941. Undoubtedly, catches of this size would have no significant effects on the stocks. The FAO observer, at the 35th Annual Meeting of the IWC in 1983, stated that "the Antarctic stock of minke whale is large and can sustain some moderate level of catches, perhaps a few thousand annually, without risk of depletion."<sup>27</sup> Therefore, crying complete cessation of commercial whaling is nothing but an unscientific way of thinking. Ironically, the Scientific Committee, in 1987, estimated that the population of minke whales in the Southern Hemisphere was approximately 440,000.<sup>28</sup>

4. On the other hand, the bowhead whale is regarded as being in the greatest danger of becoming extinct. In 1979, the Scientific Committee recommended that "from a biological point of view the only safe course is for the kill of bowhead whales from the Bering Sea stock to be zero."<sup>29</sup> However, the United States claimed that the catch limit in 1980 should be eighteen landed or twenty-six struck. Surprisingly, majority members in the IWC accepted the U.S. claim. In 1987, the Scientific Committee estimated current population size of this species to be only about 7,200.<sup>30</sup> Nonetheless, the United States requested an increase in the catch limit to thirty-two struck for 1987 and thirty-five struck for 1988. The IWC adopted this proposal. Anti-whaling countries and most environmental groups have not attempted to question this serious matter.

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22. Int'l Whaling Comm'n, 23rd Mtg./Chairman's Rep., para. 10 (1971).

23. Int'l Whaling Comm'n, 24th Mtg./Chairman's Rep., para. 15 (1972).

24. Int'l Whaling Comm'n, 25th Mtg./Chairman's Rep., para. 10 (1973).

25. Int'l Whaling Comm'n, 26th Mtg./Chairman's Rep., para. 10 (1974).

26. Int'l Whaling Comm'n, 31st Mtg./Chairman's Rep., para. 11 (1979).

27. Int'l Whaling Comm'n, 35th Mtg./Statement by FAO Observer, at 1-2 (1983).

28. Int'l Whaling Comm'n, *Report of the Scientific Committee*, para. 8, Table 3 (1987).

29. Int'l Whaling Comm'n, 31st Annual Mtg./Chairman's Rep., para. 12 (1979).

30. Int'l Whaling Comm'n, *Report of the Scientific Committee*, para. 9 (1987).

5. The United States has targeted its criticism toward "commercial" whaling in order to exempt the catch of bowhead whales by the Eskimos. At the Opening Statement of the 31st Annual Meeting of the IWC in 1979, Mr. Richard A. Frank, U.S. Commissioner, emphasized the need to strike a reasonable and equitable balance between the need to preserve an endangered species and the need to preserve an endangered culture.<sup>31</sup>

In Japan, there are similar kinds of small-scale subsistence whaling operations in remote coastal communities such as Arikawa, on the Goto Islands, Taiji, on the southeast coast, and the village of Ayukawa, on the northeast coast. At the 39th Annual Meeting of the IWC in 1987, Japan asked the member countries for special consideration of this type of whaling.<sup>32</sup> However, reactions of the anti-whaling countries and environmental groups were not so favorable to the Japanese proposal. The main reason was that Japanese local whaling was involved in commercialism. However, the fact is that whale meat and other whale products have been locally consumed, and those not consumed locally have been sold inland and the profits have been used to buy other foods and commodities which are not available locally. The geography prevents these small coastal communities from growing the rice, fruit and vegetables which are essential for local consumption. For this reason, whale meat is an important source of animal protein for local people, and whaling is a basis of local industry. Whaling in these communities has been deeply related to their traditional culture.

Japanese small-scale whaling bears some resemblance to whaling by natives in Alaska, Greenland and the U.S.S.R. For instance, whaling by the native people of Greenland, essentially a subsistence hunting, also has a minor commercial element. By the decision of the IWC at its 39th Annual Meeting, Greenlandic native people are allowed to catch 110 minke whales and 10 fin whales.<sup>33</sup> Therefore, whether or not local whaling has a commercial aspect is not a decisive factor for the exceptional allowance of the take. What is important is how the whaling contributes to the nutritional as well as cultural needs of the local people. In this sense, it is unreasonable that while claiming the need to preserve an endangered culture, the United States is not ready to accept the existence of traditional culture in other countries. The criterion for the catch allowance should be not whether whaling is commercially operated, but whether the target species is endangered. The U.S. argument does not stand on rational grounds.

Lastly, it must be pointed out that so-called "structural violence" of the majority prevails in the IWC. Respect for minority views is the fundamental principle of democracy. However, this principle has been trampled

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31. Int'l Whaling Comm'n, 31st Annual Mtg./U.S. Opening Statement, at 4 (1979).

32. Japan presented the following papers to the IWC: "Japan's Small-Type Subsistence Whaling," Int'l Whaling Comm'n 39th Mtg./25; "History of the Consideration of Aboriginal/Subsistence Whaling," Int'l Whaling Comm'n, 39th Mtg./26.

33. Int'l Whaling Comm'n, 39th Mtg./ Chairman's Rep., para. 16 (1987).

down by the majority. This majority is the result of maneuvers of anti-whaling countries and environmental groups. It has been formed by inviting non-whaling countries such as Monaco, Antigua and Barbuda, Saint Lucia and Senegal, who have no interest in the whaling industry, to join the IWC. In most cases, their seats in the IWC are occupied by environmentalists of a different nationality.

The only real aim of the majority countries seems to be the choking off of any type of commercial whaling. They attempt to achieve this aim by fair means or foul. That is the reason why they have little interest in scientific research of whale stocks. Prevailing in the IWC is no longer the scientific approach, but rather what can only be called "missionary zeal." Even the exercise of the legitimate right of a member country under the ICRW to file an objection to an amendment of the Schedule or to conduct scientific whaling is under political and economic pressure. By the threat or use of "sanctions," the United States has played a leading role as an international enforcer in forcing the majority's value system upon the minority.

### III. MORATORIUM ISSUE

#### A. *U.N. Stockholm Conference*

At the United Nations Conference on the Human Environment, which was held in Stockholm on June 5-16, 1972, it was the United States that took the lead in calling for a ten-year moratorium on commercial whaling. In putting forward such a proposal, Dr. Robert M. White, Administrator of the National Oceanic and Atmospheric Agency, stated as follows:

World whale stocks must be regarded as the heritage of all mankind, and not the preserve of any one or several nations . . . . We feel that strong action in restoring the world's whale stocks is a matter of great urgency . . . . A moratorium would allow time for stocks to start rebuilding . . . . A moratorium would allow time to develop a fund of knowledge as the basis for effective long-term management . . . . A moratorium would allow time to adequately, truly strengthen the IWC to make it a more effective instrument."<sup>34</sup>

The U.S. proposal was unexpected by the Japanese delegation. In order to avoid world-wide accusation as an environmental destroyer, Japan sought a compromise and submitted an amendment to the U.S. proposal. It aimed at limiting the ten year moratorium on commercial whaling to endangered or depleted whale stocks.<sup>35</sup> In opposing the Japanese amendment, Dr. White said as follows:

A moratorium limited to endangered species would represent no significant change from the present status. The only species on which

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34. U.S. Press Release, HE/13/72 at 1-2 (June 9, 1972).

35. U.N. Press Release, HE/S/51, at 1 (June 9, 1972).

there is agreement about endangerment are the five already protected by the IWC. Consequently, if the recommendation is limited to endangered species, it is meaningless since it is recommending the status quo. And it is the status quo which has brought these species to their status of endangerment, and has so depleted the other whale [species]. It is not enough to seek protection for a species only after its numbers have been so reduced as to threaten its existence . . . when a species is that depleted it no longer represents a resource for human welfare, nor can it play any role in the marine ecosystem.<sup>36</sup>

Being faced with the refusal by the U.S. delegation of the compromise proposal, Japan expressed its objection to placing a total ban on whaling. Motoo Ogiso, the Japanese representative, said that none of the three great stocks now being exploited were depleted. He regarded a total ban on whaling as an "extreme" and "unnecessary" measure, and appealed to the Conference not to discuss this problem from "the political and emotional point of view," but from a "factual and practical one."<sup>37</sup>

However, at the instigation of the environmentalists, the Conference was full of overzealousness. In such an atmosphere, the recommendation for the moratorium was approved by the Second Committee. The moratorium included; development and environment and management of natural resources by a vote of fifty-one in favour to three opposed (Japan, Portugal and South Africa), with twelve abstentions. In the Plenary, the recommendation was adopted by a vote of fifty-three in favour to none against, with three abstentions (Brazil, Japan and Spain). The adopted recommendation was incorporated as Recommendation 33 into the Action Plan for the Human Environment. It states:

It is recommended that Governments agree to strengthen the International Whaling Commission, to increase international research efforts, and as a matter of urgency to call for an international agreement, under the auspices of the International Whaling Commission and involving all Governments concerned, for a ten year moratorium on commercial whaling.<sup>38</sup>

Mr. Russell E. Train, Chairman of the U.S. delegation, called the recommendation "a great victory for the growing international public concern for protection of the whales," and stated, "I hope that this clear expression by the Stockholm Conference will have great influence upon the action taken by the International Whaling Commission when it meets later this month in London."<sup>39</sup>

In this recommendation, reference is made only to commercial whaling in order to exclude whaling by Alaskan natives from its application. Moreover, it should not be forgotten that the recommendation also refers

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36. U.S. Press Release, *supra* note 34, at 2.

37. U.N. Press Release, *supra* note 35, at 1.

38. U.N. Doc. A/CONF.48/14/Rev.1, at 12.

39. U.S. Press Release, HE12(72) at 1 (June 9, 1972).

to the strengthening of the IWC and increasing international research efforts.

#### B. *24th Annual Meeting of the IWC*

The 24th Annual Meeting of the IWC was held in London on June 26-30, 1972, just after the U.N. Stockholm Conference. With the object of enabling the IWC to institute a global moratorium on commercial whaling, the U.S. delegation moved and the U.K. delegation seconded a motion that the Schedule for 1973 be amended in every case where a numerical quota appears to substitute the numeral "0" for all such numerical quotas.

The proposed moratorium was considered by the Technical Committee. In introducing it to the Committee, the U.S. delegation explained that "the state of knowledge of the whale stocks is so inadequate that it is only common prudence to suspend whaling. This is necessary so that scientific efforts can be redoubled and new research techniques developed." However, the Committee rejected the motion, four voting in favour and seven against, three abstained.<sup>40</sup> As mentioned before, the Scientific Committee was also opposed to the idea of the moratorium and pointed out that:

A blanket moratorium is in the same category as a blue whale unit quota, in that they are both attempts to regulate several stocks as one group whereas prudent management requires regulation of the stocks individually. Instead of a moratorium, support should be sought for a decade of intensified research on cetaceans, particularly as regards problems relevant to their conservation. Such a programme should proceed in parallel with further development by the Commission of the policy of bringing catch restrictions into line with the best available knowledge of the state of the stocks.<sup>41</sup>

#### C. *25th Annual Meeting of the IWC*

At the 25th Annual Meeting of the IWC, held in London on June 25-29, 1973, the United States again proposed that commercial whaling for all species of cetaceans should cease for a period of ten years, except aboriginal catches that do not endanger a species. That proposal was considered by the Scientific Committee and the Technical Committee. The Scientific Committee expressed the view that at the present time there was no biological requirement for the imposition of a blanket moratorium on all commercial whaling.<sup>42</sup> However, the Technical Committee, by a majority vote, adopted a resolution proposing a cessation of commercial whaling for ten years.

In the Plenary, the Soviet Union expressed its opposition to the reso-

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40. Int'l Whaling Comm'n, 24th Mtg./Chairman's Rep., para. 9 (1972).

41. Int'l Whaling Comm'n, *Report of the Scientific Committee*, para. 38 (1972).

42. Int'l Whaling Comm'n, 25th Mtg./Chairman's Rep., para. 9 (1973).



lution on the grounds that it was contrary to the findings of the Scientific Committee, that it was incompatible with the ICRW and would lead to the cessation of the ICRW and to unregulated whaling. Japan shared that view and said that the moratorium was in contradiction to the spirit of the ICRW.<sup>43</sup> The vote, 8 in favour, 5 against and 1 abstained, failed to obtain the necessary three-quarters majority.

D. *26th Annual Meeting of the IWC*

Further consideration of a proposed moratorium on commercial whaling for a ten-year period was given at the 26th Annual Meeting, held in London, from June 24-28, 1974. The moratorium resolution was approved by the Technical Committee, but failed to obtain a sufficient majority in the Plenary. The Scientific Committee maintained the same position as ever. They pointed out that because of possible competition between species, rebuilding of severely depleted stocks may not necessarily be maximized by a moratorium.<sup>44</sup>

As already mentioned, in this meeting, the IWC decided to adopt the New Management Procedure (NMP) which was designed to classify the whale stocks into three categories and to provide for their individual management. It was the aim of the NMP to set catch limits so that such stocks would rebuild towards the maximum sustainable yield (MSY) level. This was a compromise between the IWC member countries still whaling commercially, and those wanting a moratorium. In the adoption of the NMP, the United States Commissioner stated that his Government still supported a ten-year moratorium but had voted for the resolution because it felt it represented a significant step forward in the management of the world's whales.<sup>45</sup>

E. *27th Annual Meeting of the IWC*

At its 27th Annual Meeting, held in London from June 23-27, 1975, the IWC made a formal decision that all stocks of whales should be classified according to the advice of the Scientific Committee into one of the following three categories: (i) Initial Management Stocks; (ii) Sustained Management Stocks; (iii) Protection Stocks. It was agreed that commercial whaling should be permitted on Initial Management Stocks and Sustained Management Stocks subject to the advice of the Scientific Committee and that there shall be no commercial whaling on species or stocks classified as Protection Stocks.

