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BALDRIGE/MURAZUMI AGREEMENT: THE
SUPREME COURT GIVES CREDENCE TO AN
ABERRATION IN *AMERICAN CETACEAN SOCIETY*
III

*James Michael Zimmerman**

The Japanese do not regard the whale as a valuable pet, totally different from other marine living resources, and they thus feel that such regulations are unjustified as they have practiced whaling for many years without any reasonable scientific complaint.¹

I. INTRODUCTION

The International Convention for the Regulation of Whaling (ICRW), which provides for the establishment of the International

* B.A., 1982, University of California, Irvine; M.B.A., 1984, University of California, Irvine; J.D., 1987, University of San Diego. The author is presently the Lead Articles Editor/Law of the Sea Issue Coordinator for the San Diego Law Review. The author thanks Eugene and Joanne Zimmerman for their valuable comments, support, and enthusiasm throughout the writing of this article.

¹ Sugiyama, *Japanese View Toward the Law of the Sea and Whaling*, in *THE WHALING ISSUE IN UNITED STATES—JAPAN RELATIONS* 224 (1976). Many Japanese commentators refute the environmentalist point of view. One such writer contends:

Supporters of the campaign for an overall ban on whaling and some countries, including Japan, in favor of continuing whaling operations appear to be taking basically different stands regarding the concept about the character of the whale as an animal. It seems that the former holds the view that whales should be classified in the same category of wild animals as lions, elephants and giraffes. In contrast, the latter feels that whales are a source of esculent animals.

Food supplies cannot be increased sufficiently, swiftly and sharply to keep pace with rising population. Food supplies from lands are limited. Hence, animal protein resources required by man should be sought from seas for coping with the situation. If management of marine resources is adequately and scientifically carried out, oceans can be properly pastured in the same manner as raising cattle and swine on land.

Marine resources at the same time are not in the stage of extermination.

Morisawa, *International Opinion on Whaling and Japan's Position*, 31 *Keidanren Rev.* 7-12 (1974).

Whaling Commission (IWC), was created shortly after World War II.² The original purpose of the Convention was to strengthen the whaling industry via a cartel to stabilize whale oil prices and other regulations benefitting the industry.³ In time, the IWC became a vehicle for the conservation, and ultimately, the preservation of marine mammals. The IWC's philosophy thus shifted from regulating the efficient use of marine resources to protecting completely marine mammals based on ecological, aesthetic, and ethical considerations.⁴

Congress recognized the importance of preserving whales through the instrumentality of the Convention. In addition to authorizing U.S. participation in the Convention,⁵ both the House of Representatives and the Senate passed resolutions calling for an international

² International Convention for the Regulation of Whaling, *opened for signature* Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849, 161 U.N.T.S. 361 [hereinafter ICRW]. Article III, section 1 of the ICRW provides for the establishment of the International Whaling Commission (IWC or Commission). Article IV of the Convention requires the IWC to:

- (a) encourage, recommend, or if necessary, organize studies and investigations relating to whales and whaling;
- (b) collect and analyze statistical information concerning the current condition and trend of the whale stocks and the effects of whaling activities thereon;
- (c) study, appraise, and disseminate information concerning methods of maintaining and increasing the populations of whale stocks.

Id. at 1718, art. IV. Article V holds the Commission responsible for amending the Convention's whaling schedule to meet changing circumstances. *Id.* art. V.

³ For a comprehensive discussion of the 1946 Convention and its early practices, see 1 P. BIRNIE, *INTERNATIONAL REGULATION OF WHALING* 205-60 (1985). See also R. BURTON, *THE LIFE AND DEATH OF WHALES* (1980); Smith, *The International Whaling Commission: An Analysis of the Past and Reflections on the Future*, 16 NAT. RESOURCES LAW. 543 (1984). Up until the early 1970's, the IWC covertly supported the whaling industry. In June of 1972, several countries attending the United Nations Conference on the Human Environment adopted a resolution demanding improved regulation of whale resources. Supported by 110 nations, the resolution called for international cooperation in strengthening the IWC. REPORT OF THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT (Stockholm), A/Conf. 48/14/Rev.1 at 12 (June 5-16, 1972) (Recommendation No. 33), see also INT'L WHALING COMM'N, 24th Report 23-24 (1974).

⁴ For a discussion of moral and aesthetic justifications for cetacean protection, see Travaglio & Clement, *International Protection of Marine Mammals*, 5 COLUM. J. ENVTL. L. 199, 205-07 (1979). See generally Levin, *Toward Effective Cetacean Protection*, 12 NAT. RESOURCES LAW. 549 (1979); Scarff, *The International Management of Whales, Dolphins and Porpoises: An Interdisciplinary Assessment (Part One)*, 6 ECOLOGY L.Q. 323 (1977) [hereinafter Scarff I]; Scarff, *The International Management of Whales, Dolphins and Porpoises: An Interdisciplinary Assessment (Part Two)*, 6 Ecology L. Q. 571 (1977) [hereinafter Scarff II]. For an analysis of the political and economic problems of the IWC, see M'Gonigle, *The "Economizing" of Ecology: Why Big, Rare Whales Still Die*, 9 ECOLOGY L.Q. 119 (1980); see also Kindt & Wintheiser, *The Conservation and Protection of Marine Mammals*, 7 U. HAWAII L. REV. 301 (1985).

⁵ Whaling Convention Act of 1949, 64 Stat. 421 (1950)(codified as amended at), 16 U.S.C. §§ 916e-916l (1982).

whaling moratorium.⁶ Congress also adopted the 1971 Pelly Amendment to the Fishermen's Protective Act⁷ (Pelly Amendment) and the 1979 Packwood Amendment to the Magnuson Fishery Conservation and Management Act⁸ (Packwood-Magnuson Amendment) to promote enforcement of quotas set by the IWC. The statutes are punitive measures to be applied to any nation that "diminishes the effectiveness" of any international conservation program. The Pelly Amendment allows the federal government to ban fish and fish product imports from any offending nation, and the Packwood-Magnuson Amendment calls for the reduction of the offending nation's fisheries allocation in the United States fishery conservation zone by at least fifty percent. The Secretary of Commerce's certification of the offending nation triggers both the Pelly and Packwood-Magnuson Amendments. Under the Pelly Amendment, the President has the discretion to impose sanctions on the certified nation. In contrast, under the Packwood-Magnuson Amendment, once a nation is certified, sanctions are automatically imposed.

In 1981, the IWC ordered a zero quota for harvesting North Pacific sperm whales.⁹ In 1982, the Commission voted to implement a moratorium on all commercial whaling by 1986.¹⁰ Japan, exercising its rights under the Convention, objected to both IWC decisions. During the 1982-83 and 1983-84 whaling seasons, Japan continued to hunt for sperm whales contravening the IWC ban.¹¹

With the 1984-85 whaling season in progress, and with the unlikelihood that Secretary of Commerce Malcolm Baldrige would act expeditiously against Japan, several environmental organizations

⁶ S.J. Res. 115, 92d Cong., 1st Sess., 117 CONG. REC. 22668 (1971); H. Con. Res. 387, 92d Cong., 1st Sess. 117 Cong. Rec. 38537 (1971). The federal government still permits the Arctic Eskimos to hunt bowhead whales. For an analysis of this situation, see Verges & McClendon, *Innuits Eskimos, Bowhead Whales, and Oil: Competing Federal Interests in the Beaufort Sea*, 10 U.C.L.A.-ALASKA L. REV. 1 (1980); Bockstoce, *Battle of the Bowheads*, NAT. HIS., May 1980, at 52; Kindt & Wintheiser, *supra* note 4, at 336-39.

⁷ Pub. L. No. 92-219, 85 Stat. 786 (1971) (codified at 22 U.S.C. 1978 (1982)). See *infra* notes 74-85 and accompanying text.

⁸ Pub. L. No. 96-61, 93 Stat. 407 (1979) (codified at 16 U.S.C. § 1821(e)(2) (1982)). See *infra* notes 86-89 and accompanying text.

⁹ *Review of the 33rd Int'l Whaling Comm'n Meeting: Hearing Before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs*, 97th Cong., 1st Sess. 11 (1981) [hereinafter *Review of the 33rd Int'l Whaling Comm'n Meeting*].

¹⁰ *Review of the 34th Int'l Whaling Comm'n Meeting: Hearing Before the Subcomm. on Human Rights and Int'l Org's of the House Comm. on Foreign Affairs*, 97th Cong., 2d Sess. 17-19 (1982) [hereinafter *Review of the 34th Int'l Whaling Comm'n Meeting*].

¹¹ See *Japan Whaling Assoc. v. American Cetacean Soc'y*, Brief for the Respondents 10, — U.S. —, 106 S. Ct. 2860 (1986) [hereinafter *Brief for the Respondents*].

filed suit in federal district court on November 8, 1984.¹² The plaintiffs sought an injunction prohibiting the Secretary from agreeing not to certify Japan for harvesting whales in violation of the IWC's zero quota.¹³ In spite of the pending action, the Secretary on November 13, 1984, made an executive agreement with Japan whereby Japan pledged to cease all commercial whaling by 1988, and the Secretary agreed that the United States would not certify Japan under the Pelly and Packwood-Magnuson Amendments if Japan complied with its pledge.¹⁴

In the subsequent federal action, the district court held that the Secretary's duty to certify foreign nations that "diminish the effectiveness" of conservation programs was a mandatory, not a discretionary, duty.¹⁵ The United States Court of Appeals for the District

¹² *American Cetacean Soc'y v. Baldrige* [sic], 604 F. Supp. 1398 (D.D.C. 1985) [hereinafter *American Cetacean Society I*]. The original plaintiffs were the American Cetacean Society, Animal Protection Institute of American, Animal Welfare Institute, Center for Environmental Education, The Fund for Animals, Greenpeace U.S.A., The Humane Society of the United States, International Fund for Animal Welfare, The Whale Center, and Thomas Garrett. On December 13, 1984, the Connecticut Cetacean Society, Defenders of Wildlife, and Friends of the Earth joined the plaintiffs in this suit. Plaintiffs' Amended Complaint at 2, *American Cetacean Society I*.

