

# The Role of Developing Countries in Nudging the International Whaling Commission from Regulating Whaling to Encouraging Nonconsumptive Uses of Whales

Dr. Patricia Birnie\*

## INTRODUCTION

Almost forty years have passed since the conclusion of the International Convention for the Regulation of Whaling (ICRW)<sup>1</sup> in 1946 which established the International Whaling Commission (IWC).<sup>2</sup> In this time, the member countries, including several developing countries, have made considerable progress toward protecting the great whales. The increased participation in the IWC by developing countries has made much of this progress possible. When the developing countries signed the ICRW, though, the four developing nations—of the fourteen countries which signed the Convention<sup>3</sup>—were concerned not with “development” issues,

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\* Lecturer in Law, London School of Economics; Barrister at Law; Ph.D. University of Edinburgh. [Ed. note: Dr. Birnie has consistently attended IWC meetings since the Commission's establishment in 1949. She is a leading expert on the history and policy of the IWC.]

1. International Convention for the Regulation of Whaling, with Schedule for Whaling Regulations, Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849, 161 U.N.T.S. 72 [hereinafter cited as ICRW].

2. An illuminating insight into the political and economic problems of the International Whaling Commission (IWC), is provided by Michael M'Gonigle, *The "Economizing" of Ecology: Why Big, Rare Whales Still Die*, 9 ECOLOGY L.Q. 119 (1980). For a brief account of the legal aspects of the protection of whales, including developments within the IWC and the growth of new treaties and applicable principles outside the IWC, see Birnie, *International Protection of Whales*, in YEARBOOK OF WORLD AFFAIRS 240 (1983), and P. Birnie, *Legal Measures for the Conservation of Marine Mammals*, IUCN Environmental Policy and Law Paper (EPL) No. 19 (1982) [hereinafter cited as Birnie (IUCN)].

3. In 1946, the ICRW, *supra* note 1, was signed by fourteen countries engaged in whaling: Argentina, Australia, Brazil, Canada, Chile, Denmark, France, the Netherlands, New Zealand, Norway, Peru, the United Kingdom, the United States, and the Union of Soviet Socialist Republics. Four of these countries—Argentina, Brazil, Chile, and Peru—were “developing states” and are currently members of the Group of 77 (states recognized by the United Nations as in the process of development). From its inception in 1974, the Group of 77 advocated a New International Economic Order and sought other programs to aid developing countries in other international organizations to which its members belonged.

but solely with maintaining their whaling industries.<sup>4</sup>

Between the two World Wars, when whaling was only loosely regulated by the League of Nations 1931 International Convention for the Regulation of Whaling,<sup>5</sup> many of the larger species of whales were grossly overexploited.<sup>6</sup> In contrast to the 1946 ICRW, the 1931 Convention had neither established a commission for implementation of whaling guidelines nor set any overall quota for the catch.

Pelagic or open sea whaling virtually ceased during World War II. After the war, states seized the opportunity provided by the end of hostilities to reform the prewar system; they did not, however, attempt to change significantly either the system or its basic assumptions. Their goal did not recognize the value emphasized by many environmentalists today—that whales are unique components of the global ecosystem—but rather their effort was motivated by the concern that the conservation of the great whales was necessary to sustain and develop the whaling industry. States had expressed this goal to maintain the industry from the beginning of international cooperation on the issue. Individual and private bodies at the Eighth Zoological Congress in 1910<sup>7</sup> had urged the conservation of whales primarily for the benefit of the industry. After World War II, no states questioned the need to exploit the whales. The economic and nutritional grounds for exploitation, which grew weaker in the following ten years, could be explained in part by the chronic oil and food shortages prevailing in many states after the war. The argument for higher quotas advanced by the developed states and adopted by many developing state members of the IWC prevailed from the postwar period until recently.