At the opening statement of the 28th Annual Meeting of the IWC, the Chairman, Mr. A. G. Bollen (Australia) said that the adoption of the

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43. *Id.* at para. 9.

44. Int'l Whaling Comm'n, *Report of the Scientific Committee, Summary and Recommendations to the Commission*, para. 2 (1974).

45. Int'l Whaling Comm'n, 26th Mtg./Chairman's Rep., para. 9 (1974).

NMP was the most critical decision in the Commission's history.<sup>46</sup>

F. *31st Annual Meeting of the IWC*

In spite of the IWC's introduction of a severe resource management system under the NMP, the United States was not satisfied. On June 1, 1979, one month before the 31st Annual Meeting of the IWC, President Carter stated as follows:

I believe that there is strong international support for efforts to preserve the world's whales. To reflect that support, the United States at this meeting will propose that all nations stop commercial whaling now, until there is an effective, comprehensive conservation program for whales which will guarantee their continued survival.<sup>47</sup>

At the Meeting, held in London from July 9-13, 1979, Mr. Richard A. Frank, U.S. Commissioner, reintroduced a proposal for an indefinite moratorium on commercial whaling and explained as follows:

Since 1975, when the New Management Procedure was adopted with the support of the United States, we have not pressed the moratorium issue in this forum. However, it has become increasingly clear that our management system is not functioning as adequately as we believe necessary. The time has thus come for a change.<sup>48</sup>

In justification of the proposed moratorium, Mr. Frank criticized the NMP by saying that the most serious deficiencies in the current system are as follows: 1. Exports of assistance to and imports of whale meat from non-members have seriously undermined the NMP. 2. The NMP is not fully capable of taking into account serious whale population declines. 3. Member nations have failed to submit sufficient data. 4. Member nations have failed to fund the IWC adequately. Therefore, "the Commission should adopt a moratorium until responsible management is possible."<sup>49</sup>

In opposing the proposed moratorium, the Japanese Commissioner stated as follows:

The Japanese Delegation would like to remind all the participants here that the Scientific Committee does not support the moratorium on whaling and Japan agrees with this view. Proposals for a moratorium, in the opinion of the Japanese Delegation, seem to be inappropriate for the following reasons:

(1) Each and every whale stock is carefully monitored and managed by the IWC. Only those stocks deemed to be very healthy can be exploited, and then only with a good margin of safeguard. There is no reason why the IWC should apply a moratorium on all whaling when there is no scientific need to do so;

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46. Int'l Whaling Comm'n, 28th Annual Mtg./Chairman's Rep., para. 4 (1976).

47. Statement of the White House, at 2 (June 1979).

48. Opening Statement of R. A. Frank, U.S. Commissioner at 2 (July 9, 1979).

49. Statement of R. A. Frank, U.S. Commissioner, on the Proposal for an Indefinite Moratorium on Commercial Whaling, at 7 and 15 (July, 1979).

- (2) One of the objectives of the Convention for the Regulation of Whaling is to "provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry." Proposals for a moratorium, in the view of the Japanese Delegation, do not meet this objective;
- (3) A moratorium on whaling would make it practically impossible to collect data on whale stocks;
- (4) Japan does not agree with the idea of separating commercial whaling from subsistence whaling. In its view, both kinds of whaling are essentially the same in terms of utilization of whales for the benefit of mankind; and
- (5) Moratorium proposals, if passed, will discourage non-member whaling countries from becoming members of the Commission and may lead to withdrawals of certain member countries, which would be the end of the IWC regime.<sup>50</sup>

During the Meeting, the Technical Committee, by a majority decision, adopted a recommendation to stop whaling until there is a conservation proposal in effect which would ensure the survival of whales. However, no consensus was reached in the Plenary.<sup>51</sup>

#### G. *32nd Annual Meeting of the IWC*

The 32nd Annual Meeting of the IWC was held in Brighton July 21-25, 1980. In the opening statement, the U.S. Commissioner said that "the United States is again proposing a moratorium on commercial whaling to protect whales until the inadequacies of the existing conservation program have been corrected."<sup>52</sup>

In criticizing the idea of the moratorium, Dr. I. V. Nikonozov, U.S.S.R. Commissioner, said that "we are becoming increasingly aware of our responsibility and obligations to mankind for the conservation of whale stocks, which, however, does not exclude reasonable harvesting of whales from stocks whose state permits it to do so."<sup>53</sup> The Japanese Commissioner stated as follows:

Any proposal for a total ban or moratorium would obviously be a contravention of the provisions of the Convention particularly article V - unless it were supported by solid scientific proof that a temporary or permanent ban on whaling at this point was the only recourse left in maintaining each and every stock of whales within a safety range, and that even a small catch would do irreversible damage to each and every such stock and lead to their extinction.<sup>54</sup>

Mr. M. C. Mercer, Canadian Commissioner, also opposed the pro-

50. Int'l Whaling Comm'n, 31st Mtg./Opening Statement of Japan, at 1-2 (1979).

51. Int'l Whaling Comm'n, 31st Mtg./Chairman's Rep., para. 6 (1979).

52. Int'l Whaling Comm'n, 32nd Mtg./Opening Statement, U.S.A. at 1-2 (1980).

53. Opening Statement by Dr. I. V. Nikonozov, U.S.S.R. Commissioner, at 1 (July 1980).

54. Int'l Whaling Comm'n, 32nd Mtg./Opening Statement, Japan at 1 (1980).

posed moratorium and said:

It is our view that, in the absence of a clear and scientifically justified recommendation from the Scientific Committee in support of a moratorium on commercial whaling, such action is unnecessary and that conservation requirements can be adequately met under the "New Management Procedure" of stock classification and quotas, which in essence provides for selective moratoria (zero quotas) based on scientific analyses of stock status. It is our view that a moratorium on all commercial whaling, not based on scientific grounds, is inconsistent with the expressed purposes and with article V of the present Convention.<sup>55</sup>

During the course of the Meeting, there was extensive discussion on the proposed moratorium. However, the proposal failed to obtain the necessary three-quarters majority (thirteen in favour, nine against and two abstained).

#### H. *33rd Annual Meeting of the IWC*

At the 33rd Annual Meeting of the IWC, held in Brighton from July 20-25, 1981, the Technical Committee by a majority vote recommended an amendment to the Schedule which would have the effect of placing a moratorium on all commercial whaling. However, in the Plenary the proposal failed to reach the three-quarters majority necessary to amend the Schedule (sixteen in favor, eight against and three abstained).<sup>56</sup>

#### I. *34th Annual Meeting of the IWC*

The 34th Annual Meeting of the IWC took place in Brighton from July 19-24, 1982. During the Meeting, five proposals from the Seychelles, U.K., U.S.A., France and Australia, seeking an end to commercial whaling, were presented. Upon the Seychelles' proposal, the IWC decided to amend the Schedule by twenty-five votes in favor, with seven against and five abstentions, so that the following new paragraph is added to paragraph 10:

Notwithstanding the other provision of paragraph 10, catch limit for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific advice, and by 1990 the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits.<sup>57</sup>

It should be noted that the decision is not an indefinite moratorium

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55. Int'l Whaling Comm'n, 32nd Mtg./Canadian Statement on the Moratorium on all Commercial Whaling, at 1 (1980).

56. Int'l Whaling Comm'n, 33rd Mtg./Chairman's Rep., para. 7 (1981).

57. Int'l Whaling Comm'n, 34th Annual Mtg./Chairman's Rep., para. 6 (1982).

and provides for its automatic reconsideration in 1990.

#### IV. SCIENTIFIC WHALING ISSUE

##### A. *Problem of Guidelines*

According to the moratorium decision of the IWC, commercial whaling can not be undertaken by the member countries after 1986 unless an objection to the decision is lodged by a country. Nevertheless, the member countries are guaranteed the right to issue a special permit for research whaling under article VIII, paragraph 1 of the ICRW. By invoking this provision, the whaling countries have tried to show the abundance of the resource state, and in particular to provide data and information for the Comprehensive Assessment of the moratorium decision. On the other hand, the anti-whaling countries have attempted to put restrictions on the freedom of scientific permit whaling on the ground of the possibility of its abuse.

At the 31st Annual Meeting of the IWC in 1979, the Technical Committee, by a majority decision, adopted the recommendation concerning the addition of the following paragraph to the Schedule:

A Contracting Government shall provide the Secretariat with proposed scientific permits before they are issued and in sufficient time to allow the Scientific Committee to review and comment on them. The proposed permits should specify: (a) objectives of the research; (b) number, sex, size and stock of the animals to be taken; (c) opportunities for participation in the research by scientists of other nations; and (d) possible effect on conservation of the stock. Proposed permits shall be reviewed and commented on by the Scientific Committee at Annual Meetings when possible. When permits would be granted prior to the next Annual Meeting, the Secretary shall send the proposed permits to members of the Scientific Committee by mail for their comment and review. Preliminary results of any research resulting from the permits should be made available at the next Annual Meeting of the Scientific Committee.<sup>58</sup>

This amendment is of dubious legality because of possible conflicts with article VIII of the ICRW and the sovereign rights of states. No reference is made to prior review of scientific permits in article VIII.<sup>59</sup> The IWC decided to amend the Schedule by 13 votes in favour to 4 against, with 6 abstentions.

In order to facilitate the review of scientific permits, the Scientific Committee developed a series of Guidelines for review in 1985. They are: Guideline 1, information required; Guideline 2, objectives of research; Guideline 3, review of Information on status of stocks; Guideline 4, comments on methodology; Guideline 5, participation by scientists from other

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58. Int'l Whaling Comm'n, 31st Mtg./Chairman's Rep., para. 7 (1979).

59. Under Article VIII, paragraph 1 of the ICRW, the member countries issuing special permits are only required to report to the IWC.

nations, and Guideline 6, possible effect on conservation of the stock. In view of these Guidelines, some members of the Committee suggested that Governments of Iceland and Korea refrain from issuing permits.<sup>60</sup>

In the same year, the IWC adopted the "Resolution on Scientific Permits" in which it was recommended that any whaling under special permits be conducted strictly in accordance with scientific requirements, and to take account of the advice and guidelines of the Scientific Committee. The Resolution also referred to the setting up of a Working Group to study a draft resolution proposed by Sweden and seconded by Switzerland on the subject of scientific permits and any relevant matters.<sup>61</sup>

In 1986, the Working Group met to discuss the draft resolution, but consensus was not reached, particularly because of the divergent opinions concerning a paragraph recommending that the products from special permit catches should not enter international trade. In order to bring the deadlock to an end, Argentina suggested the establishment of a small Working Group. After further protracted discussion in the Group, a new formula was developed and presented to the Chairman. Upon this proposal, the IWC adopted by consensus the following Resolution:

When reviewing such permits and when reviewing the results of research from permits previously issued in accordance with the procedures of the Convention, the Scientific Committee should take into account whether:

- (1) the objectives of the research are not practically and scientifically feasible through non-lethal research techniques;
- (2) the proposed research is intended, and structured accordingly to contribute information essential for rational management of the stock;
- (3) the number, age and sex of whales to be taken are necessary to complete the research and will facilitate the conduct of the comprehensive assessment; and
- (4) whales will be killed in a manner consistent with the provisions of Section III of the Schedule, due regard being had to whether there are compelling scientific reasons to the contrary.<sup>62</sup>

In that Resolution it is also recommended that following the completion of scientific treatment, the meat as well as the other products should be utilized primarily for local consumption. It should be particularly noted that in the Resolution the link is made between scientific permits and the Comprehensive Assessment.

At the 39th Annual Meeting of the IWC, held in Bournemouth from June 22-26, 1987, the United States proposed a resolution, cosponsored by Australia, Finland, Netherlands, New Zealand and Sweden. It was intended to give the IWC the discretion to recommend to the member countries whether the proposed research was consistent with the IWC's

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60. Int'l Whaling Comm'n, *Report of the Scientific Committee*, para. 5 (1985).

61. Int'l Whaling Comm'n, 37th Mtg./Chairman's Rep., appendix 2 (1985).

62. Int'l Whaling Comm'n, 38th Mtg./Chairman's Rep., appendix 2 (1986).

conservation policy. For that purpose it was suggested that the following four criteria should be added to the Scientific Committee's guidelines:

- (1) The research addresses a question or questions that should be answered in order to conduct the comprehensive assessment or to meet other critically important research needs;
- (2) The research can be conducted without adversely affecting the overall status and trends of the stock in question or the success of the comprehensive assessment of such stock;
- (3) The research addresses a question or questions that cannot be answered by analyses of existing data and/or use of non-lethal research techniques; and,
- (4) The research is likely to yield results leading to reliable answers to the question or questions being addressed.<sup>63</sup>

Japan was dismayed at the reopening of the permit issue dealt with in the preceding year and said that the Resolution infringed upon the sovereign rights of Contracting Governments to issue special permits. Iceland stated that since the Resolution was inconsistent with the ICRW, it would not consider itself bound by such a Resolution and would seek remedial methods in accordance with international law. The Soviet Union pointed out that the Resolution was in contradiction to the provisions of article VIII of the ICRW.<sup>64</sup>

As a justification of the Resolution, the United States invoked article VI of the ICRW.<sup>65</sup> However, it is doubtless that in article VIII the application of article VI is excluded by the phrase "Notwithstanding anything contained in this Convention." It goes without saying that the expression "anything contained in the Convention" includes not only article VI, but also other articles of the ICRW and its Schedule. Thus, U.S. reliance on article VI cannot be justified. In spite of an unequivocal meaning of the phrase of article VIII, the Resolution was adopted by 19 votes for, 6 against with 7 abstentions.<sup>66</sup> The lack of legal validity of the Resolution is beyond doubt.<sup>67</sup>

#### B. *Problem of Japanese Permits*

As mentioned earlier, at the 39th Annual Meeting of the IWC in 1987, Japan submitted a research program. It was explained that the principal aim of the program was to obtain estimates of various biological

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63. Int'l Whaling Comm'n, 39th Mtg./24.