The complaint named Secretary of Commerce Malcolm Baldrige and Secretary of State George Schultz, both being sued in their official capacities, because of the crucial role each plays in the legislative scheme. The Japanese Whaling Association and Japanese Fisheries Association were allowed to intervene as defendants in this action.

¹³ *American Cetacean Society I*, 604 F. Supp. at 1401.

¹⁴ Discussions between Japan and the United States were conducted in Washington, D.C., November 1-12, 1984. An exchange of letters followed these negotiations. See Letter from Malcolm Baldrige, United States Secretary of Commerce, to Yasushi Murazumi, Charge d'Affaires ad interium of Japan (Nov. 13, 1984), reprinted in Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at 107a, *Japan Whaling Ass'n v. American Cetacean Society*, —U.S.—, 106 S.Ct. 2860 (1986) [hereinafter *Cert. Appendix*]; Letter from Yoshio Okawara, Ambassador to Japan, to Malcolm Baldrige, United States Secretary of Commerce (Dec. 11, 1984), reprinted in *Cert. Appendix* at 110a; Letter from Malcolm Baldrige, United States Secretary of Commerce, to Yoshio Okawara, Ambassador of Japan (Dec. 11, 1984), reprinted in *Cert. Appendix* at 111a. The executive agreement permits the Japanese to take 400 sperm whales per year for the 1984 and 1985 hunting seasons, and 200 sperm whales per year for the 1986 and 1987 seasons. Japan was also required to withdraw its objections to the IWC's moratorium. For a discussion in support of this executive agreement, see Note, *The U.S. -- Japanese Whaling Accord: A Result of the Discretionary Loophole in the Packwood-Magnuson Agreement*, 19 GEO. WASH. J. INT'L L. & ECON. 577 (1985); Note, *United States Enforcement of World Whaling Programs—The Pelly and Packwood-Magnuson Amendments*, 26 VA. J. INT'L L. 2 (1986); see also Comment, *American Cetacean Society v. Baldrige: Executive Agreements and the Constitutional Limits of Executive Branch Discretion in American Foreign Policy*, 12 BROOKLYN J. INT'L L. 209 (1986); Note, *American Cetacean Society v. Baldrige: A Blow is Dealt to Executive Agreements*, 8 LOY. L.A. INT'L & COMP. L.J. 327 (1986).

¹⁵ 604 F. Supp. 1398, 1410 (D.D.C. 1985).

of Columbia upheld the lower court's ruling.¹⁶ On June 30, 1986, the United States Supreme Court decided *Japan Whaling Association v. American Cetacean Society*¹⁷ in a 5-4 decision.¹⁸ The Court reversed the lower court's decision and held that the Secretary of Commerce has broad discretion to determine whether specific whaling activities meet the "diminish the effectiveness" standard of the federal statutory scheme.

The Supreme Court's decision suffers from a serious flaw. The majority, devoting much of its opinion to statutory interpretation, overlooked several critical factors and accepted the federal government's manipulative interpretation of congressional intent.¹⁹ This Article challenges the wisdom of the Supreme Court's decision. It first discusses the development of the international regulation of whaling and United States participation in such efforts. Second, this Article critiques the Court's reasoning in the *American Cetacean Society Case* and its treatment of the Baldrige/Murazumi Agreement. Finally, this Article addresses the implications of the decision and suggests that Congress use its corrective power to counter the Court's backpeddling.

II. WHALING AND THE INTERNATIONAL REGULATION OF WHALING

A. *Early Growth of Whaling*

Before mankind developed the capabilities to capture the whale, the leviathan was an animal viewed with awe and fear and revered as a subject of fables and fantasies.²⁰ Today, mankind views whales with the same awe as in bygone epochs, and recognizes them for their aesthetic and recreational value. Whale watching, for example, has become a world-wide million dollar business.²¹

¹⁶ *American Cetacean Society v. Baldrige*, 768 F.2d 426 (D.C. Cir. 1985) [hereinafter *American Cetacean Society II*].

¹⁷ *Japan Whaling Association v. American Cetacean Soc'y*, ___ U.S. ___, 106 S. Ct. 2860 (1986) [hereinafter *American Cetacean Society III*].

¹⁸ The voting distribution in the Court's ruling surprised outside observers. The majority opinion was written by Justice White, who was joined by Chief Justice Burger, and Justices Powell, Stevens, and O'Connor. The dissenting opinion was written by Justice Marshall. He was joined by Justices Brennan, Blackmun, and Rehnquist.

¹⁹ See *American Cetacean Society III*, 106 S. Ct. at 2867-68.

²⁰ See 1 P. BIRNIE, *supra* note 3, at 63; I. SANDERSON, *FOLLOW THE WHALE* (1956). The whale inspired many biblical writers. See *Job* 41:1-34; *Psalms* 104:24-26; *Isaiah* 27:1.

²¹ Maron, *Warning! They Break for Whales*, San Diego Union, Nov. 23, 1986, at G-4, col. 1. In reference to the United States Pacific coast whale-watching business, Maron comments:

The whale originally was hunted for its oil for heat and light, its meat for human consumption, and its ivory teeth to make buttons, flageolets, and scrimshaw.²² As technology increased, new uses for whale products developed. Whale oil, replaced by petroleum for heating and lighting purposes, is now used as a high-grade industrial lubricant.²³ Whale meat, only rarely used for human consumption, is now used in the preparation of pet food and agricultural feed.

The Basques in Europe during the fourteenth century were probably the first to hunt whales for commercial purposes.²⁴ Though their early hunts were limited to small groups of boats on the Bay of Biscay, the Basques soon were voyaging great distances in search of their prey.²⁵ This was the beginning of pelagic whaling, the catching and processing of whales on the high seas.²⁶ The Basques, however, virtually ceased whaling by the end of the sixteenth century because of over-exploitation.

In the meantime, several European countries, the United States, and Japan entered the whaling industry.²⁷ New advancements in shipbuilding technology and navigation increased the accessibility of whaling fleets to distant prolific hunting grounds such as Antarctica, Tasmania, and the Bering Sea. At its climax in the mid-1800's, the American whaling industry employed 70,000 people, and 729 whaling vessels sailed under the United States flag.²⁸ This period was also marked by the invention of harpoon guns and steam powered "catcher" boats.²⁹ Such ballistic technology and swift vessels enabled whalers to catch certain species of whales too quick for prior techniques. By the beginning of the twentieth century, however, several

Last year more than a quarter-million whale-watchers spent about \$2.75 million for cruise tickets, making whale-watching a more profitable business than the earlier whaling industry, which almost wiped out gray whales in the first half of this century.

For a discussion of cetacean intelligence, see Bunnell, *The Evolution of Cetacean Intelligence*, in *MIND IN THE WATERS* 52 (J. McIntyre, ed. 1974); Morgane, *The Whale Brain: The Anatomical Basis of Intelligence*, in *MIND IN THE WATERS* 84 (J. McIntyre ed. 1974).

²² See 1 P. BIRNIE, *supra* note 3, at 48-61. See also JAPAN WHALING ASS'N, TRADITIONS OF DIET: THE WHALE AND THE JAPANESE; JAPAN WHALING ASS'N, IN DEFENSE OF WHALING: THE JAPANESE SPEAK OUT; JAPAN WHALING ASS'N, MAN, WHALES & THE SEA (available at the Embassy of Japan, 2520 Massachusetts Avenue, N.W., Washington, D.C. 20008).

²³ 1 P. BIRNIE, *supra* note 3, at 51-52.

²⁴ For a detailed history of whaling, see J. TONNESSEN & A. JOHNSEN, *THE HISTORY OF MODERN WHALING* (1982). See also Scarff I, *supra* note 4, at 344; Levin, *supra* note 4, at 558; 1 P. BIRNIE, *supra* note 3, at 63-104.

²⁵ Levin, *supra* note 4, at 559; Scarff I, *supra* note 4, at 344.

²⁶ 1 P. BIRNIE, *supra* note 3, at 66.

²⁷ *Id.* at 68-74.

²⁸ Scarff I, *supra* note 4, at 345.

²⁹ *Id.* at 346.

nations ceased their whaling operations. The profitability of their industry, like the Basques' in earlier years, failed with over-exploitation. The whaling industry, on the brink of self-destruction, collapsed because many species were believed to be biologically extinct.³⁰

B. Development of International Regulatory Measures

In the first half of the twentieth century, the whaling industry had several sporadic yet lucrative hunting seasons. During the years 1914-15, 1920-31, and 1938-39, the whaling industry prospered dramatically, expanding their fleets with larger and more efficient vessels.³¹ Though negatively affected by two world wars, the industry again nearly collapsed because of the scarcity of several species of whales.³² The stocks of certain species simply could not recover from exploitive whaling. The industry itself finally realized that the only way to maintain their businesses was to accept some form of regulation.

The signing of the League of Nations Convention for the Regulation of Whaling signed on September 24, 1931 was the first positive step towards conserving whale stocks.³³ The 1931 Convention, however, focused only on certain species of whales, and made no attempt to establish other more coercive regulatory measures such as shorter hunting seasons and limits on the number of whaling vessels per country.³⁴ More importantly, several leading whaling nations including Japan, Germany, Chile, Argentina, and the Soviet Union did not sign the 1931 Convention.

On November 20, 1946, several nations met in Washington, D.C. for the purpose of devising a comprehensive regulatory scheme for

³⁰ Several species of marine mammals, including Stellar's sea cow and the sea mink, are known to have become extinct because of human activities. See Travaglio & Clement, *supra* note 4, at 199 n.1; Herrington & Regenstein, *The Plight of Ocean Mammals*, 1 ENV'TL AFF. 792 (1972). The California gray whale was considered biologically extinct in 1890, but has remarkably recovered. The success for the gray whale's rejuvenation is due to the fact that, unlike other large cetaceans, it breeds in coastal lagoons and does not face the problem of finding a mate in the high seas. See Kindt & Wintheiser, *supra* note 4, at 325.