This Article explores the historic role of developing countries in

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4. For details on the whaling industries in these countries, see J. TONNESSEN & A. JOHNSEN, *THE HISTORY OF MODERN WHALING* (1982) [hereinafter cited as J. TONNESSEN]. On Argentina, see *id.* at 159, 166-67, 178-79, 448, 452, 490, 501, 554, 556; on Brazil, see *id.* at 205, 653, 680; on Chile, see *id.* at 159, 178, 202-04, 314, 422, 627, 651; on Peru, see *id.* at 202-03, 319, 554-55, 627, 651-52. For a more comprehensive discussion, see the original four volume work published in Norwegian, A. JOHNSEN, 1 *DEN MODERNE HVALFANGSTS HISTORIE: OPPRINNELSE OG UTVIKLING* (1959); J. TONNESSEN, 2,3 & 4 *DEN MODERNE HVALFANGST HISTORIES: OPPRINNELSE OG UTVIKLING* (1967, 1969 & 1970).

5. 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 history leading up to the Convention is explained 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).

6. The definitive history of whaling, J. TONNESSEN, *supra* note 4, includes numerous tables illustrating both the decline in whale stocks and catches for all commercially exploited species. A shorter but excellent account of the decline in whales and whaling, and a biological and economic assessment of the problems, is J. Scarff, *The International Management of Whales, Dolphins and Porpoises: An Interdisciplinary Assessment*, 6 ECOLOGY L.Q. 323 (1977).

7. For an account of the growth of the whale conservation movement from 1910-65, see P. Bock, *A Study in International Regulation: The Case of Whaling 74-79* (1966) (unpublished thesis, N.Y. Univ., available from Univ. Microfilms Inc., Ann Arbor, Michigan).

nudging the IWC away from merely regulating whaling toward encouraging members to shift to nonconsumptive uses of whales. In Section I, this Article discusses the mediating role that developing countries played between proponents of whale preservation and advocates of exploitation. The influence on the debate of the issues of sovereignty and industrial development are also examined. Section II analyzes the growing leadership role that developing countries are playing in determining the balance between sovereign control and global ecological policies. The Section concludes that even though the *raison d'être* of the IWC has changed over its history, the new trend toward nonconsumptive uses provides a continuing vital purpose for the Commission.

## I

### THE ROLE OF DEVELOPING COUNTRIES BEFORE 1979

#### A. *The Establishment of the IWC*

The fourteen states that participated in the International Convention for the Regulation of Whaling (ICRW) held in Washington in 1946 included four developing countries engaged in whaling.<sup>8</sup> Of the nineteen states invited to attend the conference, only Mexico, also a developing country, did not do so. Five observers were present but they were drawn exclusively from developed states. The absence of observers from the developing states was not surprising given that few developing countries had achieved independence at that date; only thirty-one such states were represented in the United Nations in 1946<sup>9</sup> compared to 159 in 1984.

In 1946, only those states concerned with the maintenance of a whaling industry were interested in becoming parties to the ICRW. The terms of the Convention did not, however, restrict its membership to whaling nations. Without any preconditions or qualifications, Article II(4) welcomed any government that deposited an instrument of ratification or gave notice of adherence to the Convention.

From the outset, the IWC promoted the short-term interests of the whaling countries with the passive connivance of developing states. The express goals of the ICRW included conservation of whale stocks, but were motivated by concern for sustaining the industry. The Convention's preamble expressly provided for the conservation of whale stocks through the establishment of a "system of international regulation for the whale fisheries to insure proper and effective conservation and develop-

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8. See *supra* note 1; J. TONNESSEN, *supra* note 4, at 748.

9. These states were: Afghanistan, Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, Egypt, El Salvador, Ethiopia, Guatemala, Haiti, Honduras, India, Iran, Iraq, Lebanon, Liberia, Mexico, Nicaragua, Panama, Paraguay, Peru, the Philippines, Saudi Arabia, Syria, Thailand, Uruguay, and Venezuela. [1] Y. B. OF THE U.N. 1946-47 863-64 (1947) (U.N. Sales No. 1947.I.18).

ment of the whale stocks."<sup>10</sup> No mention was made of whether the industry itself should be maintained on a long- or short-term basis, and terms such as "whale," "whaling," and even "industry," were not defined in Article II, the definitional article. These questions of interpretation of the Convention and the intent of its members to favor either conservation or maintenance of the whaling industry became increasingly important to the IWC because of the economic implications of these alternative policies. When the nonwhaling developing states eventually joined the IWC en masse and began to participate in its proceedings,<sup>11</sup> their attempts to introduce more conservatory measures were made more difficult by these questions of interpretation and intent.

