

ENFORCEMENT QUESTIONS OF THE INTERNATIONAL WHALING COMMISSION: ARE EXCLUSIVE ECONOMIC ZONES THE SOLUTION?

What is the nature of a species that knowingly and without good reason exterminates another? How long will man persist in the belief that he is master of this Earth rather than one of its guests? When will he learn that he is but one form of life among countless thousands, each of which is in some way related to and dependent on all others? How long can he survive if he does not?¹

This author was referring to the blue whale, the largest animal ever to inhabit the earth.² The blue whale is only one of many species of cetaceans (whales, dolphins and porpoises)³ that are teetering on the brink of extinction.⁴ Despite ratification of the International Whaling Commission (IWC)⁵ in 1946, whale populations

1. G. SMALL, *THE BLUE WHALE* 213 (1971).

2. The blue whale can attain a weight of over two hundred tons. A baby blue whale weighs three tons at birth and can grow at a rate of over two hundred pounds a day while weaning. The blue becomes sexually mature when it reaches a length of about seventy-eight feet. One contribution to the decimation of this species was the setting of the legal minimum length at seventy feet. These immature animals were killed legally, under the IWC guidelines, before they could sexually reproduce. *Id.* at 26.

3. The order of cetaceans contains seventy-eight species. There are two suborders: the baleen whales and the toothed whales. The baleen whales feed upon small crustaceans called krill. Whales require over two tons of krill each day and must migrate to polar waters every summer where the krill are densely concentrated. The whales bear their young in tropical waters where there is a relatively scarce food supply. The whales store summer food as blubber. The whale blubber provides the mammal's most valuable commercial product—oil used for lighting and margarine. The toothed whales feed on fish and cephalopods. Since food is more readily available to them, the toothed whales have shorter migration patterns. Both the baleen and the toothed whales are found in all major oceans of the world. Scarff, *The International Management of Whales, Dolphins and Porpoises: An Interdisciplinary Assessment*, 6 *ECOLOGY L. Q.* 323, 338-43 (1977); see also R. McNALLY, *SO REMORSELESS A HAVOC* 104-13 (1981); W. SCHEVILL, *THE WHALE PROBLEM* 336-52 (1974); E. SLIJPER, *WHALES* 316-49 (1979); L. WATSON, *WHALES OF THE WORLD* 36-54 (1981).

4. An endangered species is one that is threatened with extinction. In dealing with the depletion of fishery resources, there are two levels to consider—commercial extinction and actual extinction. Commercial extinction occurs when the population level is so low that it is not economically profitable to hunt the species. Actual extinction occurs when the animal population is reduced below a critical size. The minimum critical population varies from as high as tens of thousands of animals to as low as a few dozen. Some species of whales have been currently reduced by as much as ninety-six percent and may disappear forever. Scarff, *supra* note 3, at 389.

5. See *infra* text accompanying notes 82-96.

have continued to decline.⁶

At the thirty-fourth annual meeting of the IWC in 1982,⁷ the member States passed a moratorium⁸ on worldwide commercial⁹ harvesting in the high seas. The moratorium does not purport to solve all of the international regulatory problems.¹⁰ Instead, it provides a period during which past inefficiencies may be examined.¹¹ However, under the IWC structure, member States can avoid the moratorium by filing an objection to the vote.¹² Major whaling States, such as Japan, USSR, Norway and Peru have taken advantage of this provision, leaving their whaling companies free to harvest at will.¹³

6. *The International Whaling Commission, 1982: Hearing on H. 381-50 Before the Comm. on Foreign Affairs, House of Representatives*, 97th Cong., 2d Sess. 18, (1982).

7. At the 1982 meeting, after ten years of debate, the IWC passed a moratorium. By a 25 to 7 vote (5 abstentions), the Commission passed the following amendment:

Catch limits 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 at the latest 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.

INT'L WHALING COMM'N, 34TH REPORT 2 (1982). The seven nations voting against the moratorium were Japan, U.S.S.R., Peru, Brazil, Iceland, South Korea and Norway. *Id.*

8. This Comment discusses the moratorium in regard to both coastal and pelagic whaling. Pelagic means the high seas extending beyond any State's two-hundred-mile exclusive economic zones (EEZ's). Coastal whaling deals with the jurisdiction of an international organization within a country's EEZ. The jurisdiction of EEZ regulation in regard to the adoption of conservation measures is particularly problematic for highly migratory species such as whales, tuna and salmon. See W. BURKE, R. LEGATSKI & W. WOODHEAD, NATIONAL AND INTERNATIONAL LAW ENFORCEMENT IN THE OCEAN 10-41 (1975); R. ECKERT, THE ENCLOSURE OF OCEAN RESOURCES 21-47 (1979); G. SMITH, RESTRICTING THE CONCEPT OF FREE SEAS 13-30 (1980).

9. The moratorium applies only to commercial operations. Aboriginal whaling that is not covered by this moratorium includes whaling done by Alaskan Inupiat Eskimos and Soviet Eskimos. The rationale for excluding aboriginal people from the moratorium was the conservation of the Eskimos' "cultural, economic, and nutritional well-being." See *infra* text accompanying notes 164-73.

10. IWC members hope this moratorium will provide scientists with a time period during which stock population characteristics may be more specifically analyzed. The moratorium does not require that any new legal enforcement procedure be initiated. Thus, there not only is a problem with enforcing the moratorium, there is also the problem of avoiding the regulatory failures of past management. See Friedman, *Legal Aspects of the International Whaling Controversy: Will Jonah Swallow the Whales?*, 8 N.Y.U. J. INT'L L. POL. 211, 217 (1975).

11. *Id.*

12. See *infra* text accompanying notes 93-96.

13. The Japanese objection stated:

Total ban on commercial whaling regardless of the condition of each whale stock has no scientific justification and is inconsistent with the objectives of the whaling convention. The IWC decision does not give due consideration to the fact

The Final Act of the Third United Nations Conference on the Law of the Sea (UNCLOS), signed by 140 States in 1982,¹⁴ permits a complete prohibition of whaling by the IWC.¹⁵ UNCLOS also requires whaling States to cooperate with the IWC.¹⁶ However, UNCLOS does not include deterrent sanctions for failing to cooperate.¹⁷ The result is that neither the IWC moratorium nor UNCLOS provides an effective legal framework for the management of cetaceans.¹⁸

This Comment examines the problems and prospects of such a legal framework. First, the interests of whaling and nonwhaling States¹⁹ and the structure and history of the IWC²⁰ will be reviewed. Second, the uncertainty of cetacean population estimates and resultant complications for regulatory schemes will be examined.²¹ Third, the development of the international observer system is surveyed because enforcement of any fishery treaty requires accurate data on what is being removed from the sea.²² And

that whaling is deeply rooted in Japan's diet and other traditional and cultural backgrounds, and that whaling plays an important socioeconomic role in certain local communities [This] objection 'does not mean that Japan has decided at this stage the continuation of whaling after the three-year period, but it is presented for the sake of reservation of its position on this matter. It is hoped that the commission [will] conduct a comprehensive assessment within the coming three years to draw a rational conclusion.'

MARINE MAMMAL NEWS, Nov. 1982, at 2.

14. The Final Act of the United Nations Conference on the Law of the Sea was signed on December 10, 1982, at Montego Bay. Third United Nations Conference on the Law of the Sea, Oct. 21, 1982, U.N. Doc. A/Conf. 62/122, *reprinted in* 21 INT'L LEGAL MATERIALS 1245 (1982) [hereinafter cited as UNCLOS]. For the complete list of the 140 signatories of the Final Act, see *id.* at 1261.

15. Article 65 of the Final Act reads:

Nothing in this Part restricts the rights 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 organization for their conservation, management and study.

Id. art. 65 (emphasis added).

16. *Id.*

17. Article 61 of the Final Act does permit a coastal State to take measures designed to restore populations. A coastal State could therefore prohibit all whaling within its EEZ. *Id.* art. 61; see also *infra* text accompanying notes 291-301.

18. UNCLOS does provide a legal basis for the IWC to set catch limits that are above the current maximum sustainable yield. The key question is whether restrictive quotas will be enforceable. See *supra* note 14, art. 65.

19. See *infra* text accompanying notes 28-63.

20. See *infra* text accompanying notes 82-96.

21. See *infra* text accompanying notes 101-31.

22. See *infra* text accompanying notes 132-50.

last, jurisdictional issues²³ and other methods of circumventing regulations will be perused to illustrate the complexity of regulation and management problems.²⁴

Following the discussion of the problems in implementing an effective management program, this Comment will examine the history of unilateral legislation by the United States.²⁵ While the United States legislative action has proven to be a successful restraint on violations in the past, factors that will debilitate continued legislative accomplishments will be investigated.²⁶ Finally, this Comment will propose a mutual enforcement scheme that provides an effective, long-term deterrent. This proposal is an amendment to the IWC and UNCLOS that would exclude violating States from the exclusive economic zones (EEZ's) of all member States.²⁷

I. INTERNATIONAL WHALING CONTROLS

A. *Whaling Interests Versus Conservation Interests*

Whales could have provided the world with over two million tons of protein annually if the original stock levels had been managed properly.²⁸ The blue whales alone, if harvested at the maximum sustainable yield,²⁹ could have supplied a six-ounce steak daily for over three million people.³⁰ Why did whaling companies ignore such long-term benefits? Why did the IWC ignore scientific committees and permit harvest quotas that decimated one species after another?

The answers to these questions require an understanding of the economics of whaling.³¹ Whaling companies must borrow large sums of money to purchase vessels and equipment.³² Each com-

23. See *infra* text accompanying notes 154-217.

24. See *infra* text accompanying notes 151-63, 240-72.

25. See *infra* text accompanying notes 239-54.

26. See *infra* text accompanying notes 255-60.

27. See *infra* text accompanying notes 289-317.

28. N. HOLLIMAN, *THE WHALE MANUAL* 5 (1978); see also Scarff, *supra* note 3, at 342.

29. The maximum sustainable yield theoretically provides a formula for the largest harvest that can be indefinitely taken from a species without jeopardizing its continued existence. This concept can be very deceiving because its sophisticated mathematical formulas may easily be confused with a detailed knowledge of whale characteristics. This is important to note since a major dispute regarding the moratorium focuses on whether scientists are capable of estimating quota levels that will not further reduce stock levels. J. JOSEPH & J. GREENOUGH, *INTERNATIONAL MANAGEMENT OF TUNA, PORPOISE, AND BILLFISH* 147-53 (1979); see also W. SCHEVILL, *supra* note 3, at 336-52.