64. Int'l Whaling Comm'n, 39th Mtg./Chairman's Rep., para. 8 (1987).

65. Article VI of the ICRW provides as follows: "The Commission may from time to time make recommendations to any or all Contracting Governments on any matters which relate to whales or whaling and to the objectives and purposes of this Convention."

66. See *supra* note 64, appendix 1.

67. During the Meeting, Iceland presented a paper concerning the "legal analysis" of the Resolution. Int'l Whaling Comm'n, 39th Mtg. at 2. In that paper, it is concluded that "the adoption and implementation of the proposed resolution, having no authority in the Convention and being inconsistent with express provisions thereof, would be *ultra vires*, void *ab initio* and *ipso facto* and without any legal effect whatever."

parameters, especially of age-specific natural mortality. Additionally, it was also intended to elucidate the role of whales, (namely, the sperm whale and the minke whale) as a key species in the Antarctic marine ecosystem. Japan emphasized that the results to be obtained by the implementation for this program will provide a scientific basis for resolving problems facing the IWC which have generated confrontation among the member nations due to the divergent views on the moratorium.

Unlike the past research activities, the research program would be under the control of a standing committee called the "Whale Research Coordinating Committee" which would consist of the Institute of Cetacean Research, the Far Seas Fisheries Research Laboratory, the Fisheries Agency and other relevant institutions. Actual research activities such as sampling research would be conducted by the Institute of Cetacean Research. Therefore, the special permit by the Government of Japan under article VIII of the ICRW is issued to the Institute.

It was also suggested that opportunities for participation in the research cruises under the program would be given to foreign scientists and that data and materials would be placed under the supervision of the IWC allowing free access to the scientific activities by the IWC.<sup>68</sup> In the opening address of this Meeting, however, John Selwyn Gummer, Minister of State, Ministry of Agriculture, Fisheries and Food of the United Kingdom, implicitly criticized the Japanese research program as follows:

It would be a tragedy if, under the guise of scientific study or subsistence hunting, commercial whaling were reintroduced. It will be necessary to allow the taking of whales for scientific purposes, and aboriginal effort will remain. Yet if either exception is used as a cover for continued commercial exploitation, the credibility of the IWC will be undermined. The world will not forgive us if promises to protect the whale are betrayed by subterfuge.<sup>69</sup>

Two views were expressed in the Scientific Committee with respect to the Japanese research program. One view was that the proposed catches would have no significant effects on the stocks. Another was that past catches had probably already had a substantial effect on the stock in the proposed research area and that the proposed catches would have the possible adverse effects on this stock.

The Committee members who took the latter view emphasized that non-lethal methods were available for the estimation of recruitment and the study of stock identity. Members who held the former position, however, pointed out that the specific objectives, which were concerned with the analysis of material (particularly ear plugs, ovaries, and stomach con-

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68. Government of Japan, The Program for Research on the Southern Hemisphere Minke Whale and for Preliminary Research on the Marine Ecosystem to the Antarctic, at 2, 19, 20 and 22 (1987).

69. Int'l Whaling Comm'n, 39th Mtg., Speech of Welcome by Minister of State, Ministry of Agriculture, Fisheries and Food, U.K. (1987).



tents collected from dead whales) could not be carried out through non-lethal research. They also added that non-lethal methods, such as photo-identification, would be difficult to apply to Southern Hemisphere minke whales. These whales have quick mobile behaviour and a large stock size and it is not known whether they have identifiable individual characteristics.<sup>70</sup>

In view of the difference of opinions in the Scientific Committee, the UK submitted to the Plenary a "Proposed Resolution on Japanese Proposal for Special Permits."<sup>71</sup> It recommended that the Government of Japan "refrain from issuing special permits to its nationals . . . until such time as the Scientific Committee is able to resolve the serious uncertainties identified in its discussion." In explaining the proposed Resolution, the UK said that with respect to minke whales "it had not been satisfactorily demonstrated that this large undertaking would produce reliable results," and that "sperm whale work was not of essential importance to the commission at this time."<sup>72</sup>

In replying to this criticism, Japan pointed out the "the only way to reduce uncertainty in knowledge of the stocks is by carrying out research." It was also emphasized that "the program has been designed with a genuine scientific aim, . . . a new research institute has been established to implement this long term stock. . . . The sample sizes are large enough to give reliable results but will not adversely affect the stocks."<sup>73</sup>

Japan then presented an amendment to the UK proposal, deferring consideration and any action until the 40th Annual Meeting.<sup>74</sup> However, the Japanese amendment was defeated by 11 votes for and 16 against, with 4 abstentions. As a consequence, the IWC by the necessary majority adopted the Resolution which recommends to the Government of Japan not to carry out the proposed research program.<sup>75</sup>

## V. POLICYMAKING PROCESSES OF THE U.S.A. AND JAPAN

### A. U.S.A.

Eskimos and Indians have a long history of whaling in America. E. J. Slijper says that "the Indians of the west coast of North America probably began as early as the 16th century to hunt the California Grey Whale, a mammal which is found exclusively in the northern part of the Pacific Ocean."<sup>76</sup>

It was in the middle of the 17th century that the whalers of New

70. Int'l Whaling Comm'n, *Report of the Scientific Committee*, para. 11.3(a)(6) (1987).

71. Int'l Whaling Comm'n, 39th Mtg., para. 45 (1987).

72. Int'l Whaling Comm'n, 39th Mtg./Chairman's Rep., para. 8.2(c) (1987).

73. *Id.* para. 8.2(c).

74. Int'l Whaling Comm'n, 39th Mtg., at 47.

75. Int'l Whaling Comm'n, 39th Annual Mtg./Chairman's Rep., appendix 4 (1987).

76. E. J. Slijper, *A Hundred Years of Modern Whaling*, Netherlands Commission for International Nature Protection, 30 (1965).

England started to hunt sperm whales. The hunt of this species was practiced very intensively in the Atlantic, Pacific and Indian oceans until about the middle of the 19th century.

The discovery and increasing utilization of petroleum in America, however, led to decreased demand for whale oil and to the decline of whaling. J. L. McHugh explains that "the great era of American Whaling ended before 1900. The collapse came not from a scarcity of whales but from the discovery of petroleum in 1859 and the destruction of much of the American whaling fleet during the Civil War."<sup>77</sup> E. J. Slijper also says:

The rise of the cotton industry in America and the gold rush together with the fact that petroleum was first discovered in 1859, had such an effect on sperm whaling that by 1860 the industry of those days had practically come to an end, even though the last sperm whalers did not return until 1925 for the last time to the harbour of New Bedford.<sup>78</sup>

In fact, it was early in 1971 that the Del Monte Fishing company, last survivors of a vast and historic industry which once sent 750 New England ships to sea, finished its final expedition with a catch of nearly 100 whales. The Company's license for hunting was not renewed for 1972 as a result of the adoption of the new U.S. whaling policy.<sup>79</sup>

In 1969, Congress enacted the Endangered Species Conservation Act. Under this Act, the Secretary of the Interior was asked to put certain species of whales on the Endangered Species list. On December 2, 1970, the Department of the Interior placed eight species of whales (the bowhead, right, grey, blue, humpback, fin, sei and sperm) on the endangered list. On December 12, 1971, Roger C. B. Morton, Secretary of the Interior, said: "We have done everything we can unilaterally, and we must now consider our efforts on getting the IWC to enforce their own regulations and to set realistic catch quotas by individual species and area in order to allow a maximum rebuilding of all whale populations."<sup>80</sup>

It should be noted that reference was not made to a total ban on whaling but to setting "realistic catch quotas by individual species and area." At the 23rd Annual Meeting of the IWC held in Washington from June 21-25, 1971, U. Alexis Johnson, under Secretary of State for Political Affairs, stated that "the blue whale unit must be abolished as a regulatory device and quotas must be established by species and by stock and more stringent criteria should be used in setting quotas."<sup>81</sup>

In order to enhance the effectiveness of international conservation programs, Congress enacted in 1971 the so-called Pelly Amendment to the Fishermen's Protective Act. Section 8(a) of the amendment reads as

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77. J. L. McHUGH, *supra* note 6, at 321.

78. *See supra* note 76.

79. CONSERVATION NEWS, *supra* note 5, at 1.

80. *Id.* at 1.

81. Int'l Whaling Comm'n, 23rd Mtg./Chairman's Rep., para. 3 (1971).

follows:

- (1) When the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President.
- (2) When the Secretary of Commerce or the Secretary of the Interior finds that nationals of a foreign country, directly or indirectly, are engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species, the Secretary making such finding shall certify such fact to the President.
- (3) Upon receipt of any certification made under paragraph (1) or (2), the President may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of fish products if the certification is made under paragraph (1) or wildlife products (if the certification is made under paragraph (2)) from the offending country for such duration as the President is sanctioned by the General Agreement on Tariffs and Trade.<sup>82</sup>

As illustrated above, until 1971, the U.S. Government undertook a series of conservation measures on whale species at the domestic level. At the international level, the United States intended to strengthen the IWC's regulations on a species by species approach. However, in 1972 when the U.N. Stockholm Conference was held, the U.S. whaling policy underwent a significant change. Prior to the Conference, both Houses of Congress approved a resolution calling for a ten-year moratorium on whaling. The Department of the Interior was extremely active in promoting the new policy. However, the Department of State opposed the policy because of diplomatic consideration between Japan and the U.S.S.R. Such a prudent posture of the Department of State was exposed to a storm of criticism by environmental groups. The Department of State was finally faced with the decision of taking the initiative in the Conference for a total ban on commercial whaling. Thus, the legislative and executive branches of the United States government stood on the same footing.

After the Conference, on October 26, 1972, Congress enacted the Marine Mammal Protection Act.<sup>83</sup> It stipulated that, except in cases authorized by the Secretary of Commerce, "there shall be a moratorium on the taking and importation of marine mammals and marine mammal products."<sup>84</sup> Referring to the international program, it directs the Secretary of Commerce, through the Secretary of State, to "initiate the amendment of any existing international treaty for the protection and conserva-

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82. Paragraph (2) of this provision was added in 1978 in response to the signing by the United States of the Convention on International Trade in Endangered Species of Wild Fauna and Flora. According to this addition, necessary adjustments were made in paragraph (3).

83. Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 86 Stat. 1027 (1972)(codified as amended at 16 U.S.C. sec. 1361 (1982)).

84. *Id.* at 86 Stat. 1029 (sec.101 (a)).

tion of any species of marine mammal to which the United States is a party in order to make such treaty consistent with the purposes and policies of this Act."<sup>85</sup>

Subsequently, on December 28, 1973, the Endangered Species Act was enacted by Congress.<sup>86</sup> It provides that "the Secretary of the Interior shall publish in the Federal Register, and from time to time he may by regulation revise, a list of all species determined by him or the Secretary of Commerce to be endangered species and a list of all species determined by him or the Secretary of Commerce to be threatened species."<sup>87</sup> The same eight whale species as in 1970 were placed on the list made up by the Department of the Interior in 1984.<sup>88</sup> Therefore, the Department has never considered the minke whale to be an endangered species.

It is noteworthy that Alaskan natives are exempted from the application of this Act. The Act stipulates as follows: "The provisions of this Act shall not apply with respect to the taking of any endangered species or threatened species, or the importation of any such species taken pursuant to this section, by; (a) any Indian, Aleut or Eskimo who is an Alaskan native who resides in Alaska; or (b) any non-native permanent resident or an Alaskan native village if such taking is primarily for subsistence purposes."<sup>89</sup> It is clear that this exception is based upon political considerations which override conservation needs.

As mentioned earlier, in 1972, the United States presented to the IWC the proposal of a global moratorium on commercial whaling under the strong backing of environmental groups. Prior to the 28th Annual Meeting of the IWC, which was held in London from June 24-28, 1974, chief representatives of the seventeen largest environmental groups in America, including the National Wildlife Federation, Sierra Club, National Audubon society, Fund for Animals, Animal Welfare Institute, the Wilderness Society and others, had a joint press conference to protest the whaling policies of Japan and the U.S.S.R. After the meeting, the environmental group representatives called on the embassies of the two countries to "reevaluate your previous objections" to the ten-year moratorium on commercial whaling. Charging Japan and the U.S.S.R with having "blocked all progress toward implementing the will of the other IWC member nations" and "refusing to abide by even modest conservation measures," they said that "drastic economic pressure is our only resource," and that "should your governments continue to obstruct the efforts to guarantee the protection of whales, we will have little choice but

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85. *Id.* at 86 Stat. 1039 (sec. 108(a)(4)).

86. Endangered Species Act of 1973, Pub. L. 93-205, 87 Stat 884 (1973)(codified as amended at 16 U.S.C. sec. 1531 (1982)).