³¹ 1 P. BIRNIE, *supra* note 3, at 74-75.

³² 1 P. BIRNIE, *supra* note 3, at 130. See also, K. BRANDT, *WHALING AND WHALE OIL DURING AND AFTER WORLD WAR II* (1948).

³³ CONVENTION FOR THE REGULATION OF WHALING, Sept. 24, 1931, 49 Stat. 3079, T.I.A.S. No. 880, 155 U.N.T.S. 349. The convention and the history leading up to the convention is discussed in Jessup, *The International Protection of Whales*, 24 AM. J. INT'L L. 751 (1930); and in Leonard, *Recent Negotiations Toward the International Regulation of Whaling*, 35 AM. J. INT'L L. 90 (1941); see also 1 P. BIRNIE, *supra* note 3, at 116-118.

³⁴ 1 P. BIRNIE, *supra* note 3, at 117.

the whaling industry.³⁵ The post-war spirit of international cooperation provided the perfect opportunity for such an effort. The delegates accepted a proposal presented by the United States, signing what now is known as the International Convention for the Regulation of Whaling (ICRW).³⁶

The ICRW was created to provide a vehicle for promoting the whaling industry by establishing yearly limits or quotas for the whaling of various species. As noted in the Preamble of the Convention, the treaty was founded "to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry."³⁷ The ICRW since 1972, however, has steadily evolved into a treaty promoting the preservation rather than commercialization of whales. This shift in orientation has resulted in serious conflict between conservationists and whaling nations.³⁸

The International Whaling Commission (IWC) is the agency authorized to carry out the goals and policies of the Convention. The IWC is composed of one commissioner from each contracting government and accompanying experts and advisors.³⁹ The IWC, at its annual and/or special meetings, reviews scientific data and sets global whaling quotas and regulations restricting whaling methods.⁴⁰ The whaling quotas are binding on IWC members if accepted by a three-fourths majority vote.⁴¹ The IWC regulates "factory ships, land stations, and whale catchers under the jurisdiction of the Con-

³⁵ See ICRW, *supra* note 2. The founding members of the ICRW were: Argentina, Australia, Brazil, Canada, Chile, Denmark, France, the Netherlands, New Zealand, Norway, Peru, the Union of South Africa, the Union of Soviet Socialist Republics, the United Kingdom, and the United States. Currently, over 40 nations have ratified the ICRW and have become members of the IWC. See 1985 Treaties in Force 311.

³⁶ See ICRW, *supra* note 2.

³⁷ *Id.*

³⁸ The whaling nations and conservationists share a common goal of preserving whales from extinction. In the past, several attempts have been made to change the IWC and its policies. See Carlson, *The International Regulation of Small Cetaceans*, 21 SAN DIEGO L. REV. 577, 616 (1984). For example, in 1981, 26 IWC member nations attended a preparatory meeting to consider altering IWC policies to improve the effectiveness of its management procedures. See REPORT OF THE PREPARATORY MEETING TO IMPROVE AND UPDATE THE INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING, 1946 (Reykjavik, May 1981), IWC/33/20 (1981). For a discussion of this meeting and its agenda, see 1 P. BIRNIE, *supra* note 3, at 568-73.

³⁹ ICRW, *supra* note 2, at 1717, art. III, para. 1.

⁴⁰ The IWC has three advisory committees including: (1) the Scientific Committee, which reviews catch data and depletion rates; (2) the Technical Committee, which drafts amendments and reviews alleged infractions; and (3) the Finance and Administrative Committee, which manages personnel, budgets, and expenditures. For a general discussion of the IWC, see Smith, *supra* note 3, at 548.

⁴¹ ICRW, *supra* note 2, at 1717, art. III, para. 2.

tracting Governments" and "all waters in which whaling is prosecuted by such factory ships, land stations, and whale catchers."⁴² The Commission is also authorized to publish reports, statistics, scientific data, and other whale and whaling information.⁴³

In 1981 the IWC voted to amend its quota tables, reducing the annual harvest quota for the Western Division Stock of North Pacific sperm whales from 890 adult males to zero adult males.⁴⁴ The Commission's vote was 25 to 1, with Japan casting the lone opposition vote.⁴⁵ The People's Republic of China, Iceland, and the Soviet Union abstained from voting.⁴⁶ The IWC also voted to provide that no sperm whales could be taken from the North Pacific stock in any future year unless the IWC acted to establish a quota for that year.⁴⁷ Japan, soon thereafter, filed its formal objection to the amendment.⁴⁸

At the thirty-fourth International Whaling Commission meeting in July 1982, the IWC voted to impose a moratorium on all commercial whaling commencing in 1986.⁴⁹ As a major concession to accommodate the whaling interests, the moratorium plan called for a three-year "deferred cessation" period from 1982 to 1985.⁵⁰ The moratorium, to be effective from 1985 to 1990, would allow depleted whale stocks to regenerate and would permit scientists to have an oppor-

⁴² *Id.* at 1717, art. I, para. 2.

⁴³ *Id.* at 1718, art. IV, para. 2.

⁴⁴ *Supra* note 9. See Birnie, *The Role of Developing Countries in Nudging the International Whaling Commission from Regulating Whaling to Encouraging Nonconsumptive Uses of Whales*, 12 *ECOLOGY L.Q.* 937, 962 (1985); Birnie, *IWC—A New Era: 33rd Meeting of the International Whaling Commission*, 6 *MARINE POL'Y* 74, 75 (1982). For a review of this meeting, see Birnie, *Countdown to Zero*, 7 *MARINE POL'Y* 64 (1983).

A ban on the use of the nonexplosive, cold harpoon was also voted for at the 1981 IWC meeting. *INTERNATIONAL WHALING COMM'N*, 31st Report 25 (1981); 2 P. BIRNIE, *INTERNATIONAL REGULATION OF WHALING* 612 (1985). Brazil, Iceland, Japan, Norway, and the Soviet Union lodged objections to the ban. *Id.* at 626 n. 76.

⁴⁵ *Review of the 33rd Int'l Whaling Comm'n Meeting*, *supra* note 9, at 11. For a comprehensive review of this meeting, see 2 P. BIRNIE, *supra* note 44, at 608-13.

⁴⁶ 2 P. BIRNIE, *supra* note 44, at 610.

⁴⁷ *Id.* at 611.

⁴⁸ *Id.* at 612.

⁴⁹ See *Review of the 34th International Whaling Commission Meeting*, *supra* note 10, at 17-19. The 1982 amendment states:

[C]atch 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. The 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 the decision on whale stocks and consider modifications of this provision and the establishment of other catch limits.

ICRW, *supra* note 2, Schedule, para. 10(e), reprinted in 2 P. BIRNIE, *supra* note 44, at 615.

⁵⁰ See *Review of the 34th Int'l Whaling Comm'n Meeting*, *supra* note 10, at 17-19. See also 2 P. BIRNIE, *supra* note 44, at 614-15.

tunity to gather scientific data on the populations and distributions of whale stocks to assess whether commercial whaling could be resumed safely in the future. Of the thirty-nine member nations of the IWC, only Japan, the Soviet Union, and Norway filed objections to the moratorium.⁵¹ Brazil, Iceland, Peru, Spain, and the Republic of Korea, which at the time of the 1982 meeting allowed commercial whaling, stated that they were "committed to the implementation of the moratorium."⁵²

The IWC, in spite of its achievements, has several limitations.⁵³ First, the Commission has jurisdiction only over contracting governments. Whalers, for example, have contravened IWC regulations by establishing "flags of convenience" for their vessels in non-member countries and "joint ventures" with entities of non-member countries.⁵⁴ For the same reasons, the IWC has no control over pirate whaling as well.⁵⁵ Second, the Commission's schedules and other decisions, including moratoriums, are subject to "objections" that legally permit an objecting member to avoid IWC decisions altogether.⁵⁶ Such an objection exempts a member country from any obligation to comply with the whaling limit unless and until the objection is withdrawn. Finally, under the terms of the Convention, the IWC has no power to impose sanctions for quota violations.⁵⁷ Notwithstanding its shortcomings, the IWC has made noteworthy advancements in conserving whale stocks. As noted by Malcolm J. Forster, Legal Counsel to the Seychelles, the IWC "is by no means a perfect vehicle for conservation, but in practical terms what else is there?"⁵⁸

⁵¹ Those nations that voted in favor of the moratorium included: Antigua, Argentina, Australia, Belize, Costa Rica, Denmark, Egypt, France, West Germany, India, Kenya, Mexico, Monaco, Netherlands, New Zealand, Oman, St. Lucia, St. Vincent, Senegal, Seychelles, Spain, Sweden, the United Kingdom, the United States, and Uruguay. There were 5 abstentions: Chile, People's Republic of China, Phillipines, South Africa, and Switzerland. (Switzerland explained that it did not regard the ban as justified by the scientific advice available.) Dominica and Jamaica were absent. 2 P. BIRNIE, *supra* note 44, at 613-15.

⁵² REPORT OF THE U.S. DELEGATION TO THE 35TH ANNUAL MEETING OF THE INT'L WHALING COMM'N, Brighton, England, July 1983, at 10; *see* 2 P. BIRNIE, *supra* note 44, at 625-27.

⁵³ *See* Leggett, *International Whaling Policy*, 7 MARINE POL'Y REPORTS 1 (1985).

⁵⁴ *See generally* B. BOCZEK, *FLAGS OF CONVENIENCE—AN INTERNATIONAL LEGAL STUDY* (1962).

⁵⁵ *See generally* P. BIRNIE, *LEGAL MEASURES FOR THE PREVENTION OF "PIRATE" WHALING* (1982).

⁵⁶ ICRW, *supra* note 2, at 1719, art. V, para. 3.