30. G. SMALL, *supra* note 1, at 205.

31. N. MACKINTOSH, *THE STOCKS OF WHALES* 145 (1965).

32. *Id.* at 169.

pany's self-interest dictates increasing its catch rate to maximize profit. However, as output increases due to technological sophistication and as whaling companies increase in size, prices drop.³³ Moreover, as whaling stocks decline, each company seeks to increase output by borrowing additional money in order to modernize equipment. Thus, long-term conservation measures adopted by one company alone could lead to its bankruptcy. This situation is referred to as the "tragedy of the commons."³⁴

Until recently, the IWC membership was comprised mainly of whaling States.³⁵ In the 1800's the most valuable whale product was oil.³⁶ Whale oil has been used for lamp fuel, margarine and even as a high grade lubricant for intercontinental missiles.³⁷ Today whale meat is used primarily for animal food.³⁸ Japan is the only country in the world that eats whale as part of a regular diet.³⁹

The conservation interests in whales are represented in both developed and developing States.⁴⁰ The conservation States believe that the exploitation of a resource by a few developed coun-

33. W. SCHEVILL, *supra* note 3 at 322.

34. An example of the "tragedy of the commons" is illustrated by the following account of the common grazing grounds existing in England during the seventeenth century.

If there were already fifty cows grazing on the commons, a farmer who owned five cows and added a sixth to his own herd would increase his own capital by 20% while the additional cow would reduce the amount of food on the commons by about 2%. This additional reduction of food, would, of course, be a detriment to the farmer by about 2%, but when compared to the increase of 20% in adding a new cow it was eminently worth it to him The [long-term] result is that the commons is overgrazed and is destroyed, causing economic ruin of all the farmers. [But,] since his neighbors will ruin the commons anyway, he might as well expand his own herd and increase his own short-run benefits.

The same principle applies to whales. M. CLEMENT, A. D'AMATO, R. FRIEDHEIM, E. GOLDBERG, L. GOLDIE & J. HARDGROVE, *WHO PROTECTS THE OCEANS?* 4 (1975).

35. The IWC currently has thirty-nine member States. Prior to the last two years, the IWC often failed to reach a three-quarters majority due to the preponderance of whaling States on the Commission. See R. MCNALLY, *supra* note 3, at 117-37.

36. See *infra* text accompanying notes 106-12.

37. Whale oil has also been used for candles, cosmetics, lipsticks, cold creams, crayons, textile oils, watch oil, printing ink, shampoo, soap, suntan oil and waxes. See N. HOLLIMAN, *supra* note 28, at 124-26.

38. *Id.*

39. MARINE MAMMAL NEWS, June 1982. See also K. ALLEN, CONSERVATION AND MANAGEMENT OF WHALES 16 (1980).

40. This may be noted by UNCLOS and the States that voted for the moratorium. The developing countries have firmly resolved that the ocean's resources should not be exploited by a few developed countries. Developed countries have also been influenced by publicity of environmental groups regarding the whaling problem. Fifty-one international nongovernmental organizations attend the IWC meetings. Greenpeace, Save the Whale Campaign, Friends of the Earth and the Animal Welfare Institute are only a few of the national organizations that sponsor conservation-oriented events, such as boycotts, letter writing campaigns and high seas confrontations. See R. MCNALLY, *supra* note 3, at 222-34.

tries is inequitable.⁴¹ UNCLOS states: "Bearing in mind that the new regime must take into account, in particular, the special needs and interests of the developing countries. . . ."⁴² In the past two years, fifteen new nonwhaling States joined the IWC to promote conservation interests.⁴³ Twelve of these fifteen nations voted for the moratorium.⁴⁴

Scientists are also interested in several biological features of cetaceans. The central characteristic of scientific study is the mind of the cetacean.⁴⁵ As early as 1671, the large and highly convoluted cetacean brain was thought to indicate a high level of mental development.⁴⁶ Dolphins have been principally the species investigated regarding their intelligence. The sheer size of the larger cetaceans has made investigation of their capacity impractical.⁴⁷ While cetacean studies are clearly in an embryonic stage, higher mental functioning is apparent.⁴⁸

While the primary sense of humans is sight, the cetaceans rely primarily on sound to locate and differentiate objects in the sea.⁴⁹ The sonic frequency range used by cetaceans is ten times that of humans.⁵⁰ "Slash calls"⁵¹ and "stereophonation"⁵² are emitted and bounced off objects in the sea to delineate objects within their surroundings.⁵³

41. Annex Six of the Final Act of UNCLOS states:

Recognizing that the Convention on the Law of the Sea is intended to establish a new regime for the seas and oceans which will contribute to the realization of a just and equitable international economic order through efficient management and utilization of its resources.

UNCLOS, *supra* note 14, annex. VI, para. 1.

42. *Id.*

43. The fifteen new member governments are India, China, Jamaica, Uruguay, St. Vincent, Costa Rica, Antigua, Belize, Egypt, Federal Republic of Germany, Kenya, Monaco, Philippines and Senegal. INT'L WHALING COMM'N, 34TH REPORT 1 (1982).

44. MARINE MAMMAL NEWS, July 1982, at 1.

45. J. LILLY, THE MIND OF THE DOLPHIN 118 (1967).

46. E. SLIJPER, *supra* note 3 at 241. The potential intelligence of an animal is determined from both the size and the degree of detail or convolutions in the brain. Cetaceans are the only animal order which have both greater brain size and convolution than man.

47. *Id.* at 237.

48. J. LILLY, *supra* note 45 at 47.

49. *Id.* at 137.

50. *Id.* at 145.

51. A "slash call" is an emission of both high and low frequencies simultaneously for depth perception. The frequency of the echoes varies depending on whether the object is stationary, approaching or receding from the cetacean (called the Doppler effect). *Id.* at 154.

52. Stereophonation refers to the ability of cetaceans to emit two sounds separately and independently. *Id.* at 138.

53. The combination of stereophonation and slash calls produce what is called the ceta-

Another concern to conservationists is the effect of ecosystem alteration on cetacean populations.⁵⁴ For example, man-made contaminants, such as DDT, petroleum hydrocarbons and heavy metals have been discovered in significant quantities in cetacean tissues.⁵⁵ The most serious effect of these contaminants is reduced reproduction.⁵⁶

The increasing economy of whale watching has produced both positive and negative effects. Whale watching increases public awareness and generates a conservation-oriented, profit-making venture.⁵⁷ However, well-meaning photographers have also been known to inflict severe injury on whales by not keeping proper distance.⁵⁸

The long-term interests of the whaling States and the conservation States are the same.⁵⁹ Both desire the whaling resource to continue.⁶⁰ However, whaling companies tend to ignore long-term interests in the pursuit of short-term profits.⁶¹ Substitutes presently exist for all whale byproducts.⁶² Yet, the primary purpose of the whaling industry in forming the IWC was to obtain maximum

cean's "sonar flashlight. Through the emission of different frequencies simultaneously, a detailed picture is formed of the underwater world. Low frequencies are used for long distances while high frequencies are used to resolve details of objects. *Id.* at 153.

54. Every animal and plant species is intricately woven into our ecosystem. Concern about the whale's ecosystem has been expressed over krill harvesting, the effects of pollution and the effects of subsurface mining. The human altering of these ecosystems may not only affect the food supply, but may also have an impact on the interactions among a cetacean population.

Krill, a shrimp-like crustacean, is a key organism in the food web of whales, seals, penguins, fish and birds. The establishment of two-hundred-mile exclusive economic zones coupled with a decline in conventional fishing stocks, led to commercial exploitation of krill in the early 1960's. Dense quantities of krill exist in the Antarctic Convergence where cold water, long hours of sunlight, and nutrients from upwellings enable large quantities of photoplankton, the krill's food stuff, to exist. Krill trawlers can catch eight to twelve tons of krill per hour. On April 7, 1982, the Antarctic Marine Living Resources (AMLR) Convention became effective. This convention will provide ecosystem studies that are important to save the entire marine environment. INT'L WHALING COMM'N, 33RD REPORT 1 (1981). See F. AUBURN, ANTARTIC LAW & POLITICS 205-40 (1982).

55. D. GASKIN, THE ECOLOGY OF WHALES AND DOLPHINS 392-429 (1982).

56. *Id.* at 426.

57. *Id.* at 348.

58. Huge increases in tourism traffic may cause such a degree of distress that cetacean populations have altered migration routes. *Id.*

59. R. McNALLY, *supra* note 3, at 222-34.

60. *Id.*

61. Scarff, *supra* note 3, at 574-88.

62. High pressure machine oil may be substituted with rapeseed oil. Margarine products may be substituted with a variety of vegetable oils. For a complete listing of alternatives, see N. HOLLIMAN, *supra* note 28, at 124-26.

short-term profits.⁶³

B. Factors Leading to the IWC

The hunting of whales by humans began as early as 3,000 B.C.⁶⁴ Between 1820 and 1870, the United States dominated the whaling industry, with 736 vessels importing over 150,000 barrels of oil each year.⁶⁵ Yankee whalers would seize every whale in a fishing area, whether a bull, cow or calf.⁶⁶ When fishing in one region ceased to be economical, the whalers would move to a new area.⁶⁷ As a consequence, several stocks were driven to near extinction over one hundred years before the IWC vote for a moratorium.⁶⁸

The rapid development of the whaling industry was intensified through the inventions of the explosive harpoon in 1868,⁶⁹ the factory ship in 1903⁷⁰ and the stern slipway in 1925.⁷¹ The economic fever so decimated whale stocks that by 1925 the League of Nations urged international regulation of the industry.⁷²

The ensuing agreement for an international convention in

63. G. SMALL, *supra* note 1, at 8-9.

64. Whale oil was used in streetlamps. Whaling was big business at this time in the United States. It produced \$70 million in income out of a gross national product of less than \$10 billion. See R. McNALLY, *supra* note 3, at 89.

65. *Id.* at 91.

66. Boats, thirty feet long, would row behind a whale as the harpooner needed a close range to strike and injure the whale. In 1848 James Temple invented the toggle-iron harpoon which could be embedded in the whale. It took from six to forty hours to kill a whale. During the Civil War, the majority of whaling ships were either sunk or converted for war purposes. *Id.* at 93-99.

67. *Id.* at 101. See also H. MORTON, *THE WHALE'S WAKE* 301-15 (1982).

68. Species of commercially extinct stocks include blue, right, humpback and gray whales. Scarff, *supra* note 3, at 344-46.

69. The explosive harpoon was invented by Sven Foyn in 1868. This harpoon enabled whalers to go after the faster blue, fin and sei whales because it killed the whales on the first strike. This new technology enabled the Norwegians to replace the Americans as the major whaling nation of the world by 1890. The Norwegians were first to discover and exploit the vast number of whales in the Antarctic.