Even though a few developing states did become parties to the ICRW in 1946, their participation was regarded as far less important than that of the five Antarctic pelagic whaling states then responsible for the major portion of world catches: Japan, the Netherlands, Norway, the United Kingdom, and the USSR.<sup>12</sup> The perceived importance of these five states to the drafters of the ICRW manifested itself in Article X, that required for its entry into force only six ratifications, but specified that five of these be by the Netherlands, Norway, the United Kingdom, the United States, and the USSR (Japan was not invited to participate after its defeat in the war). By 1948, these five Antarctic pelagic whaling states had ratified the ICRW, as had Australia, Canada, France, Iceland, South Africa and Sweden. No developing state, however, had yet ratified the Convention.

#### *B. Developing States' Participation in IWC Meetings 1949-1970*

The establishment of the International Whaling Commission by the ICRW introduced a vital new actor into the improved postwar regulatory system. The Commission's first meeting took place in London on May 30, 1949,<sup>13</sup> and all eleven ratifying states attended. Three developing member states—Argentina, Brazil, and Chile—sent observers to this first meeting. One developing state, Panama, ratified the Convention later that year but did not appoint a commissioner for some years (ignoring Article III of the ICRW that provides that the Commission is to be composed of one member from each Contracting Government).

From the start, the IWC refused to make special concessions to developing countries that pleaded special needs for relaxed regulations.

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10. ICRW, *supra* note 1, preamble.

11. *See infra* Section II.

12. J. TONNESSEN, *supra* note 4, at 731-55 (statistical appendices illustrating the size of catches).

13. INT'L COMM'N ON WHALING (IWC), FIRST REPORT OF THE COMMISSION app. II, 19-21 (1950) [all IWC annual reports hereinafter cited as (FIRST) REPORT] (lists the commissioners, experts, and observers who attended the first meeting).

For example, as a precondition to its joining the IWC, Chile sought relaxation of the rules concerning the distance between land stations laid down in the first regulatory Schedule.<sup>14</sup> Chile requested that the Schedule allow it a greater frequency of land stations because of its country's poverty and the nutritional needs of its population. The IWC refused Chile's request on the grounds that the Schedule restrictions fell equally on all parties. A similar request by Chile to obtain relaxation of the IWC land station regulations at the second meeting of the IWC in 1950 was also turned down.<sup>15</sup> This early rejection by the IWC of Chile's request resulted in the country's refusal to join the IWC until 1979 and was one factor in Chile's decision to join Ecuador and Peru in 1952 and form an alternative whaling organization.<sup>16</sup>

### 1. *The PCSP—Developing Countries Form Their Own Organization*

In 1952, three developing countries—Chile, Ecuador, and Peru—signed the Declaration of Santiago and claimed exclusive rights for the three countries over a maritime zone 200 miles off their respective coasts.<sup>17</sup> Simultaneously, these countries adopted a Joint Declaration on Fishery Problems in the South Pacific and entered into an agreement to establish the Permanent Commission of the Conference on the Use and Conservation of the Maritime Resources of the South Pacific (PCSP).<sup>18</sup>

The reasons given for Chile's decision not to participate in the IWC nor abide by its regulations are set out in the Santiago Declaration itself:

- 1) Governments are bound to ensure for their peoples access to necessary food supplies and to furnish them with the means of developing their economy; 2) [it] is therefore the duty of each Government to ensure the conservation and protection of its natural resources and to regulate the use thereof to the greatest possible advantage of its country; and 3) to prevent the said resources from being used outside the area of its jurisdiction so as to endanger their existence, integrity and conservation to the

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14. FIRST REPORT, *supra* note 13, at 15-19 (text of Schedule). IWC Paper No. 28 (1949) (all IWC Papers and Documents cited herein are available from the IWC, Cambridge, U.K.).

15. IWC Doc. 13 (1950).

16. Other factors in Chile's decision were the 1946 Truman Proclamation of United States continental shelf rights and the huge whale and other fisheries conducted by foreign flag vessels off the coasts of South America. Proclamation No. 2667, 3 C.F.R. 67 (1945), reprinted in 1 NEW DIRECTIONS IN THE LAW OF THE SEA 106 (S. Lay, R. Churchill & M. Nordquist eds. 1973).