⁵⁷ *See* Leggett, *supra* note 53, at 1.

⁵⁸ Forster, *IWC Makes Some Progress*, 5 ENV'TL POL'Y & L. 170, 174 (1977).

III. DOMESTIC POLICY ON MARINE MAMMAL PRESERVATION

A. General Overview

The United States historically has led the world in protecting whales and other threatened marine mammals from needless extermination.⁵⁹ For the past two decades, Congress has adopted new, and amended existing, legislation to strengthen national conservation goals.⁶⁰ In 1969, for example, Congress amended the Endangered Species Preservation Act of 1966 (the "Act") to include wildlife threatened with worldwide extinction.⁶¹ Before 1969, the Act only protected national wildlife threatened with extinction. The Act now protects species found in foreign jurisdictions or on the high seas, and prohibits their importation into the United States.⁶² More importantly, the amendments also require the federal government to promote bilateral and multilateral treaties to protect endangered wildlife.⁶³

In 1972 Congress enacted the Marine Mammal Protection Act (MMPA)⁶⁴ prohibiting the taking and importation of any marine

⁵⁹ For a comparison of the environmental goals of the United States, Japan, and the Soviet Union, see D. KELLEY, K. STUNKEL & R. WESCOTT, *THE ECONOMIC SUPERPOWERS AND THE ENVIRONMENT* (1976).

⁶⁰ For an account of congressional efforts in developing wildlife protection laws, see M. BEAN, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* (rev. expanded ed. 1983).

⁶¹ Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, § 3(a), 83 Stat. 275 (1969) (amending the Endangered Species Preservation Act of 1966, Pub. L. No. 86-669, § 1, 80 Stat. 926 (1966)) (repealed 1973). When a species is "listed," it becomes a protected species and sanctions can be imposed for a violation of the statute. *Id.* at § 3(a).

⁶² *Id.* at § 2.

⁶³ *Id.* at § 5(a).

⁶⁴ Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, § 107, 86 Stat. 1027 (1977) (codified at 16 U.S.C. §§ 1361-1407 (1982)) [hereinafter MMPA]. The major impetus for the passage of the MMPA was the high porpoise mortality level incidental to commercial yellowfin tuna fishermen using purse seine nets. "Incidental" taking is that which occurs when fishing for other species, frequently during purse seine fishing operations. Porpoises are caught in a fishing net and, because they are mammals, they drown. See Nafziger & Armstrong, *The Porpoise-Tuna Controversy: Management of Marine Resources After Committee for Humane Legislation, Inc. v. Richardson*, 7 ENV'T L. 223 (1977). Due to the Act's incidental take requirement, porpoise mortality caused by United States fishing interests has been reduced substantially. Congress noted in 1981:

[S]ince the passage of the [A]ct, the annual loss of porpoise has been reduced from more than 400,000 animals to approximately 20,000, a reduction of more than 95 percent, due to improvements in fish gear and in fishing techniques developed by [the National Oceanic and Atmospheric Administration (NOAA)] in cooperation with the tuna industry. NOAA has recently established a 5-year industry quota of 20,500 porpoises per year, an economically and technologically achievable level which rep-

mammal by any person or vessel subject to United States jurisdiction unless a permit is obtained from the federal government.⁶⁵ The MMPA defines the "taking" of any marine mammal as any hunting, capture, killing, or harassment.⁶⁶ Permits, however, may be issued for scientific research, public display, or takings incidental to commercial fishing operations.⁶⁷ In addition, the MMPA requires the federal government to initiate bilateral and multilateral agreements to promote the policies and goals of the United States under the Act.⁶⁸ This obligation prompted the federal government to lobby the IWC for a moratorium on whaling.⁶⁹

The United States is also a signatory of the Convention of International Trade in Endangered Species of Wild Fauna and Flora (CITES).⁷⁰ This treaty, which now has over eighty signatories, regulates international trade in over 1,000 animal and plant species threatened with extinction. CITES requires species to be listed according to the extent to which they are or may be affected by international trade in their products.⁷¹ Trade in these listed species is limited to noncommercial purposes.⁷² All species of large cetaceans, except the Bryde's and minke whales, are listed as threatened. This Convention is distinguished from the ICRW in that

resents a 60 percent reduction in porpoise mortality since 1978. S. Rep. No. 63, 97th Cong., 1st Sess. 2 (1981).

For an analysis of the tuna-porpoise controversy, see Andersen, Andersen & Searles, *The Tuna-Porpoise Dilemma: Is Conflict Resolution Attainable?* 18 NAT. RESOURCES J. 505 (1978); for an analysis of MMPA, see Coggins, *Legal Protection for Marine Mammals: An Overview of Innovative Resource Conservation Legislation*, 6 ENVTL. L. 1 (1975); Erdheim, *The Immediate Goal Test of the Marine Mammal Protection Act and the Tuna/Porpoise Controversy*, 9 ENVTL. L. 283 (1979); Comment, *Dolphin Conservation in the Tuna Industry: The United States' Role in an International Problem*, 16 SAN DIEGO L. REV. 665 (1979).

⁶⁵ MMPA, *supra* note 64, at § 1371. The MMPA exempts Alaska Arctic Eskimos who hunt marine mammals for nutritional needs and for creating native handicrafts or clothing. *Id.* at § 1371(b).

⁶⁶ MMPA, *supra* note 64, at § 1362(12).

⁶⁷ *Id.* at § 1371(a). Before issuing a permit, the federal government must estimate the current stock size of the species in question and determine whether the proposed taking has an impact on the optimum sustainable population. *Id.* at § 1373(d). The MMPA also requires from foreign governments letters of compliance if they wish to export tuna into the United States. *Id.* at § 1371(a)(2).

⁶⁸ *Id.* at § 1378(a)(1)-(6).

⁶⁹ *Fish and Wildlife Miscellaneous—Part 1: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation and the Envt of the House Comm. on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. 336 (1979).

⁷⁰ Convention on International Trade in Endangerment of Wild Fauna and Flora (CITES), Mar. 3, 1973, Multilateral, T.I.A.S. No. 8249, reprinted in 12 INT'L LEGAL MATERIALS 1085 (1973).

⁷¹ CITES, *supra* note 70, art. 2.

⁷² *Id.* at art. 3(c).

CITES lacks a quota-setting, or regulatory body, analogous to the IWC. The rules of CITES thus apply only to the import and export of endangered wildlife and do not apply to the actual taking of wildlife. Congress, however, in 1978 passed an amendment to provide an enforcement mechanism for CITES.⁷³

B. Pelly Amendment

In 1971 Congress enacted the Pelly Amendment to provide effective sanctions against countries which fail to conduct fishing operations in accord with international fishery conservation programs.⁷⁴ The Pelly Amendment provided indirect enforcement power to international conservation programs where none existed before. Though this legislation was originally drafted in response to Denmark's overfishing of North American Atlantic salmon, the Amendment protects cetaceans as well.⁷⁵ Representative Pelly outlined the Amendment's express intent to support IWC quotas, stating:

⁷³ See H.R. REP. NO. 1029, 95th Cong., 2d Sess., reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 1768, 1779. In the House debate, Representative Leggett outlined the purpose of the amendment. He noted:

[I]n order to expand the success the United States has achieved in the conservation of fish and particularly whales under section 8 of the act—better known as the Pelly amendment—a number of conservation organizations strongly suggested the use of the Pelly amendment concept to extend additional protection to endangered and threatened species of wildlife.

. . . The amendment adopted by the committee would allow the Pelly amendment to be invoked in order to prohibit imports of any wildlife products from the offending nations whenever a determination is made by the Secretary of the Interior or the Secretary of Commerce, for instance, that wildlife products protected under the Convention [CITES] are being shipped between two nations and that the actions of such nations are diminishing the effectiveness of an international program for endangered or threatened species.

124 Cong. Rec. 9280 (1978). Similarly, Representative Murphy explained that:

[This amendment] would use—what is known as the Pelly amendment concept—to extend additional protection to endangered and threatened species of wildlife. In accomplishing this purpose, the bill would prohibit imports of any wildlife products from offending nations whenever the Secretary of the Interior or the Secretary of Commerce determines that wildlife products protected under the Convention on International Trade in Endangered Species of Wild Fauna and Flora are being shipped between two nations and that the actions of such nations are diminishing the effectiveness of an international program for endangered or threatened species.

Id. at 25,415 [to avoid confusing the 1971 Pelly Amendment with the 1978 Amendment, the 1978 Amendment is hereinafter referred to as the CITES Amendment]:

⁷⁴ 22 U.S.C. § 1978-1980 (1982).

⁷⁵ See 117 Cong. Rec. 34,752 (1971). Though the exploitation of Atlantic salmon was regulated by the International Convention for the Northwest Atlantic Fisheries (ICNAF), Feb. 8, 1949, 1 U.S.T. 477, T.I.A.S. No. 2089, 157 U.N.T.S. 157, this migratory fish was threatened by the overfishing of Danish fishermen. In response, the International Northwest Atlantic

The saga of the Atlantic salmon unfortunately is being repeated around the world with respect to many other creatures that inhabit the seas, most notably the whale. Commercial pressure has virtually wiped out the largest and most awesome species of whale. The International Whaling Convention, far from being a conservation measure, has proven to be a cloak for over-exploitation on a grand scale.⁷⁶

The Pelly Amendment requires the Secretary of Commerce to certify to the President if "nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program"⁷⁷ After receiving a certification, the President may direct the Secretary to prohibit the importation of fish products from the offending nation into the United States.⁷⁸ Though the Amendment gives the President the discretion to impose sanctions, the President is required to notify Congress in sixty days of any action taken as a result of the certification, or his reasons for taking no action against the offending nation.⁷⁹

After enactment, the Pelly Amendment was brought into action on numerous occasions. In November of 1974, the Secretary of Commerce certified both Japan and the Soviet Union for violating IWC whaling quotas. The Secretary stated in his certification letter:

In the case of the minke whale, a quota of 5,000 whales was set for the Antarctic The Soviet Union and Japan voted against this quota, stated their view that the figure should be 8,000, took formal objection⁸⁰ to the quota, and announced that each would take 4,000 minke whales during the 1973-1974 season. In fact, the Soviet Union took 4,000 and Japan took 3,713. This represented an excess of 2,713, or approximately fifty percent over quota.⁸¹

Fishing Commission, the regulatory entity promulgated by the ICNAF, called for a total ban on the taking of Atlantic salmon. Denmark filed an objection to the moratorium and was effectively exempt. See 117 Cong. Rec. 34,751 (1971).