The explosive harpoon also had an attached device which pumped air into the whales to keep them afloat. Many species of whales sink when killed. This inflation device allowed the whalers to go after many new species. R. McNALLY, *supra* note 3, at 102-04.

70. N. MACKINTOSH, *supra* note 31, at 145.

71. A slipway is an apparatus with which a boat could haul whales onto its stern for processing while still at high sea. With the slipway came the birth of factory ships, which enabled whalers to strip the whale meat and draw off the oil without returning to port. Prior to the 1925 invention of the stern slipway, yearly whale oil production was less than 275,000 barrels annually. Factory ships enabled whalers to harvest in Antarctic waters which increased oil production to over 3.6 million barrels yearly. *Id.* at 109-12.

72. Norway, in an attempt to at least monitor the situation, passed the Whaling Act of

1931, however, was not due solely to an interest in protecting the whales.⁷³ Actually, the industry had become so massive that oil production had glutted the market and caused prices to fall rapidly.⁷⁴ Several whaling companies went bankrupt, while others switched to more profitable enterprises.⁷⁵ Twenty-one of the remaining whaling companies determined that the only solution would be an international agreement which would limit oil production.⁷⁶

The first step toward international regulation of whaling was the Convention for the Regulation of Whaling by the League of Nations in 1931.⁷⁷ However, the 1931 Convention failed to define the length of "immature or undersized" whales.⁷⁸ The Convention provided that flag States were responsible for enforcement, yet it did not require inspectors.⁷⁹ In 1937 protection was given to the endangered gray and right whales.⁸⁰ For the first time, international law established minimum size limits: 35 feet for humpback and sperm whales, 55 feet for finbacks and 70 feet for the blue whale.⁸¹

C. *The Structure of the IWC*

After the Second World War, oil shortages created a strong need for renewed whaling.⁸² In 1946 whaling States convened to establish a system which would prevent the ruthless exploitation of previous decades.⁸³ The IWC was created by the International

1929. The most important feature of this Act was the establishment of the annual publication of *International Whaling Statistics*. G. SMALL, *supra* note 1, at 144.

73. Convention for the Regulation of Whaling 1, Sept. 24, 1931, 49 Stat. 3079, T.S. No. 880, 115 L.N.T.S. 349.

74. The increases in shore stations, factory ships and catcher boats increased production from one million barrels of oil in 1930 to 3.5 million barrels of oil in 1931. Scarff, *supra* note 3, at 350.

75. R. McNALLY, *supra* note 3, at 110.

76. *Id.*

77. N. MACKINTOSH, *supra* note 31, at 151.

78. Scarff, *supra* note 3, at 349.

79. R. McNALLY, *supra* note 3, at 112.

80. *Id.* at 113.

81. In spite of the new regulations, over 54,000 whales were killed in 1937—a new record for decimation. The large catch produced less oil than in previous years because the larger whales were teetering on the brink of extinction. In 1938 the International Council for the Exploration of the Seas pleaded for protection of the blue and humpback whales. In only fifteen years, over half the entire world population of blue whales was killed. *Id.*

82. See *infra* text accompanying notes 106-12.

83. International Convention for the Regulation of Whaling With Schedule of Whaling Regulations, Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849, 161 U.N.T.S. 361 [hereinafter

Convention for the Regulation of Whaling.⁸⁴ The Convention was comprised of two parts.⁸⁵ The first part, which could not be amended, delineated the operations and fundamental goals of the Commission.⁸⁶ The second part, called the Schedule, was amended yearly to establish catch limits and other regulations.⁸⁷

The conflicting goals of the Convention have presented problems of interpretation.⁸⁸ The preamble recognized "over-fishing of one area after another and of one species after another to such a degree that it is essential to protect all species of whales from further over-fishing."⁸⁹ This conservation language stands in sharp contrast with provisions that require the promotion of "the orderly development of the whaling industry," according to the best scientific advice.⁹⁰ Each member State is entitled to one voting commissioner.⁹¹ Any amendment to the Schedule requires a three-quarters majority.⁹²

The preamble also contains an opt-out provision: if a State objects to an amendment within ninety days following a vote, the State will not be bound by the new enactment.⁹³ If a State objects during the first ninety days, other States have an additional ninety-day period in which to file an objection.⁹⁴ The opt-out provision has been repeatedly used as a way to avoid restrictive whaling measures.⁹⁵ Some States have threatened, and others actually have

cited as IWC Convention]. The signatories were South Africa, Australia, Brazil, Canada, Chile, Denmark, France, The Netherlands, New Zealand, Norway, Peru, U.S.S.R., United Kingdom and the United States.

84. *Id.*

85. *Id.*

86. The convention recognized "the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks. *Id.* preamble, para. 2. However, the quotas set for catch limits during the following thirty years certainly did not safeguard the stocks.

87. *Id.* art. I, para. 1.

88. Scarff, *supra* note 3, at 353-54.

89. IWC Convention, *supra* note 14, preamble, para. 3.

90. Arguments regarding the intent of the Convention continue today. Japan, Norway, Peru, U.S.S.R. and Spain argue that a moratorium violates Article V of the Convention because the interests of the consumers of whale stocks must be considered in any amendment. *Id.* art. V, para. 2.

91. *Id.* art. III, para. 1.

92. *Id.* art. III, para. 2.

93. As an illustration, Peru filed an objection to the 1985 moratorium prior to the November 4, 1982, deadline. The objection deadline was then extended to February 4, 1983, for all other member countries. MARINE MAMMAL NEWS, NOV. 1982, at 2.

94. IWC Convention, *supra* note 83, art. V, para. 3.

95. See W. SCHEVILL, *supra* note 3, at 319-29; G. SMALL, *supra* note 1, at 187-201; Scarff, *supra* note 3, at 357-67.

withdrawn, in order to have liberal quotas.⁹⁶

II. PROBLEMS OF THE IWC

There are many problems that the IWC has tried to solve. A discussion of these problems is important in order to understand the obstacles an effective enforcement scheme must overcome. For example, population management is a critical area of concern because both the IWC and UNCLOS require that regulatory measures must be based on scientific advice.⁹⁷ Observer systems are also important because scientific assessments should be based on reliable data of what is actually being taken from the seas.⁹⁸ Detection of violations is essential in order to invoke sanctions.⁹⁹ Another major problem that will be investigated is the various loopholes in the current IWC regulations.¹⁰⁰

A. Population Management

A critical problem for IWC enforcement has been the lack of adequate scientific data.¹⁰¹ Before any regulations are established, scientists must know the levels of stocks that actually exist in the oceans.¹⁰² Scientists, however, have consistently disagreed regarding how the stock population should be computed.¹⁰³ Also, whaling companies have sometimes persuaded their respective States to assign scientists who favored exploitation, as opposed to conservation.¹⁰⁴ Nevertheless, States realized that if left unregulated the declining populations coupled with overproduction of whale oil

96. W. SCHEVILL, *supra* note 3, at 319-29.

97. New Zealand, in voting for the moratorium, suggested that the "benefit of the scientific doubt and uncertainty be given to the whales." Japan, on the other hand, argued that since the scientific committee had already given recommended stock levels, a total moratorium on commercial whaling was contrary to Article V of the IWC Convention. See INT'L WHALING COMM'N, 33RD REPORT 2 (1981).

98. A. Koers, *The Enforcement of Fisheries Agreements on the High Seas: A Comparative Analysis of International State Practice*, Occasional Paper No. 6 (June 1970). See *infra* text accompanying notes 132-50.

99. *Id.*

100. See *infra* text accompanying notes 152-76.

101. Whales migrate over such long distances that there is tremendous cost involved in scientific population studies. In addition, the size of whales makes it very difficult to study them in captivity. Consequently, there is a dearth of basic population data. See Payne, *At Home With Right Whales*, 149 NAT'L GEOGRAPHIC 322 (1976).

102. *Id.*

103. The applicable mathematical models are beyond the scope of this Comment. For a more thorough discussion, see Scarff, *supra* note 3, at 390-400.

104. See *infra* text accompanying note 140.

would eventually lead to the elimination of the whaling industry.¹⁰⁵

In 1936 in an effort to limit international whale oil production, whaling companies agreed to quotas based on the "blue whale unit."¹⁰⁶ A blue whale unit consisted of either one blue, three humpback or five sei whales.¹⁰⁷ At the first meeting of the IWC in 1949, the blue whale unit was adopted as the catch standard.¹⁰⁸ The whaling season would end when the worldwide catch reached 16,000 blue whale units.¹⁰⁹

Scientists objected to the blue whale unit concept because it failed to recognize that certain species of whales were in greater danger of extinction than others.¹¹⁰ For the whaler, however, endangered species, such as the blue and the fin whales, could yield far greater profit than other less endangered whales.¹¹¹ In defiance

105. During the early 1930's the production of whale oil in the Antarctic was occasionally so great that the price fell below the cost of production. Under such circumstances, many companies did not send their whaling fleets to the Antarctic as, for example, in the 1931/32 season when not a single Norwegian factory ship left its home port. G. SMALL, *supra* note 1, at 172.

106. The blue whale unit was based upon the amount of oil a given whale could yield. A blue whale was expected to yield 110 barrels of oil. Note that it took only one-fifth of the time to catch a blue whale as a sei whale which yielded the same profit. It is easy to understand how the blue whale unit failed to protect endangered species and only helped the self-serving motivations of the whaling companies. Vamplew, *The Evolution of International Whaling Controls*, in 2 MAR. HIST. 123 (1972).

107. *Id.*

108. INT'L WHALING COMM'N, 1ST REPORT 16 (1950).

109. Many theories of fishery extinction have postulated that once a species has reached a certain level of depletion it would no longer be economically feasible to continue hunting. However, when one considers that the value of a single whale may exceed \$50,000, whaling companies still have considerable motivation to catch it. The blue whale, for example, was nearly hunted to extinction since whaling boats could supplement their catch with other whale species.

Based on weekly reports from factory ships, the Bureau of International Whaling Statistics would set a date for the close of the season. This resulted in what has come to be known as "The Whaling Olympic." During this time, whalers competed for the quickest catches before the season closed. The minimum length requirements on species were set below the length at which whales reach sexual maturity.

The decimation of the blue whale had become so severe that by 1956 that the scientific committee ignored them, believing that there were not enough blue whales to hunt for profit. See Scarff, *supra* note 3, at 574-88.

110. The blue whale unit was extremely destructive to the conservation of several species of whales. The powerful whaling companies threatened to withdraw from the IWC if they did not prevail. G. SMALL, *supra* note 1, at 182.