87. *Id.* at 87 Stat. 887 (sec. 4(c)).

88. U.S. Fish and Wildlife Service of the Department of the Interior, Endangered and Threatened Wildlife and Plants 8 (July 20, 1984).

89. Endangered Species Act, *supra* note 86, at (sec. 10(e)).

to continue and expand economic pressure."<sup>90</sup>

At the diplomatic level, the U.S. Government has tried to persuade the whaling countries, especially Japan and the U.S.S.R., to cease whaling and has used the Pelly Amendment as leverage to extract their concessions. In view of the difficulty of compelling them to stop whaling under the Pelly Amendment, a general outcry arose for stronger enforcement leverage. In 1979, Congress determined that the Pelly Amendment, however effective, was inadequate to the task of persuading the whaling countries to give up whaling. For that reason, Congress passed the Packwood-Magnuson Amendment to the Fishery Conservation and Management Act.

The Packwood-Magnuson Amendment is directed specifically to whaling. It provides for an automatic sanction, that is, the reduction of at least fifty percent of a country's allocation of fish that it can harvest in the U.S. fishery conservation zone, if the Secretary of Commerce certifies that nationals of that country are whaling in a way that "diminishes the effectiveness" of the ICRW. If the certification by the Secretary of Commerce is terminated within one year, the suspended allocation may be reinstated. If the certification is not terminated within one year, the suspended allocation is permanently rescinded and the Secretary of State "may not thereafter make any allocation to that country . . . until the certification is terminated."

To sum up, the following characteristics might be pointed out in the U.S. decision-making process on whaling problems:

(1) The United States has evolved its national position on whaling issues in response to general sentiment of the public who believe with goodwill that all whales are on the brink of extinction. In contrast to many other issues, both the legislative and executive branches of government have worked together in meeting the general outcry.

(2) Instead of showing the public the scientific data and information on the resource state of whale species and removing the common misunderstanding that all whale species are severely endangered, the U.S. government has taken advantage of the whaling issues as a political means of stirring up mistrust of Japan. It is a conventional way in politics for decision-makers to manipulate diplomatic issues to divert national attention from their dissatisfaction with domestic issues.

(3) In pursuing the anti-whaling policy, the U.S. government has attempted to mobilize international public opinion through news media and NGOs' networks. For that purpose, at the 26th Annual Meeting of the IWC in 1974, the U.S. delegation asked the IWC to consider the proposal that the press and observers should be admitted to Commission meetings.<sup>91</sup> Upon this request, at the 30th Annual Meeting in 1978, the IWC

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90. *Whale Progress Made - Japan Boycott Strengthened*, CONSERVATION NEWS, vol. 39 at 2-3 (Aug. 1974).

91. Int'l Whaling Comm'n, 26th Mtg., *Circular Letter of the Agenda for the 26th An-*

decided that at the 31st Annual Meeting all Plenary sessions might be open to the press and that observers might attend meetings of the Commission and the Technical committee.<sup>92</sup>

(4) Another U.S. strategy for strengthening its influence in the IWC was to increase the number of the anti-whaling member countries. At the 27th Annual Meeting of the IWC in 1975, the U.S. Commissioner stressed the importance of persuading non-whaling non-member countries to join the IWC and suggested that the subject should be placed on the agenda for the next meeting.<sup>93</sup> In accordance with this strategy, from that year to 1982, the U.S. Government made diplomatic efforts to invite non-whaling countries to join the IWC in order to obtain the necessary three-quarters majority for the moratorium decision.

(5) At the 25th Annual Meeting of the IWC in 1973, the U.S. delegation submitted a Draft Protocol concerning amendments to the ICRW.<sup>94</sup> Upon this suggestion, the IWC adopted in 1974 a Resolution recommending the establishment of a working group to consider the matter. In that Resolution, the rationale for amendments of the ICRW was that since the signature of the ICRW in 1946, changes have occurred in whaling and stocks of cetaceans such that there is need to strengthen the mechanism for the international conservation of whales and their rational management both at present and in the future, and that the discussions in the Law of the Sea Conference may affect the activities of the IWC.<sup>95</sup> Yet, after the adoption of the moratorium decision by the IWC, the U.S. Government has kept silent on this matter.

(6) The U.S. Government draws a distinction between "commercial" whaling and "aboriginal" whaling. By this distinction, the catch of bowhead whales by U.S. aboriginals is exempted from the application of the moratorium decision. In view of the fact that this species is facing the greatest danger of extinction, however, the U.S. posture appears to be inconsistent with a genuine concern for conservation. There is serious doubt whether U.S. motivations are really directed at conservation concerns.

(7) The U.S. decisions have been motivated by political considerations rather than by scientifically based arguments. The IWC has adopted a number of appropriate conservation measures and its stance on the utilization of whale resources has been very strict under the NMP. There is considerable doubt as to the scientific validity of a total ban on commer-

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*nual Meeting* (April 24, 1974).

92. Int'l Whaling Comm'n Rep., *Chairman's Report of the 30th Annual Meeting*, para. 6, and Appendices 1 and 2 (1978).

93. Int'l Whaling Comm'n Rep., *Chairman's Report of the 27th Annual Meeting*, para. 22 (1975).

94. Int'l Whaling Comm'n Rep., *Chairman's Report of the 25th Annual Meeting*, para. 19 (1973).

95. Int'l Whaling Comm'n Rep., *Chairman's Report of the 26th Annual Meeting*, para. 21 (1974).

cial whaling. Conservation needs vary significantly from species to species and from stock to stock. In 1972, the Scientific Committee pointed out as follows: "A blanket moratorium on whaling cannot be justified scientifically. Prudent management requires regulation of the stocks individually. A moratorium would also probably bring about a reduction in the amount of research, whereas there is a prime need for a substantial increase in research activity."<sup>96</sup> In 1973, the Committee also emphasized:

The individual whale species are to be regarded by the Commission as resources which should be managed so as to keep them in a condition which will enable them to provide the optimum yield on a continuing basis. . . . Effective management can only be achieved if each species, and, indeed, each individual stock is managed and exploited separately in the way appropriate to its condition. Any blanket management, such as a global moratorium would be in direct contradiction to this principle.<sup>97</sup>

Despite the fact that the concept of individual species management has been operating effectively, the introduction of the idea of a global moratorium on commercial whaling has brought about unnecessary confusion in the IWC.

(8) In attempting to force complete cessation of commercial whaling, the U.S. Government has acted on grounds which are scientifically uncertain and lacking in data on the resource state of whales. It was on the motion of the U.S. delegation that, in 1972, the IWC adopted a Recommendation on the need of the IDCR. In 1975, the IWC decided, upon the U.S. proposal, formally to initiate the IDCR. The decision was made "remembering that the U.N. Conference on the Human Environment, Stockholm, 1972, pointed out the necessity of increased whale research."<sup>98</sup> In accordance with this decision, Japan has provided vessels, personnel and money for the Southern Hemisphere Minke Whale Assessment Cruises which have formed an important part of the IDCR program. If the United States has doubts about the results that have been obtained by such cruises, it should suggest an alternative plan for cetacean research in the Antarctic. Thus far, no constructive attitude has been seen in the U.S. policy on this matter. Obstruction to the advancement of scientific research of whale resources in the Antarctic seems to be the only policy choice of the United States.

(9) There is sufficient scientific evidence that the Southern Hemisphere minke whale is in a healthy state and that its stock size can sustain some moderate level of catches without risk of depletion. In 1973, the Scientific Committee pointed out that "this stock certainly has a surplus

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96. Int'l Whaling Comm'n Rep., *Report of the Scientific Committee*, Summary and Recommendations to the Commission, para. 22 (1972).

97. Int'l Whaling Comm'n Rep., *Report of the Scientific Committee*, Summary and Recommendations to the Commission, para. 37 (1973).

98. Int'l Whaling Comm'n, *Chairman's Report of the 27th Annual Meeting (Summary and Recommendations to the Commission at para. 13 (1975))*.

above the MSY level."<sup>99</sup> Since then, there has been no evidence of any stock decline; on the contrary, there have been a number of indications of the stock's increasing. Under these circumstances, the United States cannot justify sanctions in the name of conserving minke whales. Still more inappropriate is the imposition of those sanctions upon Japanese scientific catches.

(10) As a diplomatic means for pursuing its whaling policy, the United States has exerted political and economic pressures on the whaling countries to stop whaling. The U.S. argument on the issue of scientific whaling is that the research program of the Japanese Government on minke whales is diminishing the effectiveness of the ICRW. The United States appears to have undertaken a policeman's role in the international community regarding whale conservation, despite not having been conferred such an authority.

(11) It seems that the strongest anti-whaling sentiments are founded on emotions rather than on science and logic. It is folly to force one's own value system upon other peoples. Food supply sources of each nation are rooted in long-term tradition and dietary customs. If the Indian people protested against the Americans' habit of eating beef, how would the Americans answer? It is not a final, acceptable solution to the problem for the Japanese to switch to imported beef from the United States. The existence of McDonald's outlets in Japan, alone, is not an indication that the American food preferences have found acceptance in Japan.

A uniculture is not an ultimate goal of mankind. On the contrary, each nation should maintain its cultural identity. A culture is in essence diversified. Unification of food supply sources might contribute not only to the loss of diversification of food culture, but might also be environmentally dangerous. Excessive dependence on a single crop or livestock weakens the disease-resistance capabilities of any given species. Additionally, other environmental problems may surface. A good example of this is the depletion of South American tropical rain forests due to the increasing consumption of fast food beef in the United States. The American hamburger industry is dependent upon cheaper meat exported by those countries who are more interested in increasing export earnings by expanding ranch fields than they are in environmental protection. Some environmental groups in the United States, in the cause of saving tropical rain forests, have initiated a campaign against the eating of fast food hamburgers.

(12) Although the U.S. initiatives in marine mammal conservation efforts are praiseworthy, they are nevertheless inflexible. It becomes difficult to apply the brake to the public furor about whales and whaling. The U.S. whaling policy is like an automobile without brakes. In 1965, U.S. decision-makers, Ambassador William C. Herrington and U.S. Commis-

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99. Int'l Whaling Comm'n Rep., *Report of the Scientific Committee* (Summary and Recommendations to the Commission, para. 7 (1973)).



sioner J. L. McHugh, took the view that "the best strategy was to alert public opinion to the slow progress of the Whaling Commission." That strategy resulted in successfully strengthening the IWC's regulations. Then Mr. Hughes pointed out that the problem now is to halt the forces we have set in motion before they destroy the object of our efforts."<sup>100</sup> The subsequent official actions, however, have failed to cool the overheated public. It would be counterproductive to force a total ban on commercial whaling when the IWC has succeeded in solving most of its major problems.

### B. *Japan*

Whales have been of benefit to the Japanese since the stone age, as indicated by a number of whale bones found in shell mounds. Owing to land-poor and mountainous geographical conditions that are not favorable to the development of livestock farming and to religious constraints that forbade the eating of the meat of four-legged animals, the Japanese have, from ancient times, made use of whales, together with fish and shellfish, as a source of animal protein. For that reason, the Japanese have traditionally treated the whale not as a marine mammal, but as a kind of fish, although this is scientifically incorrect. It is only since the end of the nineteenth century that the Japanese began eating beef, pork and mutton.

From old times, the Japanese people have attempted not only to catch stranded whales but also to hunt migrating whales. Coastal whalers engaged in whaling by using small boats and hand harpoons. It was at Taiji, Kishu (now Wakayama Prefecture) in 1606 that commercial whaling started in an organized way in Japan. Yorimoto Wada established an organization of whalers called "Sashite-gumi" (hand harpooners' organization).

Using these traditional methods, however, the whalers could only hunt right and sperm whales; other species swam too fast and sank after their death. At the end of the seventeenth century, a new whaling method was invented by Yoriharu Wada at Taiji. He took an idea from a spider web and applied it to whaling. The use of whaling nets was added to traditional whaling methods. With this unique net-whaling method, it became possible to catch other fast swimming species. Afterwards, this whaling method spread from Taiji to other regions such as Kochi, Yamaguchi, Fukuoka and Chiba prefectures.

In 1899 the modern Japanese whaling industry evolved with the introduction of Norwegian whaling techniques. The new whaling method, using harpoon guns on the bows of steamships, made it possible for whalers to hunt the fastest swimming whales such as the blue, fin, sei and bryde's whales which could not be caught by the net-whaling method. Until 1908, twelve whaling companies engaged in whaling in the Japan

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100. J. L. McHUGH, *supra* note 6, at 313.

Sea and in the coastal areas of the Pacific Ocean. However, the adoption of the modern whaling method and rapid expansion of the industry caused an inevitable decline in the catch. Most of the companies went out of business for lack of whales. In 1909, the existing companies were integrated into four companies. Nevertheless, coastal whaling was no longer profitable. For that reason, since 1929, the whaling companies began to consider participation in Antarctic whaling.

But, as a late-comer, Japan faced the difficult problem of getting the understanding of the predecessor countries, Norway and England. In addition, there were other problems to be overcome such as the acquisition of factory ships, catcher boats and financial and human resources.

It was in 1934 that Japan was first able to send a pelagic whaling fleet to the Antarctic. The factory ship and catcher boats were purchased from Norway. Two years later, another factory ship, "Nishinmaru," which was built in Japan, was added to Japanese Antarctic whaling fleet. Four pelagic whaling fleets were sent to the Southern Hemisphere in 1937 and six in 1938.