⁷⁶ 117 Cong. Rec. at 34, 752.

⁷⁷ 22 U.S.C. § 1978(a)(1)(1982).

⁷⁸ 22 U.S.C. § 1978(a)(4).

⁷⁹ 22 U.S.C. § 1978(b).

⁸⁰ At the IWC meeting in June 1974, both countries switched their position. On October 3, 1974, the IWC notified all members that no nations had filed objections to the quotas adopted at the June 1974 meeting. *Circular Communication to All Contracting Governments*, October 3, 1974, 25 U.S.T. 2978.

⁸¹ Letter from Frederick B. Dent, United States Secretary of Commerce, to Gerald R. Ford, President of the United States (Nov. 12, 1974). Though Secretary Dent certified Japan and the Soviet Union, he advised against imposing sanctions pursuant to the Pelly Amendment. The Secretary recommended that "[s]ince trade sanctions would entail important do-

The Secretary thus found that both Japan and the Soviet Union acted to "diminish the effectiveness" of the Convention. Former President Ford chose not to impose sanctions, however, when both countries agreed to accept the 1974-1975 IWC quotas.⁸²

In December of 1978, the Secretary again certified several countries including Chile, Peru, and the Republic of Korea for exceeding IWC quotas.⁸³ The Secretary found that by exceeding intentionally IWC quotas, these countries diminished the effectiveness of the ICRW.⁸⁴ Though none of these nations were IWC members at the time of certification, within two months of the certification, all three had either joined the IWC or committed themselves to join by the next annual meeting. While these nations assured further compliance with IWC decisions, the Secretary nevertheless certified them for past violations.⁸⁵

In sum, the Secretary of Commerce certified to the President between 1971 and 1978 five nations that exceeded IWC quotas and thus diminished the effectiveness of the ICRW's conservation efforts. Yet on each of these occasions, the President exercised his discretion and imposed no sanctions on the offending nation.

C. Packwood-Magnuson Amendment

The 1979 Packwood Amendment to the Magnuson Fishery Conservation and Management Act of 1976⁸⁶ was enacted in response to the executive branch's refusal to impose sanctions against offending nations.⁸⁷ The Amendment provides that the Secretary of Commerce

mestic costs and could generate significant friction in our relations with Japan and the U.S.S.R., such restriction should be imposed only as a remedy of last resort after all reasonable alternatives for the achievement of the conservation objective have proven ineffective." *Id.* at 2.

⁸² See The President's Message to the Congress Submitting a Report on International Whaling Operation and Conservation Programs, 11 WEEKLY COMP. PRES. DOC. 55, 55-56 (Jan. 16, 1975) [hereinafter President's Message to Congress]; see also Brief for the Respondents, *supra* note 11, at 22-23. President Ford also accepted Secretary Dent's recommendation not to impose sanctions. *Id.* at 55.

⁸³ Message to Congress Transmitting a Report, 15 WEEKLY COMP. PRES. DOC. 265, 265-66 (Feb. 13, 1979).

⁸⁴ See Brief for the Respondents, *supra* note 11, at 23-24.

⁸⁵ *Id.* at 23.

⁸⁶ 16 U.S.C. § 1821(e)(2) (1982).

⁸⁷ During congressional hearings on the 1979 Packwood-Magnuson Amendment, Congress was well aware of the weak certification process under the 1971 Pelly Amendment. *Hearing on Whaling Operations Conducted Outside the Control of the Int'l Whaling Comm'n Before the Senate Comm. on Commerce, Science and Transp.*, 96th Cong., 1st Sess. 28 (1979). Congress also reviewed the whaling practices of Peru, Chile, and the Republic of Korea during

is responsible to ascertain and certify whether "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."⁸⁸ The Packwood-Magnuson Amendment mandates that upon certification, the offending nation's fisheries allocation in United States waters "shall be reduced by the Secretary of State, in consultation with the Secretary [of Commerce], by not less than 50 percent."⁸⁹ The Amendment thus removes the executive's discretion to impose or refuse sanctions after certification under the 1971 Pelly Amendment and requires the imposition of economic sanctions against offending nations that meet the "diminishes the effectiveness" standard.

IV. AMERICAN CETACEAN SOCIETY III

In contravention of the 1981 IWC zero quota for North Pacific sperm whales and the 1982 IWC moratorium on all commercial whaling, Japanese whalers continued to harvest whales.⁹⁰ During the fall of 1984, the threat of sanctions under the Pelly and Packwood-Magnuson Amendments encouraged Japan to negotiate with the United States to avoid a confrontation. In the event of certification, Japan would lose fishing rights worth at least \$250 million.⁹¹ Bilateral discussions were conducted in Washington, D.C., during November 1984.

In response to Japan's whaling activities, several environmental organizations filed suit on November 8, 1984, requesting that the District Court order Secretary Baldrige to certify Japan under the Pelly and Packwood-Magnuson Amendments.⁹² Plaintiffs contended

the 1979 Packwood Amendment hearings. See *Hearings on Whaling Policy and Int'l Whaling Comm'n Oversight Before the Subcomm. on Fisheries and Wildlife Conservation and the Env't of the House Comm. on Merchant Marine and Fisheries*, 96th Cong., 1st Sess. 312 (1979); see also Brief for the Respondents, *supra* note 11, at 24-25.

Ironically, President Carter reported to Congress that the frequent violations of IWC quotas by Chile, Peru, and the Republic of Korea were the basis for certification. Message to Congress Transmitting a Report, *supra* note 83, at 266-67.

⁸⁸ 16 U.S.C. § 1821(e)(2)(A) (1982); see also 125 Cong. Rec. 21742 (1979).

⁸⁹ 16 U.S.C. § 1821(e)(2)(B) (1982).

⁹⁰ See Brief for Respondents, *supra* note 11, at 10.

⁹¹ Japanese fishermen catch approximately \$500 million worth of fish within United States waters annually. *Japan Agrees to End Whaling*, N.Y. Times, Apr. 6, 1985, at 2, col. 4.

⁹² See *supra* notes 12-13 and accompanying text. Plaintiffs also requested: (1) a declaratory judgment that the Secretary's failure to certify violated both the Pelly and Packwood Amendments, because any whaling activities in excess of IWC quotas necessarily "diminishes the effectiveness" of the ICRW; and (2) a permanent injunction prohibiting any executive agree-

that certification is mandatory and nondiscretionary where harvesting is in excess of IWC quotas.⁹³

Notwithstanding the pending action, the Secretary on November 13, 1984, reached an executive agreement with Japan whereby Japan pledged to cease all commercial whaling by 1988,⁹⁴ and the Secretary agreed that the United States would forego certifying Japan under the Pelly and Packwood-Magnuson Amendments if Japan complied with its pledge.⁹⁵ The agreement permitted the Japanese to take 400 sperm whales in each of the 1984 and 1985 seasons, 200 sperm whales in each of the 1986 and 1987 seasons, and an "acceptable" number of Bryde's and minke whales in the 1986 and 1987 seasons.⁹⁶ The agreement also required Japan to withdraw its objections to the IWC's moratorium. Indeed, this agreement permitted Japan to continue violating IWC quotas with no threat of sanctions by the United States.

On March 5, 1985, the District Court issued an order and opinion granting the plaintiffs' relief and ordered the Secretary to certify Japan.⁹⁷ The Court of Appeals upheld the lower court's ruling on August 6, 1985.⁹⁸ The Supreme Court reversed the decisions of the lower courts and held that the Secretary of Commerce is not required to certify every nation taking whales in excess of IWC quotas.⁹⁹ The

ment which would violate the certification and sanction requirements of the Amendments. *American Cetacean Society I*, 604 F. Supp. 1398, 1401 (D.D.C. 1985).

⁹³ *American Cetacean Society I*, 604 F. Supp. at 1405.

⁹⁴ This agreement permits Japan to continue whaling for two years after the moratorium goes into effect. See Letter from Malcolm Baldrige, United States Secretary of Commerce, to Yasushi Murazumi, Charge d'Affaires ad interim of Japan (Nov. 13, 1984), *reprinted in* Cert. Appendix, *supra* note 14, at 107a.

⁹⁵ See *supra* note 14.

⁹⁶ See Summary of Discussions on Commercial Sperm Whaling in the Western Division Stock of the North Pacific (Nov. 9-12, 1984), *reprinted in* Cert. Appendix, *supra* note 14, at 104a-106a.

⁹⁷ *American Cetacean Society I*, 604 F. Supp. at 1411. In response to the District Court's decision, Japan unilaterally indicated that it would not, as agreed, withdraw its objections to the IWC moratorium until after the Court of Appeals rules in favor of the federal government. See letter from Shintaro Abe, Minister for Foreign Affairs of Japan, to Malcolm Baldrige, Secretary of Commerce (April 5, 1985), *reprinted in* Cert. Appendix, *supra* note 14, at 116a-118a.

⁹⁸ *American Cetacean Society II*, 768 F.2d at 445.

⁹⁹ *American Cetacean Society III*, 106 S. Ct. at 2872. The Court also held that the political question doctrine did not foreclose judicial determination of the case. Justice White stated:

We are cognizant of the interplay between these Amendments and the conduct of this Nation's foreign relations, and we recognize the premier role which both Congress and the Executive play in this field. But under the Constitution, one of the judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.

Court thus found that the Secretary had the discretion to determine in what circumstances an offending nation's conduct "diminishes the effectiveness" of international conservation measures.