111. *Id.*

The case of the blue whale is a good example of just how resistant the Commission was to scientific advice and conservation concerns. The estimated original stock of blue whales in the Antarctic was on the order of 150,000 whales. At a population size of between 100,000-125,000, this stock would produce a sustainable yield of approximately 6,000 whales a year. By the mid-1930s, the blue whale was being

of the repeated recommendations of the IWC's own scientific committee, the blue whale unit remained in effect until 1972.¹¹²

In 1972 the IWC finally discarded the blue whale unit and agreed to set quotas by species.¹¹³ However, setting quotas by species only solved part of the problem since many species of whales have biologically distinct stocks which migrate in separate areas of the high seas.¹¹⁴ Under pressure from international environmental organizations, the IWC finally implemented a scheme for separating quotas based on specific, identifiable stocks.¹¹⁵ Each stock would be placed in one of three categories: (1) sustained management stocks; (2) initial management stocks; and (3) protection stocks.¹¹⁶ A sustained management stock represents a population which is "at or near" the maximum sustainable yield.¹¹⁷ An initial management stock describes a population that has not yet been subject to intensive harvesting and may therefore be harvested above the maximum sustainable yield.¹¹⁸ A protection stock receives complete protection since the population is below the sustained management level.¹¹⁹

The new management procedure, however, still requires scientific data which are either highly controversial or simply not available.¹²⁰ In order to compute a maximum sustainable yield, many factors must be determined. These include the initial population size before exploitation,¹²¹ the current size of the stock,¹²² the age

harvested at a rate of nearly 30,000 per year, and the total population rapidly dropped to about 40,000 whales. The blue whale remained the primary target of the whaling industry In 1963, the Committee of Three estimated that there were only between 650 and 2,790 blue whales left in the Antarctic with a sustainable yield of no more than 0-200 animals per year.

Scarff, *supra* note 3, at 364.

112. INT'L WHALING COMM'N, 23RD REPORT 38 (1973).

113. W. SCHEVILL, *supra* note 3, at 333.

114. Merely counting the total number of species failed to recognize that separate stocks which did not sexually interact existed in various locations in the oceans. The location of a stock in relation to a whaling country would affect the degree to which the stock was hunted. The Bryde's whale species, for example, has now been separated into seven separate stocks. In the 1981 season, three of the Bryde's whale stocks had zero catch limits while the other four stocks had quotas of up to 237 whales for the Western South Pacific stock. N. MACKINTOSH, *supra* note 31, at 28.

115. INT'L WHALING COMM'N, 26TH REPORT 26 (1976).

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* For example, the right, blue, humpback and gray whales were placed in the protection stock category.

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

121. The publication of *International Whaling Statistics* started in 1929, long after the

and sex ratio of the stock,¹²³ and the net recruitment rate.¹²⁴ This critical need for additional scientific research supports arguments both for and against the moratorium.¹²⁵ Scientific data have been principally accumulated through the killing of whales.¹²⁶ However, data acquired through population exploitation will eventually lead to an elimination of subjects.¹²⁷ This circular reasoning has existed since the origins of the IWC and will probably continue in the future.¹²⁸

During the period of the moratorium, it is essential to enlarge research activities in order to demonstrate that fruitful scientific data can be acquired without killing whales.¹²⁹ Article 65 of UNCLOS was specifically revised in order to allow the IWC to invoke a complete prohibition of whaling.¹³⁰ Since the IWC is clearly provided with authority to set catch levels below the maximum sustainable yield, UNCLOS will help remove the legal roadblocks that the IWC must allow *at least* with respect to the maximum sustainable yield to whaling companies.¹³¹

B. Observer Systems

Population research requires accurate data on the worldwide

initial population of stocks were significantly reduced. Therefore, any statistic used on initial population size is likely to only be a gross estimate. See IWC Scientific Committee, *Report of Special Meeting Held on Dec. 3-13, 1974*, at 30 (1975) (copy on file with the CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL).

122. Estimates of whale populations are based largely on data derived from *sightings*, the number of live whales actually seen; *markings*, the number of identifiable individuals seen again; and *catch effort*, based on an arcane formula believed to represent the co-operative effort needed to find and kill whales.

See L. WATSON, *supra* note 3, at 49 (emphasis added).

123. W. SCHEVILL, *supra* note 3, at 336-47.

124. The net recruitment rate theory postulates that the recruitment rate of whales increases as the stock level decreases. Although scientists have concluded that the net recruitment rate varies from stock to stock, scientists have been known to use a recruitment rate curve for one stock on other stocks when data have not been available. Scarff, *supra* note 3, at 353.

125. The moratorium was proposed by the United Kingdom due to "uncertainties in present assessments and management activities related to an inadequate knowledge of whales." The USSR and Peru expressed the view that the moratorium would only reduce research activities. INT'L WHALING COMM'N, 33RD REPORT 2 (1981).

126. See *supra* note 122 and accompanying text.

127. INT'L WHALING COMM'N, SPECIAL ISSUE NO. 1 7 (1977).

128. *Id.*

129. If research is *not* conducted, it only reinforces the position that the killing must continue in order to acquire data. INT'L WHALING COMM'N, 33RD REPORT 2 (1981).

130. UNCLOS, *supra* note 14, art. 65. See also Oxman, *The Third United Nations Conference on the Law of the Sea*, 75 AM. J. INT'L L. 211, 233 (1981).

131. *Id.*

catches in order to assess whale stocks.¹³² Enforcement of any fishing treaty also requires information regarding what companies are actually removing from the sea.¹³³ As pressure increases against exploiting the ocean's resources, the motivation of a State to cover up unacceptable activities also increases.¹³⁴ A nonbiased international observer scheme is thus necessary both for scientific data gathering and for the implementation of deterrent sanctions.¹³⁵

At the onset of the IWC, the Schedule required at least two national whaling inspectors to maintain a twenty-four hour watch.¹³⁶ The government which had jurisdiction over the factory ship¹³⁷ was required to appoint and pay the inspectors.¹³⁸ These whaling inspectors must be distinguished from international observers. The international observers are exchanged, usually through a bilateral treaty in order to limit potential conflicts of interest present with national inspectors.¹³⁹

In the 1960's, biology experts, known as "The Committee of Three," noted such significant declines in humpback whale stocks that they questioned whether the whaling inspectors had reported properly.¹⁴⁰ The inexplicable population reductions stimulated so much debate that the IWC outlined an international observer program in 1965.¹⁴¹ However, due to a dispute over national quotas, the USSR withdrew its support, and the international observer

132. See *supra* notes 122-25 and accompanying text.

133. A. Koers, *supra* note 98, at 35-45.

134. See Bonker, *The Thirty-Second International Whaling Commission*, 24 AM. J. INT'L L. 165 (1982).

135. See *infra* notes 147-50 and accompanying text.

136. IWC Convention, *supra* note 83, art. IX, para. 4.

137. A factory ship is a whaling vessel which is capable of large scale processing on the high seas. Factory ships are accompanied by catcher boats. The catcher boats kill the whales, tow them to the factory ship and then return to the hunt. Other whaling vessels process the whales at shore stations. The Convention defines a factory ship as "a ship in which or on which whales are treated whether wholly or in part." *Id.* art. II, para. 1.

138. *Id.* Sched., para. 1.

139. See A. Koers, *supra* note 98, at 35-45.

140. The Committee of Three was established by the IWC because of conflicting population estimates from members of the scientific committee. The population experts were intended to be more neutral than scientists from whaling countries. See INT'L WHALING COMM'N, 12TH REPORT 7-8 (1961).

141. INT'L WHALING COMM'N, 15TH REPORT 20 (1965). The outline that was defeated has been described as the only attempt to establish an international enforcement scheme. Under Article 1 of the outline, observers were responsible to, and appointed by, the Commission itself. However, if observers of different nationalities had been appointed to the factory ships, the past problems of reporting would have been solved. See A. Koers, *supra* note 98, at 35-45.

scheme was not implemented.¹⁴²

A bilateral international observer program was finally enacted in 1972.¹⁴³ These bilateral treaties, however, are between the major whaling states, such as USSR and Japan.¹⁴⁴ Observers are nominated and paid by their own governments; therefore, the conflict of interest problem persists.¹⁴⁵ Further, several Japanese whaling vessels are simply not covered by the observer system.¹⁴⁶

In order to impose consequences on violators, a violation must be reported.¹⁴⁷ The 1965 outline provided for a much stronger observer system than under the current bilateral treaties.¹⁴⁸ Under the 1965 outline, States would nominate a number of observers at least equal to the number of expeditions under its flag.¹⁴⁹ The IWC would then appoint observers so that not more than one observer of the same nationality would serve on any vessel.¹⁵⁰ The 1965 outline could be enhanced by allowing nonwhaling States to participate in the observer program.

C. *Circumventing Regulations*

The IWC has been faced with a number of tactics which States or whaling companies employ to circumvent regulations.¹⁵¹ An effective regulatory system for whales must do more than monitor populations and harvesting.¹⁵² The danger of extinction is minimized only when all whaling conforms to the international controls.¹⁵³

1. *Pirate Whaling.* A pirate whaling ship is defined as one

142. The Soviet Union sought a revision of the 1962 quota agreement and refused to vote for the observer scheme unless a more favorable percentage of the Antarctic whaling quota was allotted. See INT'L WHALING COMM'N, 18TH REPORT 17 (1968).

143. INT'L WHALING COMM'N, 24TH REPORT 27 (1974).

144. INT'L WHALING COMM'N, 31ST REPORT 37 (1980); INT'L WHALING COMM'N, 30TH REPORT 7 (1979).

145. INT'L WHALING COMM'N, 31ST REPORT at 37 (1980).

146. *Id.*

147. A. Koers, *supra* note 98, at 2.

148. *Id.* at 44.

149. *Id.* at 42.

150. *Id.*

151. The IWC has a working group that studies the problem of non-IWC whaling. One proposal this group has considered is to prohibit the importation of whale products from and the export of whaling vessels, equipment and expertise to non-IWC States. However, the group subsequently recommended that no action be taken on the proposal. INT'L WHALING COMM'N, 33RD REPORT 11 (1982).