17. Declaration on the Maritime Zone, August 18, 1952, Chile-Ecuador-Peru, reprinted in *id.* at 231 [hereinafter cited as Declaration of Santiago]. For an analysis of the origins of the Declaration, see Hollick, *The Origins of 200 Mile Offshore Zones*, 71 AM. J. INT'L L. 494 (1977). A major motive behind the Declaration was the protection of Chile's and Peru's offshore whaling industry from foreign vessels.

18. For the constitution of the PCSP, see U.N. Legislative Service ST/LEG/SER B/6 (1956). See also A. KOERS, INTERNATIONAL REGULATION OF FISHERIES 100-01 (1973); M. SAVINI, REPORT ON INTERNATIONAL AND NATIONAL LEGISLATION FOR THE CONSERVATION OF MARINE MAMMALS 23-25 (FAO Fisheries Circular No. 326 FIRD/C 326, 1974).

prejudice of peoples so situated geographically that their seas are irreplaceable sources of essential food and economic materials.<sup>19</sup>

However understandable, because of the depredations by foreign fleets of the fishing grounds of these countries and the Truman Proclamation of United States claiming exclusive rights to the seabed resources of the continental shelf, the actions of these developing states threatened the IWC's effectiveness and greatly undermined the implementation of its regulations until 1979, when Chile and Peru finally joined the IWC. The PCSP developed its own regulations for whaling in the new 200-mile zones, but these were less restrictive than those progressively adopted by the IWC from 1952 to 1979. Whaling governed by PCSP rules affected whales migrating to and from the Antarctic, where they were also caught by the five major Antarctic whaling states subject to the IWC's increasingly restrictive quotas. With Chile and Peru taking the same whales outside the IWC regulations, those states whaling within its regime were discouraged from either observing their quotas or seeking to reduce them. In addition to making it difficult either to develop or enforce the strict and progressively decreasing quotas that the conservation of whales required, the separatism of Chile and Peru also hampered development of the regime of international inspection required for effective conservation.

Throughout this early period, the PCSP defended its position on the grounds that its member countries followed the IWC regulations except where they prejudiced "the just needs for national consumption and industrial supplies."<sup>20</sup> The PCSP argued that the IWC regime favored wealthy countries and damaged poor countries. The attitude of the PCSP demonstrated little appreciation, however, for the scientific factors involved in overexploitation—the biology, behavior, and special characteristics of whales, and the factors affecting their environment. The developed state members of the IWC, though, were also not well aware at this time of the breadth and range of these factors and their effects. Even if developed countries recognized the potential ecological problems of whales, they found it difficult for economic and political reasons to give proper weight to such factors in setting quotas.

## 2. *Inadequate Participation by Developing States*

Addressing the problems presented by the three South American states comprising the PCSP was also not the only difficulty confronting the IWC during this early period. Inadequate participation by the developing states who were members was another problem. Throughout the history of the IWC, the attendance of observers and delegates from de-

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19. Declaration of Santiago, *supra* note 17, §§ (a)1, (a)2, (a)3.

20. IWC Doc. V (1955).

veloping countries was sporadic.<sup>21</sup>

By the second meeting in 1950, Brazil and Mexico, both nonwhalers, had ratified the ICRW and sent representatives to the meeting. Mexico was the second developing state to ratify the 1946 Convention.<sup>22</sup> Though Chile and Peru remained signatories, only Chile joined Argentina in sending an observer to the Convention.<sup>23</sup> At this point, the IWC consisted of representatives of sixteen states, including Panama, which still had not appointed a commissioner. By the third meeting in 1951, Japan's ratification of the convention had increased the total membership to seventeen, but not all members had appointed commissioners.<sup>24</sup> Brazil and Mexico were absent from the third meeting and Argentina, Peru, and Chile still had not ratified the Convention. Argentina again sent an observer to the meeting; Peru sent one for the first time.

The IWC officially noted with regret the continued failure of these states to ratify despite repeated invitations to send observers. The Commission "view[ed] with some disappointment the continued failure of countries interested in whaling to cooperate in the maintenance of the principles underlying the 1946 Convention, on which the future conservation of the whale stocks of the world so much depends."<sup>25</sup> Neither this admonition nor subsequent expressions of "the earnest hope that nonparticipating countries, especially those whose representatives signed the 1946 Convention, may see their way to ratify or adhere to the Convention without further delay so that they may be in a position to cooperate in the vital task of conserving the whale stocks of the world"<sup>26</sup> prompted the developing countries to become involved.