The majority opinion, written by Justice White, based its decision on the fact that the legislative histories of both amendments did not define explicitly the "diminish the effectiveness" standard.¹⁰⁰ Even though they conceded that "[t]he language of the Pelly and Packwood-Magnuson Amendments might reasonably be construed [to require the Secretary to automatically certify offending nations]," the majority found that the Secretary's interpretation of the statutes was reasonable.¹⁰¹ Hence, the Secretary's decision to secure an end to all Japanese commercial whaling and future compliance with IWC quotas in lieu of economic sanctions was a reasonable construction of the amendments. The standard set out by the Court was that the Secretary may not "refuse to certify deliberate flouting of [IWC] schedules."¹⁰² Moreover, the Court noted that "if a statute is silent or ambiguous with respect to the question at issue, our longstanding practice is to defer to the 'executive department's construction of a statutory scheme it is entrusted to administer'"¹⁰³

The majority also gave weight to a report from the Merchant Marine and Fisheries Committee to the 1978 CITES Amendment.

We conclude, therefore, that the present cases present a justiciable controversy, and turn to the merits of petitioners' arguments.

Id. at 2866 (footnote omitted).

The rationale of the political question doctrine is that certain issues are better resolved by the political branches of the government than by the judicial branch. The Court in *Baker v. Carr*, 369 U.S. 186 (1962), outlined the criteria for determining whether an issue is a political question or not. Justice Harlan for the majority stated:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. For a discussion of the political question doctrine, see Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976); Champlin & Schwarz, *Political Question Doctrine and Allocation of the Foreign Affairs Powers*, 13 HOFSTRA L. REV. 215 (1985); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966).

¹⁰⁰ 106 S. Ct. at 2867.

¹⁰¹ *Id.*

¹⁰² *Id.* at 2868.

¹⁰³ *Id.* (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)).

The report, addressing the "diminish the effectiveness" standard, stated:

The nature of any trade or taking which qualifies as diminishing the effectiveness of any international program for endangered or threatened species will depend on the circumstances of each case. In general, however, the trade or taking must be serious enough to warrant the finding that the effectiveness of the international program in question has been diminished. An isolated, individual violation of a convention provision will not ordinarily warrant certification under this section.¹⁰⁴

The majority reasoned that this statement made it clear that the Secretary has discretion to determine whether the activities of a nation "diminish the effectiveness" of CITES. By analogy, the Court found that this definition was applicable to the 1971 Pelly Amendment as well.¹⁰⁵ "Without strong evidence to the contrary, we doubt that Congress intended the same phrase to have significantly different meanings in two adjoining paragraphs of the same subsection."¹⁰⁶

Justice Marshall questioned the Court's approach to resolving the issue. In his dissenting opinion, he maintained that by focusing entirely on the question of executive branch discretion, the majority overlooked the fact that Secretary Baldrige himself admitted that violations of IWC quotas diminishes the effectiveness of the ICRW.¹⁰⁷ Justice Marshall reasoned that Congress and the Executive branch had a shared understanding that IWC quota violations were the type of activity that triggered certification under the Pelly and Packwood-Magnuson Amendments.¹⁰⁸

This case typifies the emotive character of environmental litigation. It illustrates the tension between environmentalists and the whaling industry,¹⁰⁹ the United States and Japan as trading parties,¹¹⁰ and between the legislative and executive branches over their respective authority to govern foreign affairs.¹¹¹

¹⁰⁴ *Id.* at 2869-70 (quoting H.R. REP. NO. 1029, 95th Cong., 2d Sess. 15 (1978), reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 1768, 1779).

¹⁰⁵ *American Cetacean Society III*, 106 S. Ct. at 2870. The Court of Appeals, however, held that the definition found in the House Report was limited to the CITES Amendment. *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 2873 (Marshall, J., dissenting).

¹⁰⁸ *Id.* at 2875 (Marshall, J., dissenting).

¹⁰⁹ See *supra* note 38.

¹¹⁰ Japan's global trade surplus for 1986 was \$82.6 billion. The United States trade deficit with Japan alone was \$60 billion for that year. Jameson, *Japan's Global Trade Surplus Soars 79% to Record \$82.6 Billion in Year*, L.A. Times, Jan. 17, 1987, § 4, at 1, col. 1.

¹¹¹ Under article I of the United States Constitution, Congress is empowered to "regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes." U.S.

V. IMPLICATIONS

There are a number of problems with the Supreme Court's holding. First, the Secretary's actions were contrary to the majority's own standard that the Secretary may not refuse to certify intentional and flagrant disregard of IWC quotas. Not only did the majority overlook that the Secretary himself acknowledged that any IWC quota violation diminished the effectiveness of the ICRW, it also failed to take into consideration Japan's flagrant and continuous efforts to defeat international whaling regulations. Indeed, the circumstances of this case certainly meet the Court's requirements for certification under the Pelly and Packwood-Magnuson Amendments. Second, by giving the Secretary the discretion to determine when a nation's activities diminish the effectiveness of the ICRW, the decision effectively sterilizes the Packwood-Magnuson Amendment by creating an option for the executive branch in dealing with future IWC quota violations.

A. The Court's Standard and Secretary Baldrige's Abuse of Discretion

The majority held that the Secretary may not "refuse to certify deliberate flouting of [IWC] schedules."¹¹² Yet the Court reasoned

CONST. art. I, § 8, cl. 3. The Court has broadly construed this power. *See, e.g.*, *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448-51 (1979); *Brolan v. United States*, 236 U.S. 216, 222 (1915). The Executive branch is required to implement, rather than undermine, the laws enacted by Congress. U.S. CONST. art. II, § 3; *see, e.g.*, *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring); *id.* at 610 (Frankfurter, J., concurring).

The Executive Branch has historically made over 1,300 treaties and thousands of international agreements. *See* L. JOHNSON, *THE MAKING OF INTERNATIONAL AGREEMENTS* 8 (1984). *See generally* Goldwater, *The President's Constitutional Primacy in Foreign Relations and National Defense*, 13 VA. J. INT'L L. 463 (1973); Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L.J. 345 (1954); Rovine, *Separation of Powers and International Executive Agreements*, 52 IND. L.J. 397 (1977). The source of the President's power to enter into executive agreements is article II of the U.S. Constitution. Article II, section 1, clause 1 provides: "[t]he executive Power shall be vested in a President of the United States of America." Article II, section 2, clause 2 provides: "[h]e shall have Power, by and with Advice and Consent of the Senate, to make Treaties . . . ; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Counsuls . . ." Article II, section 3, clause 1 provides: "[h]e shall take Care that the Laws be faithfully executed . . ."

Many writers challenge the President's authority to conclude executive agreements. *See* Sparkman, *Checks and Balances in American Foreign Policy*, 52 IND. L.J. 433 (1977); Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972); Borchard, *Shall the Executive Agreement Replace the Treaty?*, 53 YALE L.J. 664 (1944).

¹¹² *American Cetacean Society III*, 106 S. Ct. at 2867.

that where certain circumstances justify, the Secretary has the discretion to withhold certification.¹¹³ In arguing for discretion, the Secretary contended that the issue of whaling, as a delicate foreign affairs question, called for diplomatic compromise to avoid confrontation.¹¹⁴ The federal government extolled: "[The Baldrige/Murazumi] agreement is a salutary achievement; it has produced, *for the first time*, a binding commitment from the world's premier whaling nation to comply with a comprehensive commercial whaling moratorium. The Agreement advances the worldwide interest in preserving whale populations."¹¹⁵ The Court likewise reasoned that the Baldrige/Murazumi Agreement produces results similar or superior to the immediate certification and imposition of economic sanctions.¹¹⁶ This conclusion is not borne out by reality. Japan has no intention of dismantling its whaling industry. It also has no intention of discouraging the importation of whale products from non-signatory countries and unregulated whaling operations. In the past, Japan has habitually violated the spirit and letter of the International Convention for the Regulation of Whaling.¹¹⁷ For example, Japan

¹¹³ *Id.* at 2867. The majority stated:

In these circumstances, the Secretary, after consultation with the United States Commissioner to the IWC and review of the IWC Scientific Committee opinions, determined that it would better serve the conservation ends of the Convention to accept Japan's pledge to limit its harvest of sperm whales for four years and to cease all commercial whaling in 1988, rather than to impose sanctions and risk continued whaling by the Japanese.

Id.

¹¹⁴ *Japan Whaling Association v. American Cetacean Society*, Brief for the Federal Petitioners at 42-43, 106 S. Ct. 2860 (1986) [hereinafter Brief for the Federal Petitioners]. Secretary Baldrige explained the difficulty of resolving the whaling issue, stating:

Japan is by far the most significant of the few remaining whaling nations. Not only do Japanese whalers account for the largest share of all whales harvested on a global basis, but Japan provides the export market for many of the whales harvested by nationals of other countries, including the Soviet Union. I believe that a cessation of all Japanese commercial whaling activities would contribute more to the effectiveness of the IWC and its conservation program than any other single development.

Id. at 43, n.50.

¹¹⁵ *Id.* at 10.

¹¹⁶ *American Cetacean Society III*, 106 S. Ct. at 2872. Japan's history in keeping promises in respect to whaling agreements is questionable. In 1937, Japan pledged to follow the quota limits of the Agreement for the Regulation of Whaling and Final Act but reneged on its promise. In the two years following the 1937 Agreement, Japan's total production increased from 9 percent to 15 percent and then to 21 percent. *See* Griffis, *The Conservation of Whales*, 5 CORNELL INT'L L.J. 99, 104 n.30 (1972); Travaglio & Clement, *supra* note 4, at 209.