Since Antarctic whaling had begun in 1904 with the Norwegian land station on South Georgia, and had been followed by England, the Antarctic had become the major world whaling ground by the 1920's. The monopolistic situation of Antarctic whaling by both countries was then broken by Japanese entry into Antarctic whaling. After 1935, Panama, Denmark, Germany and the United States followed Japan.

It should be noted that the present endangerment of great whales such as the blue, fin and humpback whales was caused by exploitation in the 1920's and particularly in the beginning of the 1930's. Dr. George L. Small states as follows:

During the 1925 whaling season in the Antarctic, 10,500 whales died. In 1930 the figure exceeded 30,000. In 1931 the blood ran thicker and 40,200 whales died. The worst was yet to come for the whale population as a whole, yet had already arrived for the blue whales. Between 1926 and 1930 the total catch climbed to 49,800. In the 1931 season alone, the kill of blue whales reached an incredible 29,400, the highest ever recorded. Never again could man find so many blue whales in one year.<sup>101</sup>

A substantial drop in oil prices resulting from overproduction brought the conclusion of a Production Agreement between Norwegian and British whaling companies on May 9, 1932. Since the main aims of that Agreement were to stabilize oil prices and to prevent new entry into the industry by others, it did not effectively regulate whaling<sup>102</sup> and was

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101. G. SMALL, *THE BLUE WHALE* 14 (1971).

102. The Agreement was not intergovernmental, but among private companies. In the Agreement, the BWU formula was introduced for the first time. It was a little different from the formula used in the ICRW: one blue whale equals three humpback whales which equals five sei whales.

terminated two years later.

Meanwhile, international concern for the future of the world's stock of whales was expressed not only from scientific circles but also from non-whaling countries such as France. Voices were raised concerning the need for international regulation of the industry. Under the initiative of France, a meeting of the League of Nations was held in Paris in 1927 to discuss the problem and recommended that an international treaty for regulating whaling activities be concluded. In response to that recommendation, in 1930, an intergovernmental conference was held in Berlin to consider the draft proposals of the international treaty. Japan sent two representatives to that conference. As a result, on September 24, 1931, the Convention for the Regulation of Whaling was signed in Geneva by twenty-six countries. It was the first treaty for regulating whaling at the intergovernmental level.<sup>103</sup> It was not until January 18, 1936, however, that the Convention went into force. The Convention was ratified by nineteen countries, but Japan, Germany and the Soviet Union did not adhere to it. According to the explanation of the Japanese Government, the reasons for its non-participation were that the Soviet Union did not accede to the Convention and that it had an objection to the application of the prohibition of the catch of the right whales to the North Pacific.<sup>104</sup>

On June 8, 1937, the International Agreement for the Regulation of Whaling<sup>105</sup> was signed in London by nine whaling countries. It came into force provisionally on July 1, 1937 and formally on May 7, 1938. This time, Japan did not send a delegation to the negotiating conference and again did not accede to the Agreement. Since the duration of the Agreement was for only one year, the conference to extend its duration and to amend it was held in London in 1938. The British Government strongly requested Japanese participation in that conference. In response to the request, Japan sent a delegation to the conference. The Protocol amending the Agreement was signed on June 24, 1938.<sup>106</sup> In order to induce the Japanese Government to participate in those agreements, special considerations were given in the Protocol to whaling in the North Pacific, the oldest whaling area, in terms of minimum-length requirement and the

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103. The Convention was rudimentary. Neither were minimum lengths specified nor was any catch limit established. It only gave protection to the right whales, immature whales and female whales accompanied by calves (arts. 4 & 5).

104. JAPANESE MINISTRY OF FOREIGN AFFAIRS, *SENGO NO HOGEI NO AYUMI* (History of Whaling after the Second World War) 13 (1964).

105. This Agreement also contained a few rudimentary limitations among which the following were important: It was forbidden to take the grey and right whales (art. 4); As regards the blue, fin, humpback and sperm whales, minimum lengths were specified (art. 5); It was prohibited to kill immature whales and female whales accompanied by calves (art. 6); Pelagic whaling was permitted only south of 40 South Latitude during the period from Dec. 8 to March 7 (art. 7).

106. The Protocol added the following two important amendments to the Agreement: It was forbidden to kill the humpback whale throughout the Antarctic (art. 1); A Whale Sanctuary, where no whaling of baleen whales was permitted, was established in waters south of 40 South Latitude and from 70 to 160 West Longitude (art. 2).

whaling season of the sperm whale (arts. 4 & 6). Nevertheless, Japan adhered neither to the extended Agreement nor to the Protocol. In order to remove international distrust, Japan expressed the intention to accede to them one year later, but the outbreak of the Second World War prevented it from doing so.

During the War, most of the Japanese whaling vessels were converted to military use and destroyed. One of the most serious problems after the War was a severe food shortage. In order to mitigate that plight, on November 3, 1945, General Douglas MacArthur, Commander of the Allied Occupation Forces, permitted Japan to recommence whaling within the so-called MacArthur Line. In 1946 the General Headquarters (GHQ) allowed Japan to resume Antarctic whaling. The GHQ made it a condition that American inspectors be stationed on board to assure compliance with existing international regulations.<sup>107</sup> By transforming tankers into factory ships, two pelagic expeditions were sent to the Antarctic in that year. The Japanese people were able to survive mainly on a diet of whale meat.

Whale was the cheapest animal protein for the ten years following the Second World War. Until the mid 1960s, whale meat continued to be the main source of animal protein for the Japanese. Reconstruction of the whaling fleets proceeded slowly under the administration of the GHQ. After 1951, when Japan's sovereignty was restored by the conclusion of a Treaty of Peace with the Allied Powers, expansion of the whaling industry started in full swing. The whaling industry was financed by the Japan Development Bank. Governmental financial aid continued until the mid 1960s. As a consequence, in 1954/55, the Antarctic whaling fleets increased to three, in 1956/57 to five, and in 1957/58 to six. From 1960/61 to 1964/65, seven pelagic expeditions took part in Antarctic whaling. They were the largest fleet of factory expeditions sent by Japan to the Antarctic. Of these seven factory ships, four were second-hand vessels bought from companies which had ceased whaling operations in Norway, England, Panama and South Africa.

Postwar Japanese whaling was not necessarily free from domestic legal restrictions. In 1949, the Fisheries Law was enacted. This Law is concerned with inland-water fisheries, coastal fisheries and distant-water fisheries, including whaling. Under the Fisheries Law, every whaling vessel is required to obtain a license to operate from the Minister of Agriculture, Forestry and Fisheries. Licenses can be denied to prevent an excessive number of vessels (art. 52). The Minister is also empowered to specify the number and tonnage of vessels as well as the geographical area and period of operations (art. 58). Until the mid 1960s, however, the Japanese Government did not exert these powers to limit the operation of its whaling fleets in the interests of conservation. The main concern of the government did not lie in controlling an excessive expansion of the fleets,

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107. It was in 1951 that Japan acceded to the ICRW. Therefore, even before its accession to the ICRW, Japan accepted the IWC's regulations.

but rather in promoting the economic interests of the whaling companies. It was by external pressures that Japan was forced to decrease the number of the whaling fleets.

As mentioned earlier, the IWC failed to take effective conservation measures until the mid 1960s. However, the IWC succeeded in reducing the Antarctic quota in 1963/64 from 15,000 to 10,000 BWU and in fixing the total maximum catch in 1965/66 in the Antarctic at 4,500 BWU. These steps represented a great economic sacrifice for Japan. In the subsequent years, further reductions in the Antarctic quota were made by the IWC. In response to the sharp quota reductions, Japan was forced to decrease the number of fleets it sent to the Antarctic.

In the 1970s, the situation became more unfavorable to the Japanese whaling industry. It became difficult for so many whaling companies to operate competitively in the Antarctic. For that reason, by integrating whaling divisions of the three fishing companies (Taiyo Fishing Co., Nisui Fishing Co. and Kyokuyo Fishing Co.) and three whaling companies (Nihon Whaling Co., Nitto Whaling Co. and Hokuyo Whaling Co.), "Nippon Kyodou Hoge Co." was established in 1976. Even with that measure, the whaling industry found it hard to maintain itself. In 1977, the newly established company was forced to reduce whaling fleets from three to one, because catch quotas were reduced by half. The adoption of the moratorium decision by the IWC in 1982 struck a decisive blow to Japanese commercial whaling. Japan filed an objection to that decision according to article V, paragraph 3 of the ICRW. However, in 1984, under strong political and economic pressures by the United States, Japan was forced to withdraw its objection. According to the decision of the Japanese Government to accept the moratorium of the IWC, the last remaining whaling company was dissolved on November 27, 1987.

Lastly, additional reference must be made to the problem of pirate whaling. Pirate whaling impaired to a considerable extent the international image of Japanese whaling. In addition to Japan's intransigent attitudes toward international regulations of whaling until the mid 1960s, Japanese failure to have quickly responded to control of unauthorized whaling contributed to the formation of the image of Japan as a law-breaker and gave extremist environmentalists an excuse for the moratorium on commercial whaling.

The IWC was informed of illegal whaling by the ship "Sierra" in October 1975. The Sierra was originally the whaler-catcher AM No. 4, which was launched in 1960 in the Netherlands. When Dutch whaling ended in 1966, the ship underwent conversion in Rotterdam. This conversion enabled the ship not only to catch whales but also to process them. In 1968, the ship was renamed the Run, registered to the Run Fishing Company in the Bahamas, and began catching and processing whales in the South Atlantic. From 1968 to 1971, the Run was based at Cape Town. In 1971, the Supreme Court in Cape Town ordered the attachment of Run's cargo. In the following year, the Run Fishing Company was fined US \$10,000 by the Government of the Bahamas for illegal whaling. The company de-

clared itself bankrupt.<sup>108</sup>

In the same year, the Run was renamed the Sierra and resumed whaling. The ship flew the Somali flag. The registered owner was the Norwegian *Forretningsbanken A/S*. It caught most frequently dei and bryde's whales, and as chance offered, took endangered species such as blue, humpback and right whales. The Sierra's master and first officer were Norwegians and the chief engineer was British. Four Japanese meat inspectors were aboard to buy all the meat from whales taken and processed by the ship. Japan imported whale meat under the name of the produce of Spain or Somalia. An unsigned Confirmation of Order dated June 4, 1973 revealed that Taiyo (Canada) Ltd., a subsidiary of Taiyo Fishing Co. in Japan, was involved in the trade.<sup>109</sup>

In 1977, as a result of U.S. pressure on the Somali Government, Sierra's registration was changed again, this time to Sierra, Ltd., at Limassol in Cyprus. Most of the shares of that firm belonged to Beacon Sierra Ltd., in Liechtenstein. In 1978, Japan began to import whale meat from Cyprus.<sup>110</sup>

Early in 1978 the Sierra was joined in Las Palmas, Spain, by the Tonna, a Japanese built vessel, originally named Shunyo Maru. The registered owner of the Tonna was the Dutch company, Red Mullet Shipping Company, in Curacao. The Tonna acted as factory ship and the Sierra as the killer-factory. The master of the Tonna was Norwegian. The crew was made up of Norwegians, Spaniards, South Africans and others, and included three Japanese inspectors. On July 22, 1978, the weight of the whales caused the ship to founder about 220 miles off the Portuguese coast. The survivors were rescued by a Greek vessel.<sup>111</sup>

In 1979, the Cape Fisher, which was the former Japanese trawler Yashima Maru, took the place of the Tonna. It was owned by Sierra Ltd., Limassol. The master was Portuguese and most of the crew were former crewmen of the Tonna. There were Portuguese, Norwegian, British, and four Japanese.<sup>112</sup>

From May to June of 1979, the Sierra appeared at Aveiro and Leixoes in Portugal. At Las Palmas or Leixoes, the Sierra transferred whale meat to Japanese cargo vessels such as Osaka Reefer, Yamato Reefer, Nipponham Maru No 1, Snowflower, Juyo Maru, Hayashikane Maru No 1 and Kunisaki Maru.<sup>113</sup> In the same year, while the Sierra was operating off the Portuguese coast, it suffered an attack by the Sea Shepherd which carried seventeen anti-whaling people. On February 6, 1980, while the Sierra was at anchor for repair in Port Lisbon, it suffered an explosion and

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108. PEOPLE'S TRUST FOR ENDANGERED SPECIES, PIRATE WHALING 5-6 (1979).

109. *Id.* at 10, 15.

110. *Id.* at 12, 21.

111. *Id.* at 21-24.

112. *Id.* at 34-36.

113. *Id.* at 18, 21 & Addenda.

sank into the sea.

The above-mentioned chronological facts show that a few Japanese personnel were involved in the Sierra's operations, that ex-Japanese vessels were used for pirate-whaling, and that Japan provided the market for the produce of non-IWC whalers. Whale oil went to the European market. Other IWC member countries such as England and Norway were involved in the problem in terms of financial and human resources and of technology transfer.