152. Friedman, *supra* note 10, at 220.

153. *Id.*

which flouts international law.¹⁵⁴ Outlaw pirate whaling ships, unhindered by rules and regulations, kill every whale in their path.¹⁵⁵ Entire pods of endangered species, including nursing calves, are destroyed and stripped of only the most valuable meat.¹⁵⁶ The remainder of the whale's body is then dumped back into the sea.¹⁵⁷ The pirate whaling vessel *Sierra*, for example, is registered in Liechtenstein with a South African captain, flying the Angolan flag, and labelling the whale meat as a "product of Spain."¹⁵⁸

"Flags of convenience" refers to the economic practice of States registering foreign-owned vessels under their flags while exercising no meaningful control over the vessel's operations.¹⁵⁹ Pirate whaling ships are often financed or completely owned by nationals of a member State of the IWC.¹⁶⁰ The IWC must have authority over *all* whaling operations in order to manage the species.¹⁶¹ Article 65 of the UNCLOS provides the IWC with assistance in this area.¹⁶² The 140 signatory States now have an international duty to cooperate with the IWC.¹⁶³

2. *Aboriginal Whaling*. Aboriginal whaling refers to communities that claim ancient customs and traditions that relate to whaling.¹⁶⁴ A significant debate in the past few years has concerned aboriginal whaling.¹⁶⁵ The moratorium does not apply to such whaling.¹⁶⁶ The Alaskan Inupiat Eskimos have been harvesting bowhead for four hundred years. They justify continued hunting

154. Frizell, *The Pirate Whalers*, 77 OCEANS 25 (1981).

155. *Id.*

156. *Id.* See also *Pirate Whaling: Crippled, But is It About to Die?*, in 3 THE WHALE REPORT 5 (F. Swift ed. 1979). A. Koers, *supra* note 98, at 598.

157. A. Koers, *supra* note 98, at 598.

158. The *Sierra* was rammed by the vessel *Sea Shepard* in a deliberate attack by a group of conservationists. Often, the pirate whalers only take the most profitable part of the whale. This was usually the tail meat which would sell for over five dollars a pound in Japan. Unlike other fishery operations, endangered whales may still yield a great profit even though their populations are low. Frizell, *supra* note 154, at 25.

159. Osieke, *Flags of Convenience Vessels: Recent Developments*, 73 AM. J. INT'L L. 604-26 (1979).

160. A. Koers, *supra* note 98, at 598.

161. *Id.*

162. See *supra* text accompanying note 130.

163. *Id.*

164. *Preparations for the 34th International Whaling Commission Meeting: Hearing of the Comm. on Foreign Affairs, House of Representatives*, 97th Cong., 2d Sess. 381 (1982) [*hereinafter cited as* Hearing on Foreign Affairs].

165. *Id.* See also Bonker, *U.S. Policy and Strategy in the International Whaling Commission: Sinking or Swimming?*, 10 OCEAN DEV. & INT'L L. 41, 45 (1981).

166. See *supra* note 9 and accompanying text.

for cultural, historic and nutritional reasons.¹⁶⁷ However, the scientific and technical committees of the IWC recognize the bowhead as one of the most endangered whale species.¹⁶⁸ Current research indicates that the Eskimos have more than an adequate supply of animal protein in their diet without killing the endangered bowhead.¹⁶⁹

Another mingled issue concerning the abuses in the aboriginal whaling exception is illustrated by the Soviet Eskimos. In comparison to the thirty whales annually taken by United States Eskimos, the Soviet Eskimos harvest over 150 California gray whales.¹⁷⁰ The Soviet Eskimos chop up the whales and feed them to minks in large fur farms along the coast.¹⁷¹ The mink pelts are then sold to the West in what can only be characterized as a commercial operation.¹⁷²

The United States should reconsider its position in regard to aboriginal whaling. The number of whales struck but lost, the evidence of nutritional surplus, and the Soviet abuses all point to a policy that should eliminate aboriginal whaling, at least until the whale populations recover.¹⁷³ This shift in policy would not only close a loophole in the moratorium, but would also make the United States position on whaling more consistent and effective. A further action that would be warranted is banning the importation of Soviet mink pelts.

3. *Small Cetaceans*. Small cetaceans are hunted both directly and indirectly by the fishing industry.¹⁷⁴ Perhaps the best example of indirect cetacean killing is in the tuna industry.¹⁷⁵ Since schools of tuna swim beneath schools of dolphins, tens of thousands of dol-

167. *Hearing on Foreign Affairs, supra* note 164, at 24.

168. INT'L WHALING COMM'N, SPECIAL ISSUE No. 4 (1982).

169. *Id.*

170. *Hearing on Foreign Affairs, supra* note 164, at 24.

171. *Id.*

172. *Id.*

173. Friends of the Earth has argued that both the aboriginal countries and the whales need protection equally. However, they state: "Without the cooperation of the Inuit, we could lose both the Arctic and the bowhead to the ravages of the industrial age; both would be consumed by an exploitative and transient culture whose roots are not bedded in a permanent balance with the environment." N. HOLLIMAN, *supra* note 28, at IX.

174. See J. JOSEPH & J. GREENOUGH, *supra* note 29, at 137-44.

175. For example, the white-belly spinner dolphins have a very close association with yellowfin tuna as they share similar diets. With the advent of light-weight nylon netting in the 1960's, large purse-seining operations would capture thousands of dolphins with the tuna. See D. GASKIN, *supra* note 55, at 352.

phins are annually killed incident to the tuna catch.¹⁷⁶

States primarily contend that the IWC lacks jurisdiction and competence to deal with small cetaceans.¹⁷⁷ The IWC jurisdiction over small cetaceans should be vigorously endorsed.¹⁷⁸ At the present time, the IWC scientific committees could also research the population of these mammals.

D. Jurisdiction

Two issues raised by the nations which voted against the moratorium are: (i) the customary international law concept of freedom to fish on the high seas, and (2) States sovereignty within its costal zones.¹⁷⁹ Coastal EEZ's are particularly important because they often encompass the whales' migratory paths.¹⁸⁰ The control of the EEZ's will determine if the IWC has the power to regulate in those areas.¹⁸¹

1. *Freedom of the Seas*. The principle of freedom of the seas is based on the concept of *res nullius*: the seas may not be possessed by any one person or nation.¹⁸² The freedom of the seas doctrine has been a stable concept in international law since the writings of Hugo Grotius in 1609.¹⁸³ Grotius' thesis was *mare liberum*—the sea is by nature intended to be free to all.¹⁸⁴ His doctrine was formulated on the assumption that ocean fishery resources were inex-

176. *Id.* See also Scarff, *supra* note 3, at 373-87.

177. INT'L WHALING COMM'N, 33RD REPORT 10 (1982).

178. Small cetaceans fall into the same category as highly migratory fish such as tuna and billfish. Thus, the problem of EEZ control is important for the management of these species as well as for whales. See *infra* text accompanying notes 291-308.

179. INT'L WHALING COMM'N, 33RD REPORT 2 (1982).

180. It has been estimated that approximately one-half of all whales are found outside any 200 mile economic zone. Due to the smaller area of Northern Hemisphere temperate oceans, a considerably higher percentage of northern whales occur within 200 miles of the coasts of one or more States. In the Southern Hemisphere, the main feeding grounds of the large baleen are often more than 200 miles from any coast, but nearly all the humpback and right whales and many stocks of norquads and sperm whales migrate and winter within 200 miles of South America, Africa, or mid-ocean islands.

Scarff, *supra* note 3, at 613.

181. See *infra* text accompanying notes 291-312.

182. G. SMITH, RESTRICTING THE CONCEPT OF FREE SEAS, MODERN MARITIME LAW RE-EVALUATED 14 (1980).

183. Comment, *Fishery Conservation: Is the Categorical Exclusion of Foreign Fleets the Next Step?*, 12 CALIF. W. INT'L L.J. 154, 157-59 (1982).

184. GROTIUS, THE FREEDOM OF THE SEA OR THE RIGHT WHICH BELONGS TO THE DUTCH TO TAKE PART IN THE EAST INDIAN TRADE 25 (DEMAN TRANS. 1916).

haustible.¹⁸⁵ To protect the rights of the Dutch to freely navigate and fish, Grotius argued: "The sea is common to all because it is so limitless that it cannot become a possession of anyone, . . . because it is adapted for the use of all."¹⁸⁶ The concept of freedom of the seas must be regarded as outmoded law. With the aid of sonar, helicopters, satellites and elaborate processing at sea, the ability to fully exploit the ocean's resources is presently beyond doubt.¹⁸⁷

Jurisdictional claims to the sea began to take a new form in the early eighteenth century.¹⁸⁸ Terms such as "marginal seas," "territorial seas" and "jurisdictional seas" were used by coastal States which staked claims three miles from the low water mark of their coast.¹⁸⁹ The "cannon shot" rule advanced the position that a State could exercise jurisdiction up to the range of a cannon shot.¹⁹⁰ The cannon shot rule only provided pockets of territorial supremacy that depended upon the locations of the cannons on shore.¹⁹¹ Galiani, an Italian diplomat, proposed that the three-mile belt should be a continuous zone from the shoreline.¹⁹²

During the twentieth century, States began to assert jurisdiction six,¹⁹³ nine¹⁹⁴ or twelve¹⁹⁵ miles into the sea. Labels such as "contiguous zone," "customs area," "conservation zone" and "zone of neutrality" were used.¹⁹⁶ Some States claimed these zones as territorial waters.¹⁹⁷ Others simply claimed control of fishing rights.¹⁹⁸

2. *Exclusive Economic Zones.* The United States, faced with the depletion of coastal resources by foreign operations, unilaterally extended its jurisdiction in the Truman Proclamation of

185. *Id.*

186. *Id.*

187. Anand, *The Politics of a New Legal Order for Fisheries*, 11 OCEAN DEV. & INT'L L. 263, 268-70 (1982).

188. G. SMITH, *supra* note 182, at 20.

189. *Id.*

190. *Id.* at 21; *see also* Comment, *supra* note 183, at 159.

191. G. SMITH, *supra* note 182, at 21.

192. S. SWARZTRAUBER, *THE THREE-MILE LIMIT OF TERRITORIAL SEAS* 55 (1972).

193. *Id.* at 34-39.

194. *See* Comment, *supra* note 183, at 159.

195. *Id.*

196. G. SMITH, *supra* note 182, at 22.

197. *Id.*; *see also* S. SWARZTRAUBER, *supra* note 192, at 65-75.

198. S. SWARZTRAUBER, *supra* note 192, at 65-75.

1945.¹⁹⁹ Due to “an urgent need to protect coastal fishery resources,” the United States claimed jurisdiction over the natural resources in the continental shelf contiguous to the coastline.²⁰⁰ Chile soon followed in 1947 to “prevent the exploitation of all fisheries and whaling activities.”²⁰¹ By 1958 jurisdiction of the seas became a focal issue: twenty-seven of the seventy-three coastal States claimed legal control beyond the customary three-mile limit.²⁰²

The United Nations Conferences on the Law of the Sea in 1958 were an attempt to bring order to the legal uncertainties.²⁰³ Although recognizing the need for the conservation of fishery resources, the four emerging conventions²⁰⁴ did not acknowledge exclusive rights within these enlarged coastal areas. However, the conventions declared that “all States have the duty to adopt or cooperate with other States in adopting conservation measures.”²⁰⁵

The early law of the sea conventions failed to solve the problems of enforcing coastal conservation measures.²⁰⁶ Six of the 150 States caught more than one-half of the total world catch of fisheries.²⁰⁷ Therefore, during the early 1970’s developing states in

199. See *The Truman Proclamation*, Proc. No. 2667, 10 FED. REG. 12303 (1946), reprinted in 24 DIGEST OF INT’L LAW 493 (1965).