¹¹⁷ Japan's history of violating international law is well documented. *See, e.g.,* Frizell, *The Pirate Whalers Versus the Environmentalists*, OCEANS, Mar.-April 1981, at 25-26; Carothers, *Assault on the Whales: How Long Can They Endure "So Wide a Chase"*, GREENPEACE EXAMINER, Jan.-Mar. 1985, at 14.

has played a significant role in "pirate" whaling operations.¹¹⁸ Many of these unregulated activities are owned, operated, and manned by Japanese nationals.¹¹⁹ The whale products of these operations are exported to Japan.¹²⁰ Because their flag-states are not members of the ICRW, these "pirate" whaling operations do not violate international law. Such "flags of convenience" operations, however, are in violation of the spirit of the ICRW.¹²¹

In addition, Japan has violated several quotas, including the quota which is the subject of *American Cetacean Society III* litigation, for many stocks of whales and other marine mammals. In 1976, for example, after the IWC voted a zero quota on Bryde's whales, Japan harvested several hundred animals in contravention of the quota.¹²² Japan, issuing itself a permit, claimed an exception under the "scientific research" exception.¹²³ Moreover, Japan has been charged with the questionable killing of Dall's porpoises¹²⁴ and bottleneck dolphins.¹²⁵

More importantly, Japan violates all political ethics when dealing with the IWC, its members, and its policies. This is especially true with Japan's treatment of economically weak IWC member countries. For example, in 1978 Japan threatened to cancel a \$10 million sugar purchase with Panama in retaliation for placing an anti-whal-

¹¹⁸ The most notorious "pirate" whaling vessel was the *Sierra*, owned, operated and manned by Japanese nationals. At the end of each voyage, the *Sierra* usually unloaded about 250 tons of whale meat worth about \$750,000. In 1979, the *Sea Shepard*, a vessel financed by the Fund for Animals, rammed the *Sierra*. For an account of *Sierra's* exploits, see Frizell, *supra* note 117, at 25. See also Kindt & Wintheiser, *supra* note 4, at 336.

The Japanese government also subsidizes its whaling industry. In 1978 the Japanese government paid a \$10 million subsidy after the Taiyo Fisheries Company, which owns a 30 percent interest in the Japan Joint Whaling Company, lost \$20 million in its whaling operation. ANIMAL WELFARE INSTITUTE INFORMATION REPORT, Feb.-Mar. 1979, at 1.

¹¹⁹ See Frizell, *supra* note 117, at 25-27.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² See Scarff II, *supra* note 4, at 634; M'Gonigle, *supra* note 4, at 155; Kindt & Wintheiser, *supra* note 4, at 339.

¹²³ See Scarff II, *supra* note 4, at 634; McGonigle, *supra* note 4, at 155; Kindt & Wintheiser, *supra* note 4 at 339.

¹²⁴ See Nafziger & Armstrong, *supra* note 64, at 598; Scarff I, *supra* note 4, 379-80; Travaglio & Clement, *supra* note 4, at 202; Kindt & Wintheiser, *supra* note 4, at 344; see also NAT'L OCEANIC AND ATMOSPHERIC ADMIN., NAT'L MARINE FISHERIES SERVICE, U.S. DEP'T. OF COMMERCE, FINAL ENVIRONMENTAL IMPACT STATEMENT ON THE INCIDENTAL TAKE OF DALL PORPOISE IN THE JAPANESE SALMON FISHERY 1, 9 (May 1981).

¹²⁵ In 1978, the natives of several Japanese islands slaughtered between 1,000 and 2,000 bottleneck dolphins claiming the mammals interfered with fisheries costing them \$2.5 million annually in lost income. For an account of the dolphin hunt, see Whyman, *Can the Japanese Dolphins Survive the Fishing War*, OCEANS, July 1978, at 55; see also Kindt & Wintheiser, *supra* note 4, at 343.

ing proposal on the agenda at the IWC's 1978 meeting.¹²⁶ On the first morning of the session, Panama withdrew this item from the agenda. Japan routinely denied all accusations of applying economic pressure to Panama.¹²⁷ In 1986, Jamaica was another victim of Japan's political maneuvering. Once a forceful voice in IWC deliberations, Jamaica withdrew its membership after Japan threatened to cancel purchases of Jamaican coffee if the government continued its anti-whaling orientation.¹²⁸ Japan is also accused of paying the IWC dues and offering other economic aid to several other third-world countries to sway them into the whaling camp.¹²⁹

In addition, Japan uses its semantic genius in an attempt to redefine the meaning of such terms as "aboriginal" or "subsistence" whaling and "scientific research" whaling to permit its nationals to continue commercial whaling under the guise of legitimate practices sanctioned by the IWC. At the thirty-eighth Annual Meeting of the IWC in June of 1986, Japan endeavored to establish a relationship between its whaling and the aboriginal whaling quotas of Alaska and Greenland.¹³⁰ Moreover, Japan placed a proposal on the agenda for the 1987 meeting to reclassify its coastal whaling as aboriginal or subsistence whaling, effectively avoiding IWC commercial whaling regulations.¹³¹ The IWC, however, has so far distinguished coastal whaling from aboriginal whaling.¹³²

In short, the Baldrige/Murazumi Agreement simply buys time for Japan. It is evident that Japan is actively and aggressively undertaking a campaign of intimidation to rescind the 1982 moratorium by

¹²⁶ See M'Gonigle, *supra* note 4, at 160-61.

¹²⁷ *Id.*

¹²⁸ See WHALENEWS, Autumn 1986, at 3.

¹²⁹ *Id.* The editor's of WhaleNews note:

For several years the small islands of St. Vincent and St. Lucia had been part of the anti-whaling bloc within the IWC. . . . It was soon learned that the prime ministers of these two economically-depressed islands had been given the red carpet treatment in Japan, to which they had been invited by the Japanese government. A few days before the IWC meeting started, the arrears due the IWC were paid and economic aid was offered. Two new commissioners and the accompanying delegations were also appointed by the countries' governments.

Id.

¹³⁰ MARINE MAMMAL NEWS, May-June 1986, at 2. For a review of the 38th annual IWC meeting, see Phillips, *Is There a Whaling Moratorium?*, 11 MARINE POL'Y 76 (1987).

¹³¹ WHALE NEWS, *supra* note 128, at 3-4. The Japanese approached an IWC Working Group with the same proposal only a few weeks after the Baldrige/Murazumi Agreement. See Brief for the Respondents, *supra* note 11, at 11-12. Japaj's proposal is weak at best given that "the so-called shore-based whale fishery in Hokkaido Island is not village-orientated but is actually run off a modern, high speed boat which distributes the minke whale meat throughout Japan." MARINE MAMMAL NEWS, Nov. 1986, at 3-4.

¹³² MARINE MAMMAL NEWS, *supra* note 130, at 2.

increasing its polity. Neither the United States nor the international community should tolerate such threats and enticements. The executive branch, unfortunately, fell prey to this campaign. For whatever reason, political or economic,¹³³ the Baldrige/Murazumi Agreement compromised congressional intent behind the Pelly and Packwood-Magnuson Amendments.

Moreover, the Court ignored the fact that Secretary Baldrige himself admitted that Japan's whaling activities seriously "diminish[ed] the effectiveness" of the ICRW. On June 28, 1984, Senator Packwood wrote the Secretary seeking assurances that he would certify any nation that disregards IWC decisions.¹³⁴ Senator Packwood wrote to Secretary Baldrige as follows:

It has been assumed by everyone involved in this issue, including the whaling nations, that a nation which continues commercial whaling after the IWC moratorium takes effect would definitely be certified. I share this assumption since I see no way around the logical conclusion that a nation which ignores the moratorium is diminishing the effectiveness of the IWC.

What I am asking, [Secretary Baldrige], is that you provide me with an assurance that it is the position of the Commerce Department that any nation which continues whaling after the moratorium takes effect will be certified under Packwood-Magnuson.¹³⁵

The Secretary responded on July 24, 1984, expressing his unequivocal agreement:

You noted in your letter the widespread view that any continued commercial whaling after the International Whaling Commission (IWC) moratorium decision takes effect would be subject to certification. I agree, since any such whaling attributable to the policies of a foreign government would clearly diminish the effectiveness of the IWC.¹³⁶

This letter, written less than four months before the Baldrige/Murazumi Agreement, illustrates the Secretary's belief that Japanese whaling activities diminished the effectiveness of the ICRW. Secretary Baldrige personally confirmed his commitment to punish violators of IWC decisions. The Secretary, however, renounced this

¹³³ See *supra* notes 109-11 and accompanying text.

¹³⁴ See Brief for the Respondents, *supra* note 11, at 38-39 (quoting letter from Senator Robert Packwood to Malcolm Baldrige, Secretary of Commerce (June 28, 1984)).

¹³⁵ *Id.*

¹³⁶ See Brief for the Respondents, *supra* note 11, at 38-39 (quoting letter from Malcolm Baldrige, Secretary of Commerce, to Senator Robert Packwood (July 24, 1984)).

commitment with the Baldrige/Murazumi Agreement. Such foreign policy smacks of political arrogance and insensitivity to Congressional intent. Representative Don Bonker in 1981 realized that politics should not play a role in the application of the Pelly and Packwood-Magnuson Amendments. He explained:

Where the evidence justifies its application, certification must not be held hostage to "policy" considerations. . . . The threat of these important amendments will continue to ring hollow unless they are utilized in a nonpolitical manner.¹³⁷

In sum, the circumstances of this case certainly meet the Court's own standard for certification under the Pelly and Packwood-Magnuson Amendments. The Secretary's decision to withhold certification of Japan and the subsequent executive agreement is clearly an abuse of his administrative discretion.