In the meantime, the IWC made efforts to prevent IWC members from becoming involved in whaling under flags of convenience. Under the U.S. initiative, the IWC, at its 28th Annual Meeting in 1976, adopted a resolution recommending that the IWC's member countries take the following measures to:

- (1) prohibit the sale, charter, transfer, loan or delivery of vessels, equipment or supplies likely to be used for whaling operations to any nation or entity under the jurisdiction of any nation which is not a member of the IWC; and (2) take all practicable steps to discourage the dissemination by its citizens of expertise and assistance necessary to the conduct of whaling operations in any form, including, but not limited to (a) the training of personnel; (b) the designing of ships, land stations, or other facilities to be used in the conduct of whaling operations; and (c) financial aid for whaling operations; to any nation or any entity under the jurisdiction of any nation which is not a member of the IWC.<sup>114</sup>

At a Special Meeting of the IWC, which was held in Tokyo on December 6 & 7, 1977, Japan reported that,

[I]t is their practice not to authorize the transfer or sale of whaling vessels and equipment to non-member whaling nations . . . with great respect to restrictions on imports of whale products from non-IWC nations, there are difficulties arising from other treaty obligations such as GATT, but steps are being taken to discourage such imports.<sup>115</sup>

At the 30th Annual Meeting of the IWC in 1978, Japan reported its compliance with IWC's resolutions dealing with the prohibition of importation of whale products from non-member countries and the prohibition of the transfer of whaling vessels and equipment and other types of assistance to non-member countries.<sup>116</sup>

At its 31st Annual Meeting in 1979, the IWC resolved as follows:

All member nations shall cease immediately any importation of whale meat and products from, and the export of whaling vessels and equipment to non-member countries and operations. With respect to any international efforts to negotiate a new convention for the protection

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114. Int'l Whaling Comm'n, 28th Mtg./Chairman's Rep., Appendix 5, (1976).

115. Int'l Whaling Comm'n, Special Mtg./Chairman's Rep., para. 12 (1977).

116. Int'l Whaling Comm'n, 30th Mtg./Chairman's Rep., para. 22 (1978).

and conservation of whales, all member nations shall support a textual prohibition on any importation of whale meat and products from, and the export of whaling vessels and equipment to non-member countries and operations, and all member countries consider through the application of national legislation, prohibiting whaling by non-member countries within their fishery conservation zones.<sup>117</sup>

It was on July 5, 1979 that Japan took formal legal measures to prohibit the import of whale products from non-IWC member countries and to prohibit the transfer of whaling tools to them. Pirate whaling was unauthorized and clearly illegal. It was irrelevant to whaling by Nippon Kyodou Hogeï Co. which was authorized by the Japanese Government. However, selfish and greedy pursuit of economic interests by many Japanese and delay of a governmental response undermined considerably the credibility of Japanese whaling and accelerated an international public outcry against whaling.

To conclude, the characteristics of the Japanese decision-making process might be summarized as follows:

(1) Japanese traditional whaling methods, which were represented by the net-whaling method, did not cause overexploitation of whale resources. They were in harmony with the natural mechanism. However, the introduction of the modern whaling method by steam-driven vessels with harpoon guns brought about a complete change in whaling practice. It encouraged ecologically insensitive commercial whaling.

(2) Since the Japanese had regarded whales as a kind of fish, little thought had been given to conservation of wildlife or marine mammals. For a long time, the Japanese considered whale resources not as *res communis*, but as *res nullius*. It was not until the 1970s that Japan came to understand the real need for conservation of whale resources as a common heritage of mankind.

(3) In the prewar days, Japan acted passively to the international regulations of whaling. Japan never participated in international agreements on whaling. This generated distrust of Japan among other countries. Such distrust was intensified by a passive attitude to the quota restrictions by the IWC in the 1950s and 1960s.

(4) Lack of concern for resource management is reflected in the absence of effective domestic legislation on whaling. In comparison with the Norwegian Whaling Act of 1929, which became the model of the Convention for the Regulation of Whaling in 1931, the Japanese Factory Vessel Law of 1933 was less stringent and less strictly enforced. The same is true of the Fisheries Law of 1949.

(5) Past Japanese whaling policy was biased toward the promotion of the whaling industry. Throughout the prewar and postwar periods, economic considerations were given much weight. Japanese whaling activities

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117. Int'l Whaling Comm'n, 31st Mtg./Chairman's Rep., Appendix 9 (1979).



were governed by short-range economic considerations rather than by the requirements of conservation.

(6) Reduced catch limits and increasing costs of Antarctic whaling since the mid 1960s forced a series of readjustments in the fleets of whaling countries. As a consequence, England, Norway and the Netherlands decided to drop out of Antarctic whaling by transferring their fleets and quota shares to Japan. Japan increased its share through the purchase of the factory ships of those countries. This was due to the fact that the Japanese whaling industry had higher operating profits than other competitors as a result of the several advantages it derived from whale meat.

(7) Policy efforts for reduction of excessive whaling fleets were the result of the strengthening of international regulations on whaling. However, the turning point for Japanese whaling came in 1982, when the IWC adopted the moratorium decision on commercial whaling. It was an appalling shock to the Japanese whaling companies, for they had made the necessary economic adjustments according to reduced catch limits.

(8) Except in the case of its active cooperation in Antarctic minke whale research under the IDCR, Japan has never played a constructive role in building up a better management system of whale resources. Instead of acting in a productive way, a passive emotional approach based upon an inferiority complex has prevailed among the Japanese people. Many opinion leaders have often made mention of racial discrimination or "bashing" of the Japanese.

## VI. WHALE WAR

### A. *First Round*

At its 33rd Annual Meeting in 1981, the IWC amended the Schedule for the Western Division stock of North Pacific sperm whales to establish what was effectively a zero catch limit. On November 9, 1981, Japan filed an objection to this amendment under article V, paragraph 3 of the ICRW. In 1982, Japan succeeded in obtaining an IWC revision of this zero quota for the following two harvest seasons.<sup>118</sup> Moreover, as mentioned above, in 1982 the IWC decided on a five-year moratorium on commercial whaling beginning in 1986. Japan, along with the Soviet Union and Norway, lodged an objection to this decision on November 4, 1982. To these Japanese actions, the United States made protests and suggested sanctions under the Packwood-Magnuson Amendment and the Pelly Amendment. The linkage between fish and whales was a strong pressure to Japan.

In order to avoid a diplomatic confrontation with the United States, Japan entered into discussions with the Secretary of Commerce Malcolm

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118. At its 34th Annual Meeting in 1982, the IWC reconsidered the matter and agreed that, "catch limits for the 1982 and 1983 coastal seasons are 450 and 400 whales respectively." See Int'l Whaling Comm'n, 34th Mtg./Chairman's Rep., para. 13, (1982).

Baldrige and Secretary of State George Shultz, in an attempt to resolve differences between the two countries over whaling issues. Japan was compelled to make a hard policy choice of whether to continue whaling at the cost of fish allocation in the U.S. 200-mile waters. The fear of reduction of fish allocation narrowed the scope of the Japanese policy.

These discussions resulted, on November 13, 1984, in an exchange of letters between Yasushi Murazumi, charge d'affaires of Japan in the United States, and the Secretary of Commerce. In the Murazumi-Baldrige Agreement, Japan was obliged to make one-sided concessions. In that Agreement, Japan made two promises to the United States. One was to withdraw its objection to the sperm whale quota; another was to withdraw its objection to the moratorium decision of the IWC and to end all commercial whaling by April 1, 1988. The United States in turn agreed not to certify Japan under the Pelly and Packwood-Magnuson Amendments.

Meanwhile, Greenpeace and other major environmental groups in the United States filed suit on November 8, 1984, about three weeks after the negotiations between both countries commenced, requesting that the U.S. District Court in the District of Columbia order the Secretary of Commerce to certify Japan under the Packwood-Magnuson and Pelly Amendments. The Japanese Whaling Association and the Japanese Fishing Association participated in the case as defendant-intervenors.

On March 5, 1985, the case was decided in favor of the plaintiffs. Charles R. Richey, U.S. District Court Judge, ruled that "the defendant Baldrige (sic) and his subordinates, and defendant Shultz and his subordinates, have no discretion not to certify Japanese sperm whaling in violation of the IWC zero sperm whale quota, and reduce Japan's fishing allocation since such activities diminish the effectiveness of the International Convention for the Regulation of Whaling," and ordered that "defendant Baldrige (sic) shall forthwith certify to the President, pursuant to the Pelly and Packwood-Magnuson Amendments, the Japanese sperm whaling which has taken place in violation of the IWC sperm whaling quota."<sup>119</sup>

In response to the District Court decision, Japan indicated that it would not withdraw its general objection to the moratorium on April 1, 1985, as agreed. It also indicated, however, that if the decision of the District Court were reversed by the United States Court of Appeals, it would be prepared to withdraw that objection within five days of the new decision.

The U.S. Government immediately appealed the ruling. However, the Court of Appeals upheld the judgement of the District Court. The Court said as follows: "Where a foreign nation allows its nationals to fish in excess of recommendations set forth by an international fishery conserva-

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119. *American Cetacean Soc'y v. Baldrige [sic]*, 604 F. Supp. 1398 (D.C. Cir. 1985).

tion program, it has *per se* diminished the effectiveness of that program. In such a case, the Secretary is mandated to certify the foreign country under the Pelly Amendment. Specifically, where a foreign country's nationals harvest whales in excess of IWC harvest quotas, certification is mandatory and nondiscretionary."<sup>120</sup>

In the course of the trial, intervenor-appellants Japan Fisheries Association and Japan Whaling Association argued that "certification and the imposition of sanctions pursuant to such certification are violations of international law when applied to a validly objecting member insofar as the Convention requirements are not effective with respect to such a member."<sup>121</sup> However, such an argument was rejected by the Court which said as follows: "There is no prohibition in the Convention against member nations acting unilaterally to force an objecting member (or non-member) to comply with the Convention's regulations, even where those regulations are not binding on the member (or nonmember) under the terms of the Convention itself."<sup>122</sup> This interpretation is against the fundamental principle of international law, especially the Law of Treaties, *pacta sunt servanda*. The result is the law of the jungle.

In the dissenting opinion, U.S. District Court Judge Oberdorfer wrote: "I cannot agree that, in the circumstances of this case, the Pelly Amendment . . . should be construed to impose upon the Secretary of Commerce a ministerial duty to certify Japan solely because it is not adhering to an international whaling quota which is not binding on it."<sup>123</sup> From the legal point of view, Judge Oberdorfer was accurate in his interpretation of the ICRW. However, the majority opinion was based upon the mistaken interpretation of the ICRW, especially in saying that Japan violates IWC whaling quotas.

The Case was then brought before the Supreme Court of the United States by the U.S. Government. In the petition, it was emphasized that foreign affairs is the province of the Executive Branch. In addition, it was pointed out that "Japan has an unchallenged and unchallengeable right to free itself of quotas established by the IWC by filing objections to them," and that "Japan could not violate the quotas because, by its objections, the quotas were not applicable to it."<sup>124</sup> The Court ruled against the plaintiffs. As a result, in accord with the Murazumi-Baldrige Agreement, Japan withdrew the objection to the sperm whale quota and the objection to the moratorium decision. At any rate, Japan lost the first round of the "whaling war."

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120. *American Cetacean Soc'y v. Baldrige* [sic], 768 F.2d 426, 444 (D.C. Cir. 1986) (summarizing congressional intent with regard to the Pelly Amendment).

121. *Id.* at 429, n. 1.

122. *Id.*

123. *Id.* at 445.

124. *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986) (quoting from the Petition for Certiorari, No. 85-954, filed Dec. 4, 1985, 19-20).

## B. *Second Round*

As mentioned before, at the 39th Annual Meeting of the IWC, Japan presented a research program. In explaining the rationale behind the program, Japan emphasized that the undertaking of scientific research is a matter of duty for the member countries of the ICRW, and said that "Japan neither believes that the cessation of the commercial whaling subsequent to the moratorium decision exempts the Contracting Governments from such duties, nor does it believe that it is proper to disrupt the continuous progress being made on the study on the whales."<sup>125</sup> In this respect, Japan pointed out that the Comprehensive Assessment is the most important task before the IWC and stated as follows:

A number of immediate results from this program will be available for the Comprehensive Assessment in 1990, while the long-term results will contribute to information essential for rational management of minke whale stocks. . . . The program will contribute to the Comprehensive Assessment by providing age structure data free from the selectivities of the commercial catch. These will be used to improve the analysis of historical data.<sup>126</sup>

However, the Japanese explanation was not understood by the anti-whaling countries and the IWC adopted the Resolution recommending that the Government of Japan refrain from issuing the special permit. Japan expressed its disappointment at the adoption of the Resolution. The Japanese legal position on this problem was that under article VIII, paragraph 1 of the ICRW, member countries have the legitimate right to issue special permits for scientific whaling. However, in order to avoid a diplomatic confrontation, even after the Meeting, Japan had several negotiations with the anti-whaling countries, particularly with the United States, to secure their understanding. For that reason, a Special Meeting of the Scientific Committee was held at Cambridge from December 15 to 17, 1987. But, no agreement was reached in that Meeting. Thus, consultations ended in failure. In such a situation, the Japanese Government decided to undertake a "Feasibility Study." On December 1987, a research cruise set sail for the Antarctic.

To this Japanese action, environmental groups in the United States raised voices of protest. On January 13, 1988, Greenpeace and twelve other environmental groups sued the U.S. Government to force sanctions against Japan. In the lawsuit, it was claimed that since Japan's "scientific" whaling expedition was merely a ruse to evade the IWC moratorium on commercial whaling, it violated the moratorium decision, and it also infringed upon a 1984 agreement with the United States to halt whaling in 1988.

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125. Government of Japan, *The program for Research on the Southern Hemisphere Minke Whale and for Preliminary Research on the Marine Ecosystem in the Antarctic* (1987).