200. *Id.* See also S. SWARZTRAUBER, *supra* note 192, at 155-69; Comment, *supra* note 182, at 163-64.

201. Due to the Second World War, pelagic whaling operations were suspended worldwide. This lack of competition from other whaling operations prompted a Chilean company to begin whaling to supply its nation with edible fats and oils. After the war, Europe and Japan, faced with low supplies of fats and oils, returned distant whaling fleets to the high seas with renewed vigor. The Chilean government signed the 1937 whaling convention, but failed to ratify it out of fear for its infant whaling industry.

Whaling officials convinced the Chilean President that the three-hundred-mile Declaration of Panama by the United States could be used as legal precedent to expand its own jurisdiction. See N. HOLLICK, U.S. FOREIGN POLICY AND THE LAW OF THE SEA 76-79 (1981).

202. Anand, *supra* note 187, at 271.

203. *Id.*

204. Convention on the High Seas, done Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82; Convention on the Territorial Sea and Contiguous Zone, done Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205; Convention on Fishing and Conservation of the Living Resources of the High Seas, done Apr. 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969, 559 U.N.T.S. 285.

205. Landlocked countries protested their position with regard to the EEZ’s. The African landlocked States, for example, initially proposed regional economic zones. Eventually the landlocked countries were given “the right to participate in the exploration and exploitation of the living and nonliving resources on an equal and nondiscriminatory basis.” N. REMBLE, AFRICA AND THE INTERNATIONAL LAW OF THE SEA 129 (1980).

206. Anand, *supra* note 187, at 271-75.

207. *Id.* at 276.

Latin America,²⁰⁸ the Caribbean²⁰⁹ and Africa²¹⁰ declared economic zones within their exclusive jurisdiction and control. The rationale for these EEZ's was "an attempt at creating a framework to resolve the conflicts of interest between the developed and the developing countries in the utilization of the sea."²¹¹

In 1974 the question of unilateral extension of EEZ's came before the International Court of Justice in a dispute between Iceland and the United Kingdom.²¹² In an *ex parte* judgment, the court refused to declare EEZ's invalid under international law.²¹³ Aware of the United Nations codification of the Law of the Sea, the court held that it could not render judgment *sub specie legis ferendae*, that is, anticipate the law before promulgation by the legislators.²¹⁴ However, the court recognized the extension of coastal jurisdiction up to twelve miles as a principle of customary international law.²¹⁵

The Final Act of UNCLOS recognizes the right of coastal states to determine catch quotas in two-hundred mile EEZ's.²¹⁶ Further, Article 61 requires the coastal State to use the best scientific evidence available to ensure that the living resources in the EEZ are not endangered by overexploitation.²¹⁷

Japan and other States opposed to the IWC moratorium have argued that under customary international law every State has the right to exploit the resources within EEZ's²¹⁸ These States argue that jurisdiction over an EEZ should rest solely with the coastal State. This jurisdictional issue is a critical factor that will determine the outcome of international regulation of migratory species.

Japan is an example of the conflicting interests over the au-

208. Montevideo Declaration of Principle on Law of the Sea, *cited in* Anand, *supra* note 202, at 273-75.

209. D. O'CONNELL, *THE INTERNATIONAL LAW OF THE SEA* 588 (1982).

210. N. REMBLE, *supra* note 205, at 278.

211. *Id.*

212. Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 23.

213. *Id.*

214. *Id.*

215. *Id.* Customary international law is defined as "consistent and uniform usage which states are obliged to follow because of a general feeling that a sanction will be imposed upon them if they do not." Lauterpacht, *Sovereignty Over Submarine Areas*, 27 BRIT. Y.B. INT'L L. 376, 393 (1950).

216. UNCLOS, *supra* note 14, art. 56.

217. *Id.* art. 61.

218. INT'L WHALING COMM'N, *supra* note 177, at 10.

thority a State may claim over EEZ's.²¹⁹ Japan, as the largest fishing nation in the world, harvests over 3.5 million tons of fish from EEZ's of foreign coastal States.²²⁰ Initially, Japan condemned EEZ's in the 1970's and asserted that unilateral claims violated international law.²²¹ Less than five years later, when the international recognition of EEZ's was apparent, Japan claimed its own EEZ.²²²

Japan's bifurcated position reflects worldwide uncertainty regarding the control a coastal State may assert within EEZ's.²²³ The United States has used its EEZ to deter both IWC and non-IWC States from violating IWC regulations.²²⁴ The history of the United States' use of EEZ's demonstrates the potential of this enforcement scheme on a worldwide basis.²²⁵

III. THE UNITED STATES' USE OF EXCLUSIVE ECONOMIC ZONES

A. *Unilateral Action by the United States*

The United States' use of national legislation has proved to be an interesting development in the enforcement of fishery regulations.²²⁶ The Endangered Species Act of 1969²²⁷ and the Marine Mammal Act of 1972²²⁸ prohibit the importation of whale products into the United States.²²⁹ However, these restrictions on the international trade of whale products in the United States have not solved the IWC's enforcement problems.²³⁰ Alternatively, the Pelly and Packwood-Magnuson amendments have been temporarily

219. Kuribayashi, *The New Ocean Regime and Japan*, 11 OCEAN DEV. & INT'L L. 95, 99 (1982).

220. *Id.* This estimate is out of a total world annual harvest of ten million tons, making Japan the world's largest fishery operation.

221. *Id.* at 109.

222. *Id.* at 110.

223. See *infra* text accompanying notes 291-305.

224. See *infra* text accompanying notes 243-54.

225. *Id.*

226. The United States' legislation indicates that the proposal will be a strong deterrent to distant water fishing States. See *infra* text accompanying notes 306-17.

227. The Endangered Species Act created a new category of "threatened" species. This allowed for protection of a species *before* the species was near extinction. Endangered Species Act of 1969, Pub. L. No. 91-135, 83 Stat. (codified as amended at 16 U.S.C. § 710 (1969)).

228. Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, 86 Stat. 1027 (codified as amended at 16 U.S.C. § 668 (1972)).

229. The acts had "a significant impact on the international trade of whale products, because at that time the United States accounted for about one-fifth of the entire world market for whale products." Scarff, *supra* note 3, at 601.

230. The result was merely a shift in the market. *Id.* at 602.

successful.²³¹

Under the 1971 Pelly amendment to the 1967 Fisherman's Protective Act, the President has the power to prohibit the importation into the United States of the fish products of any State which conducts, directly or indirectly, fishing operations contrary to international fishery conservation programs.²³² Initially, the Secretary of Commerce "certifies" a country deemed to be in violation.²³³ The President then has sixty days to either ban imported fish products from the offending country or to inform Congress why such actions were not taken.²³⁴ Penalties of up to \$10,000 for the first violation, and \$25,000 for each subsequent violation, may be imposed.²³⁵

The 1979 Packwood-Magnuson amendment to the 1976 Fisheries Conservation and Management Act has several features that exceed the regulations of the Pelly amendment. First, a country can be certified not only for fishing operations, but also for "engaging in trade" which would diminish IWC effectiveness.²³⁶ Second, upon certification, the Secretary of State is required to reduce the State's fishing allocation in the United States two-hundred-mile zone *by at least fifty percent*.²³⁷ This aspect of the amendment is nondiscretionary. Third, the amendment is specifically designed to assist the IWC.²³⁸

B. History of the Use of the Pelly and Packwood-Magnuson Amendments

To date, sanctions have not been levied under the Pelly or Packwood-Magnuson amendments. However, as the following history demonstrates, the success of these regulations lies in the threat of their imposition.

On November 12, 1974, Japan and the USSR were certified

231. *See infra* text accompanying notes 239-54.

232. 1971 Pelly Amendment to the 1967 Fisherman's Protective Act, Pub. L. No. 83-680, 85 Stat. 687 (codified as amended at 22 U.S.C. § 1971 (1971)).

233. *Id.* § 8(a).

234. *Id.* § 8(b).

235. *Id.* § 8(d)(1).

236. 1979 Packwood-Magnuson Amendment to the 1976 Fisheries Conservation and Management Act, Pub. L. No. 94-265, 93 Stat. 407 (codified as amended at 16 U.S.C. § 1882 (1979)).

237. *Id.* § 3(B)(ii).

238. Certification is made when "nationals of a foreign country, directly or indirectly, are conducting fishing operations or engaging in trade or taking which diminishes the effectiveness of the International Convention for the Regulation of Whaling." *Id.* § 3 (a)(i).

under the Pelly amendment.²³⁹ This action was the result of objections filed over the 1973 minke whale quota and a harvest which exceeded their quotas by 507.²⁴⁰ Warnings were issued to the respective embassies, and both countries agreed to the 1974 quotas.²⁴¹ The Secretary of Commerce therefore recommended that import restrictions should not be applied, and President Ford followed this advice.²⁴²

On December 14, 1978, Peru, Chile and the Republic of Korea were certified by the Secretary of Commerce.²⁴³ This action represented an effort to use the Pelly amendment to coerce non-IWC whaling states to join the IWC.²⁴⁴ Pressure was applied through the foreign embassies and before the sixty days had expired, all three States had joined the IWC.²⁴⁵ President Carter notified Congress that an embargo would not be declared since these nations had joined the IWC.²⁴⁶

Following the 1979 IWC meeting, Spain filed an objection to the fin whale quota.²⁴⁷ After consultation with the Marine Mammal Commission and the National Marine Fisheries over potential certification, communication was made through both embassy contacts and personal visits by the Department of State to visiting Spanish fishing representatives.²⁴⁸ Spain subsequently agreed not to violate the IWC fin quota.²⁴⁹

The Republic of Korea filed an objection to restrictions on nonexplosive (cold) harpoon use following the 1980 IWC meeting.²⁵⁰ After certification warnings from the United States, Korea agreed to follow the IWC's provisions.²⁵¹ In addition, Korea also agreed to allow outside observers on whaling vessels flying Korea's flag.²⁵²

Taiwan's violations of the IWC's restrictions in 1980 and 1981

239. *Hearing on Foreign Affairs*, *supra* note 164, at 10.