### 3. *Pirate Whalers*

The seventh meeting in 1955 introduced a disturbing new development in the regulation of whaling: the appearance of "pirate" whalers. Photographic evidence produced by Norway revealed that Panama, which had regularly attended meetings since 1951, allowed one of its whale factory ships, the *Olympic Challenger*, to operate outside IWC regulations by registering it under a Honduran flag. Panama had not included returns for this vessel in the catch statistics that the ICRW

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21. See Appendix A to this article.

22. For a complete list of governments participating in the ICRW, see Appendix B to this Article.

23. SECOND REPORT app. I, at 9 (1951) (commissioners, experts, and observers attending the second meeting).

24. THIRD REPORT app. I, at 8-9 (1952) (commissioners, advisors, and observers attending the third meeting).

25. *Id.* at 3.

26. FOURTH REPORT 3 (1953). Similar exhortations also fell on deaf ears at subsequent meetings. See SIXTH REPORT 3 (1955); SEVENTH REPORT 3 (1956).

requested it to submit to the IWC. Ironically, the vessel was eventually seized by Peru, and its operators fined for violations of the PCSP regulations governing the Peruvian Maritime Zone.<sup>27</sup>

#### 4. *Inadequate Information*

Article VII of the ICRW requires members to provide statistical and other information to the International Bureau of Whaling Statistics (IBWS), then at Sandefjord, Norway, to develop an overall picture of the state of whale stocks and to determine the incidence of catching of particular stocks and its effect. Unfortunately, the developing states that became parties to the IWC provided little such information,<sup>28</sup> and what information they did provide was erratic or imperfect.<sup>29</sup> In the first ten years of IWC operations, neither developing members nor nonmembers sent reports of a scientific nature on whaling to the IWC, with the exception of Argentina, whose contribution in the first fourteen years consisted only of background papers.<sup>30</sup> In contrast, the developed members submitted several scientific reports,<sup>31</sup> and members with colonies and dependencies (which later became independent states able to join the IWC) also occasionally provided information on whales and whaling off their shores.<sup>32</sup>

During this period, the lack of participation by the developing countries continued to hinder the work of the IWC. None of the developing states took part in the work of the original Ad Hoc Scientific Committee or its successor, the Scientific Committee, although the PCSP, representing several developing countries, did once send two observers.<sup>33</sup> Brazil,

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27. 2 NORWEGIAN WHALING GAZETTE 689 (1954). Throughout the IWC's history, other developing states have from time to time provided "flags of convenience" for pirate whalers. This practice has only recently been discouraged through the application of sanctions provided by new international treaties, innovative national legislation, and the unilateral acts of certain nongovernmental organizations. These developments are discussed in Section II of this Article.

28. In the first ten years of the IWC, only three papers were received from developing countries. FOURTH REPORT, *supra* note 26, at 26 (Argentina); NINTH REPORT 28 (1958) (Brazil); TENTH REPORT 29 (1959) (China). Only Brazil's paper related specifically to whales.

29. See, e.g., SEVENTEENTH REPORT 44 (1967). Developing countries also did not comply with a request made at the second meeting (in 1951) that they should provide the IWC with full information as to their laws and regulations implementing the ICRW. SECOND REPORT, *supra* note 23, at 4. None of the developing countries replied to the questionnaire sent out by the IWC. See THIRD REPORT, *supra* note 24, at 29-39; FOURTH REPORT, *supra* note 26, at 28-31.

30. FOURTEENTH REPORT 119 (1964). Argentina's adherence reduced to two the original developing state signatories that remained nonparties, namely Chile and Peru. *Id.* at 2; FIRST REPORT, *supra* note 13, at 3.

31. The annual reports of the IWC list scientific and other papers received.

32. ELEVENTH REPORT 27 (1960) (taking of humpback off the Congo, Tonga, and some South West Pacific islands).

33. The PCSP sent both a Chilean and a Peruvian observer to the Scientific Committee meeting in 1963. FOURTEENTH REPORT, *supra* note 30, at 23.