B. Sterilizing the 1979 Packwood-Magnuson Amendment

The Supreme Court held that neither the Pelly nor the Packwood-Magnuson Amendments define the phrase "diminish the effectiveness" or specify factors to assist the Secretary in applying this standard. The Respondents contended that whaling in excess of IWC quotas automatically triggers certification under the 1979 Packwood-Magnuson Amendment.¹³⁸ When the Amendment was introduced, the sponsors made it clear that this legislation was distinguishable from the 1971 Pelly Amendment. Representative Oberstar, for example, clarified this point, stating:

Mr. Speaker, to date, the Pelly amendment has been somewhat effective in encouraging compliance with fishery agreements. The major weakness has been that certification does not necessarily impose any penalty on the violator. In fact, in all five certifications to date, the President has not used his discretionary power to impose a penalty. In order to improve the effectiveness of the Pelly amendment, the legislation before us will provide for a specific penalty to result from certification.¹³⁹

¹³⁷ Bonker, *U.S. Policy and Strategy in the International Whaling Commission: Sinking or Swimming?* 10 OCEAN DEV. & INT'L L.J. 41, 52-53 (1982).

¹³⁸ See Brief for the Respondents, *supra* note 11, at 13.

¹³⁹ 125 Cong. Rec. 22,083-84 (1979) (statement of Rep. Oberstar). Senator Packwood also emphasized this point, stating before the Senate:

The core of the Packwood-Magnuson amendment is simply that any foreign nation which directly or indirectly conducts whaling operations or allows its nationals to conduct whaling operations or engage in trade in whale products in disregard of the

The Court, however, found the legislative history unpersuasive.¹⁴⁰ Giving weight instead to a report given at Congressional Hearings on the 1978 CITES Amendment,¹⁴¹ the Court reasoned that the Secretary was vested with the discretion to determine when a country "diminishes the effectiveness" of any international conservation measure. The 1978 CITES Amendment, unlike the 1971 Pelly Amendment and the 1979 Packwood-Magnuson Amendment, was designed to enforce a wholly different treaty, the Convention on International Trade in Endangered Species of Wild Fauna and Flora.¹⁴² Nevertheless, the Court reasoned that it was "doubt[ful] that Congress intended the same phrase to have significantly different meanings in two adjoining paragraphs of the same subsection."¹⁴³ The Court's own statement, however, reveals a serious flaw. Given that the 1971 Pelly Amendment and 1978 CITES Amendment are

conservation regulations of the International Whaling Commission shall be denied access to the rich fishery resources of our 200-mile zone.

. . . This amendment . . . will prohibit those nations which violate the conservation regulations of the International Whaling Commission from fishing within our 200-mile zone. As Senator Magnuson and I had initially drafted it, it would have prohibited them from totally fishing in the zone if they violated the conservation regulations, but it would not have prohibited it until their permit to fish within the zone had to be renewed, and that would be up to a year.

Consequently, in working with the House managers we have reached a compromise which says that if any nation that fishes within the 200-mile zone violates the whaling conservation regulations, they will immediately, not having to wait until their permit can be renewed, lose 50 percent of their allocation for fishing within our 200-mile zone. If between that time and the time of the renewal of the permit they have not brought themselves in compliance with the regulations of the International Whaling Commission they will totally lose the right to fish in our 200-mile zone.

The reason that this amendment will be so effective is because it is going to force Japan and Russia, which are the two principal violators of the International Whaling Commission regulations, to choose between the continued taking and/or buying of illegal whale meat, to choose between that privilege and the privilege of fishing in our 200-mile zone. The privilege of fishing in our 200-mile zone is an infinitely superior economic privilege and any country in its right mind when forced to the decision between fishing in the 200-mile zone and giving up illegal whaling is going to give up illegal whaling. This amendment would have the effect of forcing that decision, and it is probably the most significant step this country can take toward protecting the remaining whales of the world.

125 Cong. Rec. 21,742-43 (1979).

¹⁴⁰ *American Cetacean Society III*, 106 S. Ct. at 2871.

¹⁴¹ See *supra* note 104 and accompanying text.

¹⁴² See Brief for the Respondents, *supra* note 11, at 36.

The primary function of [CITES] is to regulate international trade in the species it protects. Its rules, however, apply only to import, export and reexport. The Convention does not apply . . . to the taking of species, or to the preservation of habitat.

Id. H.R. REP. No. 1029, 95th Cong., 2d Sess. 10 (1978).

¹⁴³ *American Cetacean Society III*, 106 S. Ct. at 2870.

in the same subsection, it sheds little light on the standard embodied in the 1979 Packwood-Magnuson Amendment which is under an entirely different title.

The Court's holding effectively sterilizes the Packwood-Magnuson Amendment. By construing as similar the standards of certification under both the Pelly and Packwood-Magnuson Amendments, the Court grants the executive branch one standard with two options. Under the Court's interpretation, the executive branch may choose to (1) certify an offending nation under the 1971 Pelly Amendment, giving the President the discretion to impose or withhold sanctions; or (2) certify an offending nation under the 1979 Packwood-Magnuson Amendment, requiring the immediate imposition of economic sanctions with no executive discretion. Historically, the former is the preferred course of action for the President.¹⁴⁴ The latter, on the other hand, is the preferred course of action for the legislature.¹⁴⁵ That Congress intended to create such an option is contrary to reason. Logic indicates that when a system malfunctions—such as the 1971 Pelly Amendment in light of the President's consistent refusal to impose sanctions on five separate occasions—the system must change. This was the role of the 1979 Packwood-Magnuson Amendment and its automatic sanction provision.

Certainly, the legislature could have worded the language in the 1979 Amendment more clearly. Clarity, in 1979, was not an issue. Congress and the executive branch had a shared understanding that IWC quota violations *always* "diminish the effectiveness" of the ICRW. Such an understanding is evident when considering the consistent interpretations of past Secretaries of Commerce in certifying every nation that departed from IWC schedules.¹⁴⁶ Clarity only became a question when Secretary Baldrige, under pressure from Tokyo, became dissatisfied with the Packwood-Magnuson Amendment.

The negative impact of the Court's decision manifested itself quickly. On June 9, 1986, Secretary Baldrige certified to President Reagan that Norway had conducted whaling operations that diminished the effectiveness of the ICRW.¹⁴⁷ Norway harvested minke

¹⁴⁴ See Brief for the Respondents, *supra* note 11, at 4–6; see also Statement of Rep. Oberstar, *supra* at text accompanying note 139.

¹⁴⁵ See Brief for the Respondents, *supra* note 11, at 4–6.

¹⁴⁶ *Id.*

¹⁴⁷ President's Message to Congress on Norwegian Noncompliance with the International Whaling Commission's Program, 22 WEEKLY COMP. PRES. DOC. 1045 (Aug. 4, 1986). For a

whales in the North Atlantic in violation of IWC zero quotas. The Secretary certified this country pursuant to the 1971 Pelly Amendment. Four days after *American Cetacean Society III* was decided, on August 4, 1986, President Reagan—exercising his discretion under the Pelly Amendment—announced that he was not imposing sanctions on the government of Norway in response to assurances of future compliance.¹⁴⁸ No mention was made of the 1979 Packwood-Magnuson Amendment. The executive officers, choosing their own course of action, simply opted to apply only the 1971 Pelly Amendment. Justice Marshall's dissenting opinion, like an utterance of a prophet, foresaw the follies of the majority's approach. He commented:

It is uncontested here that Japan's taking of whales has been flagrant, consistent and substantial. Such gross disregard for international norms set for the benefit of the entire world represents the core of what Congress set about to punish and to deter with the weapon of reduced fishing rights in United States waters. *The Court's decision today leaves Congress no closer to achieving that goal than it was in 1971*, before either Amendment was passed.¹⁴⁹

VI. CONCLUSION

The Supreme Court's holding in *American Cetacean Society III* is illogical. By not certifying Japan for violating IWC quotas, Secretary Baldrige's actions were inconsistent with the majority's own standard. The Secretary's admission and subsequent repudiation, and his failure to take into consideration Japan's continuous disregard of international conservation measures, demonstrate that the Baldrige/Murazumi agreement was an abuse of discretion. Indeed, the circumstances of this case certainly meet the Court's requirements for certification under the Pelly and Packwood-Magnuson Amendments. More importantly, the majority's decision sterilizes the Packwood-Magnuson Amendment. In the case of future IWC violations, the executive branch can simply ignore the stringent sanctions of the 1979 Packwood-Magnuson Amendment for the more

discussion of this situation, see WHALENEWS, *supra* note 128, at 3; MARINE MAMMAL NEWS, *supra* note 130, at 1.

¹⁴⁸ President's Message to Congress on Norwegian Noncompliance with the International Whaling Commission's Conservation Program, 22 WEEKLY COMP. PRES. DOC. at 1045-46.

¹⁴⁹ *American Cetacean Society III*, 106 S.Ct. at 2876. (, J., dissenting)(emphasis added).

flexible and lax 1971 Pelly Amendment. Congress did not intend such an illogical result.

Rather than manipulate the wording in the statute, the Court should have focused on the realities of whaling regulation. The result of the Court's holding is to allow Japan to continue its whaling activities with impunity. The United States, as the former vanguard of marine mammal protection, is now an accomplice to marine mammal destruction. If ever a perfect time for judicial activism was needed, this was the Court's opportunity.¹⁵⁰ Congress, with its corrective powers, must now put the "bite"¹⁵¹ back into the Packwood-Magnuson Amendment.

¹⁵⁰ "[T]he *function* of the judge—a statement of social purpose and a definition of role—is not to resolve disputes, but to give the proper meaning to our public values." Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 30 (1979) (emphasis in original).

Political scientist Glendon Schubert defined judicial activism stating that "the Court is activist when its decisions conflict with those of other political policy-makers." Schubert, *Judicial Policy Making*, in SUPREME COURT IN AMERICAN POLITICS: JUDICIAL ACTIVISM VS. JUDICIAL RESTRAINT 17 (D. Forte ed. 1972).

¹⁵¹ See 125 Cong. Rec. 21,742 (1979). Senator Packwood, during congressional debates on the Packwood-Magnuson Amendment, stated:

Mr. President, the policy of our Nation for many years has been to support international conservation agreements. Among the conservation efforts which the United States has supported is the worldwide effort to protect the great whales from extinction. *The Packwood-Magnuson amendment puts real economic teeth into our whale conservation efforts.* *Id.* (emphasis added).