240. *Id.*

241. *Id.*

242. Comment, *Not Saving the Whales: President Ford Refuses to Ban Fish Imports From Nations Which Have Violated IWC Quotas*, 5 ENVTL. L. REPORT 10044 (1975).

243. *Hearing on Foreign Affairs*, *supra* note 164, at 11.

244. *Id.*

245. INT'L WHALING COMM'N, 31ST REPORT 2 (1979).

246. *Hearing on Foreign Affairs*, *supra* note 164, at 11.

247. INT'L WHALING COMM'N, 32ND REPORT 3 (1980).

248. *Hearing on Foreign Affairs*, *supra* note 164, at 11.

249. *Id.*

250. INT'L WHALING COMM'N, 33RD REPORT 8 (1981).

251. Scarff, *supra* note 3, at 605.

252. *Hearing on Foreign Affairs*, *supra* note 164, at 11.

led to communications that the Taiwanese could expect "a high probability of certification."²⁵³ This threat was removed in July 1981, when Taiwan placed an absolute ban on whaling.²⁵⁴

The unilateral legislation of the United States, however, has not been successful in preventing the objections to the moratorium filed by Japan, USSR, Peru and Norway.²⁵⁵ It is difficult to determine the reason why the threat of sanctions did not work. However, it is likely that these nations decided that whaling was more profitable than losing quotas in the United States' EEZ's.²⁵⁶ They may have also noted that the United States has only threatened and has never actually issued sanctions.²⁵⁷ Even in the event of lost quotas in the United States, these States are, nonetheless, free to make up for the loss in other EEZ's.²⁵⁸

The United States Senate is aware of the need to be firm in the application of the amendments. In August 1982, sixty-five senators wrote: "In order to avoid any thought that the United States can be 'faced down' on the whaling issue, we should make it absolutely clear now that the United States will invoke two amendments against any nation violating IWC decisions."²⁵⁹ Three months later, Congress approved a new five-year international fishery agreement which allows Japanese fishing within the United States' EEZ.²⁶⁰ Japan had resorted to counterthreats which caused a shift in the firm posture by the United States.

C. *Arm-Twisting: Japan—A Case in Point*

Japan is a major whaling State and one of the United States' largest trading partners.²⁶¹ Certification of Japan could therefore have significant consequences to trade relationships between the

253. *Id.*

254. In July 1981 Taiwan banned whaling and the licensing of whaling operations. However, Taiwan had stored whale meat which it could sell. *Id.* Note that many of these aforementioned States were responsible for pirate whaling and for whaling under flags of convenience. See *supra* text accompanying notes 154-61.

255. INT'L WHALING COMM'N, 34TH REPORT 2 (1982); see also MARINE MAMMAL NEWS, July 1982, at 1.

256. See *infra* text accompanying notes 269-72.

257. See *supra* text accompanying notes 243-254.

258. The States may also be influenced by the declining quotas the United States is allowing within the EEZ. The smaller the quota, the less the impact of restrictive sanctions. See Comment, *supra* note 183, at 154.

259. MARINE MAMMAL NEWS, Aug. 1982, at 4.

260. MARINE MAMMAL NEWS, Dec. 1982, at 3.

261. MARINE MAMMAL NEWS, June 1982, at 1.

two countries.²⁶² While Japan has used arm-twisting techniques against other countries,²⁶³ the following analysis will be limited to the impact on the United States.

In an effort to influence Congress not to enforce the IWC moratorium, Japan threatened to retaliate with legislation forbidding fish exports of the United States into Japan.²⁶⁴ The Japanese estimate that in Alaska alone two-thirds of the fishing processors might go bankrupt as a result of such legislation.²⁶⁵ In addition, National Oceanic and Atmospheric Administration officials fear that that restricted access to the United States' EEZ might cause Japan to revoke existing salmon treaties.²⁶⁶ Under these treaties, Japan has agreed to avoid fishing in waters *beyond* the United States' EEZ in order to avoid competition with salmon fishermen.²⁶⁷ The economic effect to the United States of Japan's fishing in these waters could exceed \$100 million.²⁶⁸

The United States has its own economic interests to protect. Congress is concerned that over sixty-five percent of the catch in the United States' EEZ is taken by foreign fishing operations.²⁶⁹ These foreign operations process the fish and then export it back to the United States.²⁷⁰ Congress has regarded foreign fishing in the United States' EEZ as such a problem that legislation was introduced in 1980 that would phase out all foreign fishing by 1987.²⁷¹

262. *Id.*

263. A favorite tactic has been a form of economic blackmail against Third World nations. In 1978, for example, Japan threatened to cancel a sugar purchase agreement unless Panama dropped a proposal at the IWC for a whaling moratorium. The threat succeeded.

The Seychelles experienced similar pressures in 1980—Japan threatened to cancel a fisheries development agreement. *Hearing on Foreign Affairs, supra* note 164, at 22.

264. MARINE MAMMAL NEWS, July 1982, at 4.

265. *Id.*

266. Japan has argued that:

to use the full force and power of the American government to deny nations the right to utilize a small portion of an available food resource, in the face of scientific judgment that such utilization will not harm the resource, can only have a damaging effect on the United States' foreign relations. Foreign nations will view this only as an attempt by the United States, with its abundant surpluses of grain and protein, to impose its will on less fortunate nations.

Protection of Whales, 1981: Hearing and Markup on H. 381-68 Before the Subcomm. on Human Rights and Int'l Org., 99th Cong., 1st Sess. 55 (1981).

267. MARINE MAMMAL NEWS, July 1982, at 4.

268. *Id.*

269. Comment, *supra* note 183, at 177. "More than three years after the enactment of the 1977 Fishery Conservation and Management Act, United States fishing fleets were harvesting only 33 percent by volume, and 66 percent by value, of the total catch in the fishery conservation zone." *Id.*

270. *Id.* at 178.

271. *Id.* at 154.

This legislation will dramatically reduce the impact of the Packwood-Magnuson amendment as a deterrent to IWC violations.²⁷² Clearly, a new regulatory system must be established.

IV. ENFORCEMENT SCHEMES

The consequences imposed upon violators of a fishery treaty is a critical factor in deterring noncompliance. Even if the IWC moratorium is temporarily successful, commercial whaling operations will eventually return.²⁷³ During the interim period, potential enforcement schemes can be analyzed.²⁷⁴ If whaling companies do not exert great pressure on their respective States, a workable system may be developed and added to the IWC. Essentially, three types of enforcement schemes are possible.

A. National Enforcement

National enforcement schemes in international fishery treaties give the flag State of the vessel the exclusive responsibility for enforcement.²⁷⁵ The IWC provides: "Each contracting government shall take appropriate measures to ensure the application of the provisions of the Convention and the punishment of infractions against the said provisions in operations carried out by persons or by vessels under its jurisdiction."²⁷⁶ In addition, governments are required to fully report the details of each infraction, the measures taken in response to the infraction and the penalties imposed on violators.²⁷⁷ The responsibility for enforcement may rest with the flag State, while the responsibility for the observer system may rest

272. See *supra* text accompanying note 258.

273. See *supra* text accompanying note 7.

274. In this Comment, the term "enforcement" refers to the process by which an arrangement is made effective.

275. The national enforcement scheme may be expressly written or it may be implied from the treaty. The IWC Convention is an illustration of an express provision. The Atlantic Tuna Convention and the Northeast Atlantic Seals Agreement are other examples of express provision. See Atlantic Tuna Convention, *done* at Rio de Janeiro, May 14, 1966, art. IX, 20 U.S.T. 2887, T.I.A.S. No. 6767, 673 U.N.T.S., 63, *reprinted in* 6 INT'L LEGAL MATERIALS 293; Northeast Atlantic Seals Agreement, Feb. 9, 1957, art. 8, 8 U.S.T. 2283, T.I.A.S. No. 3948, 309 U.N.T.S. 29.

Implied national enforcement schemes may be found in the Black Sea Fishing Convention of 1959 and the Fishing Operations Agreement of 1964. Black Sea Fishing Convention, July 7, 1959, BULGARIA-ROMANIA-USSR, 97 MARTENS NOUVEAU RECUEIL 20, 337 U.N.T.S. 203 (1959); Fishing Operations Agreement, Dec. 14, 1964, 15 U.S.T. 2179, T.I.A.S. No. 5703, 531 U.N.T.S. 213 (1964).

276. IWC Convention, *supra* note 83, art. IX, para. 1.

277. *Id.* art. IX, para. 4.

with the international organization.²⁷⁸ Thus, many combinations of the three basic enforcement schemes are possible.²⁷⁹

B. Mutual Enforcement

A mutual enforcement scheme involves an express provision that any party to the Convention has the authority to inspect all pelagic fishing vessels under the flag of those States that are members of the agreement.²⁸⁰ This authority usually includes the seizure of the vessel and the arrest of persons suspected of violations.²⁸¹ However, prosecution of violators usually remains with the flag State.²⁸²

C. International Enforcement

An international enforcement scheme would provide an international organization with the authority to arrest and seize violators of a pelagic fisheries treaty.²⁸³ To date, no such enforcement scheme has been ratified.²⁸⁴ The difficulties in establishing an international enforcement scheme are multifold. An international enforcement scheme includes an observer program in which instruction and appointment of observers lies with an international organization.²⁸⁵ However, the observation of violations is only one component of a truly international enforcement scheme. A complete international enforcement scheme would provide power to an international organization both to observe and impose sanctions upon a noncomplying vessel.²⁸⁶ Enormous costs would be involved in such an operation.²⁸⁷ In addition, the control of the organization

278. A. Koers, *supra* note 98, at 598.

279. *Id.*; see also R. FRIEDMAN, UNDERSTANDING THE DEBATE ON OCEAN RESOURCES 46-52 (1969).

280. See Hayashi, *Soviet Policy on International Regulation of High Seas Fisheries*, 5 CORNELL INT'L L.J. 131, 147 (1972).

281. For examples, see Black Sea Fishing Convention, *supra* note 275, at 203; Fishing Operations Agreement, *supra* note 275, at 213.

282. Hayashi, *supra* note 280, at 148.

283. *Id.* at 147.

284. A. Koers, *supra* note 98, at 20.

285. *Id.* at 43.

286. See *infra* text accompanying notes 321-26.

287. Another cause for failure of the International Whaling Commission was a perpetual shortage of funds for which it was not directly responsible. Governmental or administrative blindness on the part of the world's greatest whaling nations is probably responsible for the annual contribution of a paltry £250 to support the work of the Commission.