126. *Int'l Whaling Comm'n, 39th Mtg./Report of the Scientific Committee* (1987).

Although the World Wildlife Fund (WWF) had not taken part in the suit in 1984, it did so this time. WWF President William K. Reilly said that the "World Wildlife Fund did not join in that action because we were assured that Japan would live up to its side of the bargain," but "clearly . . . and sadly . . . we were mistaken."<sup>127</sup>

The WWF's decision seems to be based upon the following observation of its research scientist Dr. Roger Payne who occupies the seat of Antigua & Barbuda in the IWC:

Japan claims that it needs to kill these whales for scientific research, to find out how many are left for future hunts. They're really trying to skirt the whaling moratorium and the deal they made with Secretary Baldrige (sic). There is nothing scientific about killing 875 whales and selling the meat. It's just a scam cloaked, unfortunately, in pseudo-science.<sup>128</sup>

It is truly regrettable that the WWF, with a worldwide reputation, has been influenced by the narrow-minded and prejudiced view of a radical protectionist. That careless decision has undermined the credibility of the WWF, at least in Japan. It should be noted that even in the United States, other environmental organizations such as the Environmental Defense Fund, the National Wildlife Federation, the Environmental Policy Institute and the International Institute for Environment and Development have taken a neutral position on the problem.

At the instigation of extremist environmentalists, on February 10, 1988, the Secretary of Commerce, C. William Verity, certified that Japan is whaling in a way that diminishes the effectiveness of the ICRW. Upon the certification by the Secretary, on April 6, President Ronald Reagan applied to Japan the Packwood-Magnuson Amendment. As a sanction, denial of Japanese fishing rights in the U.S. 200-mile zone had no real effect on the Japanese fishing industry, because no quotas were allocated to Japanese fishermen that year. However, it seems that its real aim was in excluding Japanese fishing vessels from the U.S. 200-mile zone. The U.S. Government took advantage of whaling as an excuse for refusing access of Japanese fishing vessels to the U.S. 200-mile zone and for monopolizing fishery resources in that zone.

## VII. INCOMPATIBILITY OF THE U.S. DOMESTIC LEGISLATION WITH INTERNATIONAL LAW

### A. *Packwood-Magnuson Amendment*

A whaling problem is irrelevant to a fishing problem. The conservation measures should be taken on a species by species basis. Certainly, further studies should be directed to the problems of competition between species of whales and of relationships with other marine organisms.

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127. World Wildlife Fund, Press Release (Sept. 1, 1987).

128. *Id.* at 2.

However, such studies should be conducted according to the whales' migratory nature.

Under international law, there is nothing to prevent a coastal state from setting standards on whaling within its 200-mile zone which are stricter than international standards. However, beyond national jurisdiction of coastal states, it is the IWC that establishes regulations on whales and whaling.<sup>129</sup> In addition, it is each member country that ensures their implementation.

Under the Packwood-Magnuson Amendment, reference is made to another country's activity which "diminishes the effectiveness" of the ICRW. Consequently, even with respect to the legitimate activity of a country, if the Secretary of Commerce certifies as diminishing the effectiveness of the ICRW, sanctions are directed at that country. Such unilateral action is against international law. It is not a reprisal, which is recognized under general international law, which may be taken against an illegal action of another country.

Another problem concerns the access of other countries to the surplus of fishery resources within the U.S. 200-mile zone. Whether the right of access of other countries to the surplus of fishery resources within the 200-mile zone of a coastal state should be recognized was one of the subjects in the Third United Nations Conference on the Law of the Sea. After prolonged negotiations, both the principle of "optimum utilization" and the obligation of the coastal state to give other states access to the surplus were confirmed.<sup>130</sup>

It is certain that the United States has neither signed nor ratified the Law of the Sea Convention, so that it is not bound by the Convention.

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129. Article 65 of the United Nations Convention on the Law of the Sea, which was incorporated by the proposal of the United States, provides:

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 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.

United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, U.N. DOC. A/CONF.62/122, at 27 (1982)[hereinafter Convention], *reprinted in* 21 I.L.M. 1261, 1282 (1982).

130. The Convention provides:

1. The coastal State shall promote the objective of optimum utilization of the living resources in the exclusive economic zone without prejudice to article 61.
2. The coastal State shall determine its capacity to harvest the living resources of the exclusive economic zone. Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations referred to in paragraph 4, give other States access to the surplus of the allowable catch, having particular regard to the provisions of article 69 and 70, especially in relation to the developing States mentioned therein.

*Id.*, at art. 62, para. 1-2, *reprinted in* 21 I.L.M. 1261, 1281.

However, the concept of the 200-mile zone is based on the Convention; it cannot have its cake and eat it too. Therefore, denial of the surplus principle itself is not permissible under the 200-mile concept.

### B. *Pelly Amendment*

Under the Pelly Amendment, the President, upon receipt of certification by the Secretary of Commerce, is authorized to prohibit the importation of fish products from the offending country for a period that the President decides is appropriate and to the extent that such a prohibition is permitted by the General Agreement on Tariffs and Trade (GATT). Although such an embargo is required to be consistent with GATT, its achievement might be very difficult, since the various legal issues cannot be overcome. Firstly, an embargo cannot meet the requirement of the "general elimination of quantitative restrictions" under article XI of GATT.<sup>131</sup>

Secondly, an embargo of fish products cannot constitute the exemption provided in article XX of GATT.<sup>132</sup> There is no connection between fish products and whale products. With respect to fish products, no legitimate connection with conservation needs as required by the article can be found. If such an arbitrary and unjustifiable measure is permitted, all thorny trade problems between Japan and the United States concerning beef, oranges and rice might be easily solved. Therefore, there is no doubt that an embargo on imports of fish products, other than whale products, is inconsistent with this article.

## VIII. JAPAN'S POLICY OPTIONS

So far Japan has not chosen to take countermeasures to U.S. whaling policies, in particular, sanctions. However, facing strong U.S. political and economic pressures, the Japanese Government will be obliged to choose any of the following policy alternatives:

- (1) To accept the U.S. argument and to stop the ongoing research

131. "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." General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, art. XI, para. 1, 61 Stat. A5, A32, T.I.A.S. No. 1700, 55 U.N.T.S. 187, 226 [hereinafter GATT].

132.

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:

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

*Id.*, at art. XX, para. 1(g), 61 Stat. at A60, T.I.A.S. No. 1700, 55 U.N.T.S. at 262.

program. In this case, it will result in the collapse of the Japanese whaling industry. More importantly, however, since there is no rational ground for the U.S. pressures, the Japanese will lose the feeling of respect for Americans which has been nourished for a long time.

(2) To cease the Antarctic whaling, but instead to receive recognition by the IWC of the continuance of shore-based small-type whaling as "subsistence whaling";

(3) To continue the present research program by claiming that issuing a special permit is the legitimate right of a member country under the ICRW. In this case, the research whaling issue will continue to pose a threat of friction between Japan and the United States;

(4) To show the firm Japanese belief that scientific permit whaling is in conformity with the ICRW, and to impose anti-sanction sanctions against the United States, namely to embargo the importation of fish products or agricultural products from the United States. At present, Japan is facing strong requests to increase imports of fish and agricultural products from Canada, New Zealand, Australia and developing countries. Accordingly, this might be a good chance to diversify trade partners;

(5) Another alternative to the above-mentioned measure is to withdraw from the International Convention for the High Seas Fisheries of the North Pacific Ocean (INPFC) entered into by Japan, the United States and Canada. Once freed of its obligations under the INPFC, Japan could engage in catching North American salmon in the high seas outside the U.S. 200-mile zone. Similarly, consideration might be given to the withdrawal from the International Commission for the Conservation of Atlantic Tunas, and the Inter-American Tropical Tuna Commission;

(6) As a more radical countermeasure, to refuse the provision of the U.S. military bases in Japan by abrogating the Japan-U.S. Security Treaty. The adoption of neutral policy by Japan might contribute to the establishment of its truly independent status and to the achievement of world peace without arms races;

(7) To submit the dispute to the International Court of Justice (ICJ). Since there is a legal dispute concerning the interpretation of provisions of the ICRW, in particular of the Preamble, paragraph 3 of article V, article VI, and paragraph 1 of article VII, submission of the dispute to the ICJ is the best recourse;

(8) To ask for an advisory opinion of the ICJ on legal questions such as the validity of the moratorium decision or the compatibility of resolutions restricting issuance of special permits by member countries with the ICRW. Certainly, the IWC is not a specialized agency of the United Nations. Therefore, the IWC itself is not entitled to ask for such an advisory opinion of the ICJ. However, it might be possible to do so through the General Assembly or FAO;<sup>133</sup>

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133. U.N. CHARTER art. 96 provides:



(9) To continue to request that the IWC rectify matters and normalize its functions. It should be noted that the moratorium decision is not unconditional. It is provided for that the Comprehensive Assessment to review the decision is to be undertaken in 1990. It should not be forgotten that such a review must be "based upon the best scientific advice";

In the moratorium recommendation adopted under the initiative of the United States in the U.N. Stockholm Conference in 1972, reference is made to strengthening of the IWC and increasing international efforts. As regards the former, the permanent Secretariat of the IWC was set up in 1976, and Dr. R. Gambell, a whale biologist, was appointed to be its full-time Secretary and Mr. M. Harvey was nominated Executive Officer. However, financial problems remain unsolved.

With respect to the latter, as mentioned before, the United States proposed to initiate the IDCR in 1975. In the resolution adopted by the IWC, particular emphasis is on the needs of stock monitoring and stock identification in the Southern Hemisphere. The resolution also refers to the decision of indicating "to UNEP that its assistance would be most useful in aiding IWC member nations in stock monitoring and stock identification cruises in the Southern Hemisphere."<sup>134</sup> According to this resolution, Japan has made the best efforts in Antarctic minke whale research. On the other hand, the United States has made little effort to research the resource state in the Antarctic. And after the adoption of the moratorium decision, it has never referred to the need "to increase international research efforts" and only spoken of "uncertainties" of the resource state.

Under such a situation, it is undoubtedly difficult to increase research capability of the IWC and to strengthen its rational and effective resource management mechanism. However, Japan should make every constructive effort to improve the IWC and show that "the pen is mightier than the sword;"

(10) When there is no prospect of improvement of the IWC, to withdraw from it. The All Japan Seamen's Union has suggested such an option by announcing the following:

We have no choice but to demand the Japanese Government to withdraw from the IWC, in the event the IWC is: (a) not able to carry out its function as an organisation established in pursuit of the objective of the International Whaling Convention, 1946; (b) unable to recognize the freedom of scientific study and research activities which will be conducted by a certain number of the contracting governments; (c)

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1. The General Assembly of the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

134. Int'l Whaling Comm'n Rep., No. 27, at 10 (1977).

incapable of upholding a fair and comprehensive assessment of information obtained by scientific viewpoints.<sup>135</sup>

#### IX. PROSPECTS OF THE JAPAN-U.S. RELATIONSHIP OVER THE WHALING PROBLEM

The United States was a primary mover in the establishment of a world public order after the Second World War. For a long period, American democracy and rationalism have been a goal for the Japanese. However, recently, America has lost its generosity and fair-mindedness. It has jeopardized its leadership in the international community by taking questionable unilateral actions with its whaling policy as a typical example.

Past history shows that lack of religious and cultural tolerance has often been an important cause of international frictions. Foreign policy without regard to diversification of value systems in the international community invites solely an unnecessary diplomatic confrontation. Still more, a policy of imposing the concepts of one way of thinking upon others who do not share those same values should be avoided in the international arena. In this sense, the imposition of political and economic pressures upon the whaling countries, instead of reasonable consultations for better management of the magnificent creatures of the earth, would set back the present and future credibility of the United States. Continuation of the present inflexible U.S. whaling policy might play havoc with Japan-U.S. relations. It should be noted that a unilateral action by the United States, or by any other country, is not a viable alternative to the effective conservation of whale resources.

In 1984, Japan was obliged to withdraw its objection to the moratorium decision of the IWC as a result of the political and economic pressures of the United States. Once again, the United States is attempting to compel Japan to cease scientific permit whaling by invoking domestic legislation, namely, the Packwood-Magnuson Amendment and the Pelly Amendment.

It is the legitimate right of a member country of the ICRW to file an objection to a Schedule amendment or to issue a special permit for scientific whaling. If a member country were free to coerce other member countries to abstain from the exercise of treaty rights by the threat of sanctions under domestic legislation, it would vitiate the fundamental concept of treaty-making itself. It is a denial of the existence of international law and a "might is right" type of approach.

It is the fundamental principle of international law that a state cannot invoke national law to evade obligations under international law. The logical corollary is that if domestic legislation of a state is against international law, that state should rectify such an irregularity according to international law. Instead of revising its domestic legislation, the United

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135. Int'l Whaling Comm'n, Rep./Opening Statement 39th Annual Mtg., at 3 (1987).

States has imposed sanctions upon the exercise of legitimate rights by other countries.

As long as the United States continues to interpret arbitrarily the ICRW and to invoke domestic legislation in order to force its own value standard upon other countries, settlement of the dispute will be difficult by direct negotiations between Japan and the United States. The past history of bilateral negotiations on this problem shows that the more Japan makes concessions, the more the United States escalates its requests. Therefore, the issue should be left to the means of a third party settlement. In this context, the most appropriate way is to bring the dispute before the ICJ. Another choice would be to constitute an *ad hoc* arbitral tribunal by a compromise between the two countries. The third option is to request an advisory opinion of the ICJ through the FAO or the General Assembly.