G. SMALL, *supra* note 1, at 206.

would be problematic.²⁸⁸

V. PROPOSAL FOR AN AMENDMENT TO IWC AND UNCLOS

The national enforcement system of the IWC has not been an effective regulatory scheme.²⁸⁹ As discussed, an international enforcement scheme is also not a realistic proposal at this time.²⁹⁰ Effective regulation must therefore be some form of a mutual enforcement scheme.

EEZ's are used in UNCLOS to solve the problem of regulating local coastal fisheries.²⁹¹ However, in spite of UNCLOS, there are still no absolute constraints on *how* the EEZ's may be used.²⁹²

The EEZ is a newly emerging concept that may pose a danger to fishery conservation.²⁹³ Some States may allow unlimited killing of whales within their EEZ under the rationale that the IWC has no jurisdiction within their territory. Another possible argument would be that a State's scientists are capable of more valid population estimates than that of the thinly spread IWC scientific committee. Under either position, the danger of State abuse of EEZ's is apparent.

Since 1975, seventy-one new claims to two-hundred-mile zones have been established.²⁹⁴ Fifteen of these zones claim the two-hundred-mile zones as part of territorial sea.²⁹⁵ Fifty States have legislation establishing economic zones,²⁹⁶ and twenty-one States lay claim to an exclusive fishing zone.²⁹⁷ Three States have even asserted control over the waters extending *beyond* two-hundred miles, to the end of the continental shelf.²⁹⁸

Article 55 of the Final Act of UNCLOS defines an EEZ as "an

288. A. Koers, *supra* note 98, at 44.

289. See *supra* text accompanying notes 151-77.

290. See *supra* text accompanying notes 283-88.

291. "Absolute freedom of the sea and *laissez faire* in the ocean have led to ruthless exploitation and destruction of worldwide fisheries. Recently, however, states have come to acquire control over a 200-mile coastal zone where more than 90 percent of the fish are caught." Anand, *supra* note 187, at 265.

292. W. BURKE, R. LEGATSKI & W. WOODHEAD, *supra* note 8, at 290-93.

293. D. GASKIN, *supra* note 55, at 387.

294. Anand, *supra* note 187, at 279-83.

295. India, Guyana, Mauritius, Pakistan, Seychelles and Barbados claim the area of the EEZ is covered by all laws of the State as if "it is a part of the territory." W. BURKE, R. LEGATSKI & W. WOODHEAD, *supra* note 8, at 296.

296. Anand, *supra* note 187, at 273.

297. *Id.*

298. W. BURKE, R. LEGATSKI & W. WOODHEAD, *supra* note 8, at 294. The three States are India, Pakistan and Guyana.

area beyond and adjacent to the territorial sea.”²⁹⁹ Therefore, an EEZ should not be considered as being under the total control of the coastal State. Article 57 requires that the EEZ may not extend more than two-hundred nautical miles beyond the established baselines.³⁰⁰ Article 60 permits a coastal State to promulgate measures designed to maintain *or restore* whale populations at levels which are able to produce a maximum sustainable yield.³⁰¹

The coastal States are clearly permitted to set catch limits within their respective EEZ’s.³⁰² Uncertainty arises, however, over whether a coastal State may *exclude* foreign fishing.³⁰³ The legislation of many States which purports to exclude foreign fishing solely to protect national fishing interests is not supported by the majority of the international community.³⁰⁴ This legislation does demonstrate, however, the strong desire of coastal States to protect the world fisheries from exploitation by a few distant fishing States.³⁰⁵

One way the fishery stocks could be protected would be to condition fishing permits within EEZ’s on the State’s cooperation with international regulatory bodies. Article 61 of the UNCLOS requires coastal States to cooperate with competent international organizations.³⁰⁶ Thus, this proposal is a realistic interpretation of UNCLOS.³⁰⁷ An amendment to UNCLOS and the IWC could make it clear that *all* coastal States would deny EEZ access to States which disregard international regulatory bodies.

299. UNCLOS, *supra* note 14, art. 55.

300. *Id.* art. 57.

301. *Id.* art. 60, para. 3. The importance of this factor is that population levels may be set *above* the maximum sustainable yield in order to allow the stocks time to recover.

302. Article 62 provides:

The coastal State shall determine its capacity to harvest the living resources of the EEZ. Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements, give other States access to the surplus of the allowable catch, having particular regard to the provisions of articles 69 and 70, especially in relation to the developing States mentioned therein.

Id. art. 62, para. 2.

303. The language is simply not clear in this area. *Id.*

304. N. HOLLICK, *supra* note 201, at 92-95.

305. Anand, *supra* note 187, at 276-79.

306. Article 61 provides: “The coastal State and competent international organizations, whether subregional, regional, or global, shall co-operate to this end.” UNCLOS, *supra* note 14, art. 61, para. 2.

307. The members of UNCLOS are required to cooperate with international regulatory bodies. The coastal States also have a duty to cooperate with international regulatory bodies in setting quotas. It seems logical, therefore, that the coastal State could reduce the quota of any State that does not comply with an international regulatory body such as the IWC, within the limits of UNCLOS.

This procedure could begin when the international organization certified that a State was violating its regulations. The next step would be to determine the nature of the offense. The greater the offense, the more restrictions would be placed upon the permits into EEZ's. Article 282 of UNCLOS provides a dispute settlement procedure.³⁰⁸ The four choices for dispute settlement under Article 282 are:

- (1) The International Tribunal for the Law of the Sea in accordance with Annex VI;
- (2) The International Court of Justice;
- (3) An arbitral tribunal constituted in accordance with Annex VII;
- and (4) A special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.³⁰⁹

One of these four procedures could then be selected to determine the scope and length of the penalty.

The mood of UNCLOS clearly indicates that both developed and developing countries are very concerned with the preservation of the oceans' fisheries.³¹⁰ Coastal States were distinctly displeased with distant fishing fleets' reckless exploitation of coastal fishery populations.³¹¹ The proposed amendment would deter violations of fishery quotas both within and beyond the EEZ's.³¹²

This amendment would also be a strong deterrent to the distant fishing fleets. Over ninety percent of the worldwide catch is taken within the two-hundred-mile EEZ's.³¹³ The whaling States are major fishing States as well.³¹⁴ Japan, for example, harvests 3.7 million tons of fish within the two-hundred-mile EEZ's of foreign

308. UNCLOS, *supra* note 14, art. 282.

309. Article 282 States:

If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional, or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this part.

Id.

310. See *supra* text accompanying notes 40-41.

311. See W. BURKE, R. LEGATSKI & W. WOODHEAD, *supra* note 8, at 292; see also N. S. REMBLE, *supra* note 205, at 7-13; Anand, *supra* note 187, at 277;

312. It is not enough merely to deter whaling operations only within EEZ's. Many endangered whale species complete migration paths are beyond the EEZ's. See *supra* text accompanying note 180.

313. Anand, *supra* note 187, at 265.

314. The technology necessary to support a pelagic whaling operation necessarily implies that other pelagic fisheries will be conducted. Those States which are concerned about whaling are also necessarily concerned about access to EEZ's and their other pelagic fishery operations. See Kuribayashi, *supra* note 219, at 96-99.

coastal States.³¹⁵ Distant fishing States depend upon access to foreign EEZ's in order to support their industry.³¹⁶ While distant fishing States may initially oppose this proposal, they will eventually realize that in an era of modern high technology fishing,³¹⁷ international regulation is the only solution to preserving the oceans' resources.

VI. CONCLUSION

The IWC's moratorium represents worldwide concern over the international regulation of whaling.³¹⁸ Populations of endangered species of whales continue to be reduced.³¹⁹ The moratorium merely provides a period during which regulatory schemes may be examined.³²⁰

An effective enforcement scheme is comprised of many components.³²¹ Population management is a vital area because both the IWC and UNCLOS require that regulatory measures be based on scientific advice.³²² States have a duty to cooperate with research efforts that will enable scientific calculations on populations to be made.³²³ Enforcement of any fishery treaty requires accurate data on what is actually being removed from the sea.³²⁴ As pressure increases not to exploit the ocean's resources, the motivation of a State to cover up unacceptable activities also increases. A nonbiased international observer scheme is critical both for imposing consequences³²⁵ and for gathering scientific data.³²⁶

UNCLOS does not resolve the degree of constraints that may be placed on access to EEZ's.³²⁷ The coastal States are allowed to

315. *Id.* at 99.

316. Anand, *supra* note 187, at 265-70; *see also* Kaczynski, *Joint Ventures in Fisheries Between Distant-Water and Developed Coastal Nations: An Economic View*, 5 OCEAN MGMT. 39, 40-47.

317. "[S]ignificant technological breakthroughs in the ability to detect and harvest fish on the high seas and even in the deep seas increased the capacity of a few technologically advanced countries to indulge in massive overfishing and thus threatened fishery resources near the coasts of other States." Anand, *supra* note 187, at 272-73.

318. *See supra* text accompanying notes 4-13.

319. *See supra* text accompanying notes 120-28.

320. *See supra* text accompanying notes 11-13.

321. *See supra* text accompanying notes 273-79.

322. *See supra* text accompanying notes 101-28.

323. *See supra* text accompanying notes 129-31.

324. *See supra* text accompanying notes 132-46.

325. *See supra* text accompanying notes 147-50.

326. *See supra* text accompanying notes 284-88.

327. *See supra* text accompanying notes 291-97.

institute regulatory procedures designed to conserve fishery populations.³²⁸ A mutual enforcement scheme that would condition EEZ fishing permits with international cooperation will solve the regulatory problems of highly migratory mammals and fish.³²⁹

The mood of the coastal States at the United Nations Conferences on the Law of the Sea clearly indicates a strong desire to protect the world's fisheries.³³⁰ The importance of the oceans as a vital source of food becomes more apparent as the human population continues to grow and the useful land for food production becomes more scarce.³³¹ The coastal States have demonstrated a robust inclination for the promulgation of a more effective regulatory system.³³² The proposal of a mutual enforcement EEZ permit system would provide a strong regulatory system for both marine mammals and highly migratory fish.³³³

The history of whaling is made up of a number of chapters each covering a few centuries and all more or less repeating the same pattern Each began with new discovery and hopeful enterprise, passed through a phase of fierce competition and ruthless exploitation with improving techniques and ended at length in diminishing resources, exhaustion and failure.³³⁴

Only with international cooperation may the circle be broken.

Joseph P. Rosati

328. *See supra* text accompanying notes 301-02.

329. *See supra* text accompanying notes 306-09.

330. *See supra* text accompanying notes 310-12.

331. Anand, *supra* note 202, at 266.

332. *See supra* text accompanying notes 28-63, 310-12.

333. *See supra* text accompanying notes 306-17.

334. F. OMANNEY, LOST LEVIATHAN 69 (1971).