Yet, if the United States is reluctant to bring the problem before the international judicial organs, Japan will be obliged to seek ways to solve the issue by itself. Unless Japan yields to outrageous U.S. pressure, it will have to consider taking countermeasures against the U.S. actions.

Under international law, it is in principle prohibited to resort to self-help. However, in an exceptional case, that is, when there is an international delict, recourse to reprisals is permissible under international law. A reprisal is defined in general as "[A]cts which, although normally illegal, are exceptionally permitted as reaction of one state against a violation of its right by another state."<sup>136</sup> The United States has committed an international delict, because it has taken actions which are not authorized by international law, that is, by the ICRW. Consequently, if the United States continues to impose illegal economic sanctions upon Japan, the latter will be entitled to resort to reprisals. In this respect, the aforementioned measures might be taken.

Lastly, it must be added that the Murazumi-Baldrige Agreement in 1984 is void *ab initio*, because it was concluded under coercion. In view of the Vienna Convention on the Law of Treaties, this interpretation is justified, because it provides that "a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations" (article 52).<sup>137</sup> Although there is a difference of opinion as to the interpretation of the word "force", that is to say, as to whether it is only concerned with armed force or if it includes political or economic pressures, the *travaux preparatoires* of this article shows that its meaning is open-ended.<sup>138</sup> In

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136. H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 21 (2d. ed. 1966).

137. The Charter provides that "[A]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. CHARTER art. 2, para. 4.

138. In the drafting process of this article, Sir Humphrey Waldock, Special Rapporteur, said that "the text is open-ended in the sense that any future interpretation of the law of

addition, in the Vienna Convention, the prohibition of "the threat or use of force" is regarded as a typical example of *jus cogens*, that is, a peremptory norm of general international law from which no derogation is permitted (article 53).<sup>139</sup>

Since the Murazumi-Baldrige Agreement was brought about by the threat of sanctions under the Pelly and Packwood-Magnuson Amendments, which is against the clear-cut prohibition of the threat or use of force in article 2, paragraph 4 of the Charter of the United Nations and also against *jus cogens*, it is of dubious legal validity. The free and voluntary consent of Japan to the Agreement is vitiated by the illegal threat of sanctions. Therefore, the Agreement is an absolute and automatic nullity.

## X. CONCLUSION

It is true that residual effects of 19th century whaling remain. Due to past heavy exploitation, some whale species have been in danger of extinction. Even after the establishment of the IWC in 1946, many of its regulations were not necessarily effective, especially until the mid 1960s, because short-term economic considerations overrode long-term conservation needs. This was symbolized in the adoption of the BWU. However, since the mid 1960s the IWC has come to grips with its problems and its shortcomings have been corrected.

In addition to the right and gray whales, the catching of which was prohibited since prewar days, the IWC decided to forbid the catching of the humpback whale in 1963 and the blue whale in 1964. And, as Dr. J. L. McHugh says, "the turning point came in 1965, when for the first time in its history the Commission agreed to establish a catch limit in the Antarctic lower than the best scientific estimate of the sustainable yield." He mentions the following:

The sharp quota reductions in 1965 and subsequently were a remarkable victory for the Commission. This was the first indication that the Whaling Commission might become an effective organization. Its critics have failed to recognize this important point or have chosen to ignore it. The widespread recent publicity in the press, in magazines, and on radio and television in the United States has verged on the irresponsible and has led people generally to believe that the International Whaling Commission has been completely ineffective.<sup>140</sup>

Following the adoption of the International Observer Scheme in 1971, separate quotas by species for the Antarctic whaling were intro-

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the Charter would affect the rule embodied in article 36 (present article 52)." Y.B. INT'L L. COMM'N 120 (1966).

139. According to the explanation of the International Law Commission, "[T]he law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*." Report of the International Law Commission to the General Assembly, at 76, para. 1 (1966).

140. J. McHUGH, *supra* note 6, at 311, 331.

duced in 1972 in lieu of the BWU. As to this measure, the Scientific Committee stated that "this is the most rational way of managing stocks from a biological point of view."<sup>141</sup> In this context, it should be noted that the resource management system under the NMP is stringent enough to ensure that all stocks are maintained at levels that will not significantly increase the risk of biological extinction.

It was extremely tragic that the IWC decided on a moratorium on commercial whaling. On this point, the FAO observer at the 34th Annual Meeting of the IWC in 1982 stated:

The continuation of commercial whaling can also be threatened by management measures that are too restrictive. The most extreme example is a moratorium on all whaling. This is a completely unselective measure. Given the differing status of the various stocks, and the fact that virtually all those species or stocks that are seriously depleted are already receiving complete protection, there seems to be no scientific justification for a global moratorium. A justification for a complete cessation of whaling can be put forward on aesthetic or moral grounds, but these seem outside the terms of reference of the Commission.<sup>142</sup>

By its deviation from the original objectives and purposes, the IWC has lost its *raison d'être*. The moratorium decision has undermined the credibility of the IWC in the international community. Unless the IWC rectifies matters and normalizes its functions, its collapse will be inevitable. It goes without saying that unregulated whaling is undesirable. The "tragedy of the commons" should not be repeated in the future. What is needed at present is a rational and reasonable way of thinking. Without it, this intricate problem is unsolvable.

There are divergent views on whether or not whales can be properly managed as common resources under the nation-state system. However, since it seems unlikely that a world government will emerge in the near future, the best should be done under the present nation-state system. Maurice F. Strong, former Executive Director of the United Nations Environment Programme (UNEP), has stated:

What is needed is a global framework within which national action can be seen and taken in relation to the global concerns on which they impact. The role of international organizations is to provide that framework - and the services, linkages, and mechanisms for cooperation which permit nations to unite in a common approach to particular problems and issues. For it is not by abdication of national sovereignties that we will achieve the reality of the 'new internationalism', but by the evolution of new concepts of sovereignty and more effective means for the exercise of national sovereignty on a collective basis in those areas in which it is not feasible or desirable to exercise it unilaterally. This will not be accomplished by dismantling the present na-

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141. Int'l Whaling Comm'n, *Rep. of the Scientific Committee* (1972).

142. Int'l Whaling Comm'n, 34th Mtg./Statement by FAO Observer (1982).

tion-state system and building a new world 'super government.' Rather, it can best be accomplished by step-by-step building on the present nation-state system, and on the system of international organizations which has grown out of it, a much stronger and more effective system of international organizations that can provide the international services for consultation and cooperation that the nation-states will more and more require and provide them with the instrumentalities for carrying out those common tasks which it is either not feasible or not advantageous for them to carry out themselves.<sup>143</sup>

Fortunately, the international community has a global framework for regulating national actions on whales and whaling. The problem is how to operate it rationally and effectively, and how to improve its existing shortcomings. In this respect, particular consideration should be paid to the improvements of the IWC, especially in terms of financing and scientific activities.

The IWC faces serious financial problems. Its financial base is extremely weak. This situation is aggravated by late payment and non-payment of contributions by some member countries. It is reported that "nearly half of the member governments have not paid their required contributions nine months after they were due."<sup>144</sup> As a consequence, the IWC has been forced to reduce its expenditures to the lowest possible level.

In order to deal with the present financial constraints, the IWC decided in 1985 to undertake the revision of member contribution procedures.<sup>145</sup> For that purpose, an Intersessional Working Group was established in 1986.<sup>146</sup> The Group suggested the following three alternative methods: Formula A, where 60% of the budget is divided equally among member governments and the remaining 40% is distributed by taking the delegation size into account; Formula B, where the budget is divided by taking three factors into consideration - membership, aboriginal subsistence whaling activity, and scientific research activity; and Formula C, the existing method. Although a majority of the member countries backed Formula A, no consensus was achieved at the 39th Annual Meeting of the IWC in 1987.<sup>147</sup>

The weakness of the financial bases of the IWC has put a serious constraint, *inter alia*, upon its scientific research ability. The IWC's budget for research projects during 1976-77 was only LLB100,000 (US \$175,000).<sup>148</sup> In 1986, scientific research was funded only at a level of

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143. Address by Maurice F. Strong, *Fairfield Osborn Memorial Lecture* (1973)(unpublished manuscript, *The Environment and the New Internationalism* 23-24).

144. Int'l Whaling Comm'n, 37th Mtg./Chairman's Rep., para. 19.1 (1985).

145. *Id.* at para. 21.

146. Int'l Whaling Comm'n, 38th Mtg./Chairman's Rep., para. 20.5 (1986).

147. Int'l Whaling Comm'n, 39th Mtg./Chairman's Rep., para. 23.5 (1987).

148. Int'l Whaling Comm'n, 28th Mtg., *supra* note 113.

LLB153,000.<sup>149</sup>

According to the U.S. suggestion on the initiation of the IDCR, the IWC decided in 1976 to establish a voluntary Research Fund for the IDCR. The United States stated that "although the Research Fund would give a small start, large funding from bodies such as UNEP would still be required in this connection."<sup>150</sup> However, few contributions have been made to the Fund by the member countries. For that reason, the idea of mandatory contributions to the Research Fund was put forward in 1982. However, the idea failed to win the majority support.<sup>151</sup>

In 1985, the UNEP indicated that research projects on large cetaceans should be implemented by the IWC in the Second IDCR as a contribution to achieve the goals of the Global Plan of Action for the Conservation of Marine Mammals. The Scientific Committee recognized that such research projects need to be initiated and funded by the IWC.<sup>152</sup> But, most of the member countries were reluctant to contribute money to the Research Fund for those projects.

Until now, research activities on whale resources in the Antarctic have been carried out by Japan and the U.S.S.R. under the IDCR. The research cruises have been open to interested foreign scientists. However, if some doubt is cast on the objectivity of Japanese research results, an alternative way should be devised. Under the auspices of the IWC, FAO or UNEP, and international research team could be organized by highly qualified scientists and periodically sent to the Antarctic.

Since the adoption of the recommendation for a ten year moratorium on commercial whaling in the U.N. Stockholm Conference, the UNEP has stressed the need to increase international research efforts on whales. In 1975, the Governing Council of the UNEP requested that its Executive Director "support research on marine mammal populations and on whales and small cetaceans in particular."<sup>153</sup> In 1977, the Governing Council requested that the Executive Director "extend the support, as appropriate, to research activities with respect to the conservation and effective management to conserve whales and other cetaceans."<sup>154</sup> The FAO/UNEP Global Plan of Action for the Conservation, Management and Utilization of Marine Mammals was endorsed by the Governing Council in 1984.<sup>155</sup> As mentioned earlier, although the Plan of Action was endorsed by the Scientific Committee of the IWC and the IWC itself, no progress in implementation by the IWC of research projects on large cetaceans has been made owing to lack of commitment by member governments.

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149. Int'l Whaling Comm'n, 38th Mtg., *supra* note 145.

150. Int'l Whaling Comm'n, 28th Mtg, *supra* note 113.

151. Int'l Whaling Comm'n, 34th Mtg, *supra* note 117.

152. Int'l Whaling Comm'n, 37th Mtg., *supra* note 143.

153. United Nations Environmental Programme, Decision 33 of the Governing Council, May 2, 1975.

154. UNEP, Decision 88 of the Governing Council, May 25, 1977.

155. UNEP, Decision 12/12 of the Governing Council, May 28, 1984.

There can be no reasonable solution to management problems as long as disregard for scientific evidence continues. Scientific research is of vital importance and an essential prerequisite to the IWC's Comprehensive Assessment in 1990. What is needed at present is not a subjective but an objective approach. There is a strong need for independent research cruises, under the auspices of the appropriate international organization such as the IWC, FAO, or UNEP, in all areas and seasons, and unrelated to commercial operations. The IWC, FAO, or UNEP might initiate a world-wide research program by employing unused whaling vessels to obtain catches for research purposes in all areas inhabited by whales and in all seasons.

As a matter of *lex ferenda*, another possible alternative worthwhile to consider is the strengthening of the management system of whale resources. The idea is to grant ownership of the whales of the world to some international authority. The authority would be given the power to regulate all whaling activities. Dr. George L. Small has stated:

The best method of achieving this would be to grant to some international body such as the Food and Agricultural Organization of the U.N. the sole authority to harvest the whales of the high seas. A World Whaling Authority could limit the catch of each species to its sustainable yield, and it could license the required number of whaling companies needed to achieve that end. Further, the World Whaling Authority could sell the production of nations with the greatest food shortage and limit the profit of the licensed companies to a fair and reasonable level of return on investment. Any excess profits could be used to support research into better food production methods or added to the operating budget of the U.N. itself. Only under the protection of some such international authority can the remaining whales of the high seas be secure from the threat of extinction and constitute a perpetual source of food in a world increasingly plagued with hunger.<sup>156</sup>

In this context, the revision of the ICRW so as to strengthen the financial base and enhance the scientific research capability of the IWC, or create a new global management authority in lieu of the IWC, should be considered. At any rate, all decisions on whales and whaling must be made on the basis of scientific information and data. International research activities concerning the state of whale resources are a basis for rational conservation measures. This type of new global management mechanism should be established under the existing IWC or proposed authority.

An emotional or political approach to the management problem concerning whales is counterproductive. A whale stock can only be brought to or maintained at a desired level by the application of a long-term policy based on the best scientific evidence. Toward the realization of the

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156. G. SMALL, *supra* note 100, at 207-08.



concept of "ecodevelopment" or "sustainable development," the new management policy on whales and whaling should be formulated and adopted by the international community as a whole.