Mexico, and Panama were also responsible for delaying enforcement of important amendments to the Convention in 1956 which expanded the inspection provisions to permit appointment of international observers to factory ships in Antarctica. The ICRW makes no provision for revision or amendment, therefore amendments, introduced by Protocol, could not become effective until ratified by all the contracting governments. These three states, the last to ratify the amendments, did so at the tenth meeting in 1958 only after attention was drawn to the effects of their inactivity.<sup>34</sup>

### 5. *Deteriorating Whale Stocks*

While states were failing to supply adequate information that would have revealed dramatically declining stocks, the consequences of whaling occurring outside the reach of the IWC regulations grew increasingly serious. At the seventeenth meeting in 1966, the Scientific Committee noted that the catching by Peru and Chile of blue and humpback whales (the species most threatened by global overexploitation) had actually increased. A special Scientific Committee group was established to identify the best method of solving the problem because catches of baleen whales in the Antarctic could not successfully be brought below the sustainable yield unless land station catches were taken into account. The Scientific Committee asked the IWC to make further appeals to Chile and Peru to ratify the ICRW<sup>35</sup> in the hope that these states at least would comply with the IWC's limits on the minimum sizes of whales to be taken and would agree to supply data to the IBWS. The IWC accepted this recommendation and made another appeal.<sup>36</sup> The two countries did not respond, though, and the IWC could only express concern at the eighteenth meeting that the numbers of whales being caught from land stations in nonmember states was excessive and that these states should adopt better protective measures. The PCSP responded merely by inviting the IWC to send an observer to the PCSP's next meeting. Brazil and Panama exacerbated the difficult situation by announcing their intention to withdraw from the Convention.<sup>37</sup>

During this same period, the policies of many developed IWC members were no more conservatory than those of these developing states. The unwillingness of some developed countries, particularly the Netherlands in the IWC's early years, and later Japan and the USSR, to reduce catches to the levels advised by the Scientific Committee and to enforce the quotas had disastrous effects.<sup>38</sup> By the end of the 1960's, whale stocks

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34. NINTH REPORT, *supra* note 31, at 3; TENTH REPORT, *supra* note 31, at 6.

35. SEVENTEENTH REPORT, *supra* note 29, at 25-26.

36. *Id.* at 19-20.

37. *Id.* at 11.

38. *See supra* note 6.

had decreased to such an extent that countries began to be alarmed that some of the great whales, if not entire species, might become extinct. Then, two major events occurred that since have proven to be the catalysts for gradual change in IWC policies and those of developing states. The events brought scientific advice on the regulations to the forefront of IWC decisionmaking, a crucial step toward more effective conservation policies. The first event was a series of changes in the policy of the United States following its abandonment of commercial whaling, resulting in innovative national legislation that encouraged novel initiatives at the international level backed by effective sanctions. The second event was the 1972 United Nations Conference on the Human Environment in Stockholm. In addition to its adoption of certain important and novel resolutions, the Stockholm Conference prompted the enactment of broad international conventions applicable to preservation of the whales and to the establishment of new IWC measures.

*C. Impact on Developing Countries of United States Legislation  
Affecting Marine Mammals: New Perspectives, New  
Measures, New Sanctions*

During the period from 1969 to 1979, the United States adopted new legislation and amended existing statutes in an attempt to strengthen conservation efforts.<sup>39</sup> In 1969, the United States amended its Endangered Species Preservation Act of 1966 (ESPA),<sup>40</sup> which enabled it to "list"<sup>41</sup> national wildlife and fish threatened with extinction. The amendments allowed listing species threatened with *worldwide* extinction,<sup>42</sup> including those found in foreign jurisdictions or on the high seas, and prohibited their importation into the United States except for certain purposes.<sup>43</sup> The amendments required the United States to promote bilateral and multilateral treaties to protect the endangered wildlife.<sup>44</sup>

Three years later, the United States adopted a comprehensive Marine Mammal Protection Act (MMPA)<sup>45</sup> that introduced a moratorium on the taking in the United States of all marine mammals and products, and prohibited their importation. Under the Act, these species

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39. For a full account of this legislation, see M. BEAN, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* (1977); Birnie (IUCN), *supra* note 2.

40. Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, § 3(a), 83 Stat. 275 (1969) (codified at 16 U.S.C. §§ 668cc-1 to 668cc-6 (1982)), amending the Endangered Species Preservation Act of 1966, Pub. L. No. 86-669, § 1, 80 Stat 926 (1966) (repealed 1973). See *infra* note 52 and accompanying text.

41. When a species is "listed" under section 3(a) of the ESPA, it becomes protected by the Act and sanctions can be invoked to prohibit its taking.

42. Endangered Species Conservation Act of 1969, *supra* note 40, § 3(a).

43. *Id.* § 2.

44. *Id.* § 5(a).

45. Marine Mammal Protection Act of 1972, Pub. L. No. 92-522, § 107, 86 Stat. 1027 (1972) (codified at 16 U.S.C. §§ 1361-1407 (1982)).

were to be protected and conserved at or above optimum sustainable population levels.<sup>46</sup> Equally important to subsequent developments in the IWC, the MMPA required the relevant United States cabinet secretaries to follow a program of international activities to implement the Act.<sup>47</sup> This program included a mandate to initiate bilateral and multi-lateral agreements to protect and conserve all marine mammals, to amend the existing international treaties to which the United States was a party to make such treaties consistent with the purposes and policies of the MMPA, and to endeavor to convene a ministerial meeting on marine mammals to negotiate a binding international convention that would insure comprehensive protection for the various species.<sup>48</sup> The Act also established the Marine Mammal Commission to administer the MMPA.<sup>49</sup> In 1976, Congress directly strengthened the scope and effectiveness of the Act when it extended the United States fisheries jurisdiction to 200 miles.

After the Stockholm Conference in 1973, and following the initiatives of the International Union for Conservation of Nature (IUCN), the United States also strongly advocated the adoption of the Convention of International Trade in Endangered Species (CITES).<sup>50</sup> This Convention requires species to be listed in appendices according to the extent to which they are threatened by extinction or affected by trade in them or their products. Listed species on Appendix A can be traded only if there exists an export and import licence; species listed on Appendix B, which are less threatened, require only an export licence. Countries not parties to CITES, which now has over eighty signatories, are required to produce similar documentation when trading listed species with CITES members.

Since 1979, all whales have been listed on at least one of the CITES Appendices. This listing puts economic pressure on states still trading in whales or their products. The IWC later followed the lead of CITES by recommending to its members that they not supply whales or whale products to nonmember states. This stricter policy indicates the changing attitude of countries toward whaling, and since this policy was adopted, developing or other states have been unable to start up a new whaling industry except for subsistence purposes. For example, Taiwan attempted to do so in 1976, but failed.<sup>51</sup>

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46. MMPA, *id.* § 2(6).

47. *Id.* § 108(a)(1)-(6).

48. *Id.*

49. *Id.* § 201.

50. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, T.I.A.S. No. 8249, reprinted in 12 INT'L LEGAL MATERIALS 1085 (1973). See Birnie (IUCN), *supra* note 2. Coggins, *Legal Protection for Marine Mammals: An Overview of Innovative Resource Conservation*, 6 ENVTL. L. 1 (1975).

51. For details of Taiwan's activities and those of other countries whaling outside IWC

In 1973, the United States further strengthened its Endangered Species Preservation Act<sup>52</sup> by recognizing the "aesthetic, ecological, educational, historical, recreational and scientific value" of endangered species of wildlife,<sup>53</sup> providing for their conservation, and urging all United States federal agencies to help achieve these objectives by taking all measures necessary to remove species from the endangered category.<sup>54</sup> The amendments required consultation with concerned foreign countries before listing a species, but once a species is listed, the Act prohibits and penalizes the "taking" (a word very broadly defined in the Act) of the species or their import from or export into any place under United States jurisdiction.<sup>55</sup> All of the great whales are now listed as endangered under the Act.<sup>56</sup>

To provide effective sanctions to enable fulfillment of the international aspects of the above legislation, Congress amended two major United States fisheries acts. In 1978, Congress adopted the Pelly Amendment to the 1967 Fishermen's Protective Act.<sup>57</sup> The amendment directed the Secretary of Commerce to certify to the President (i) whether foreign countries were fishing in a manner or under circumstances that diminished the effectiveness of an international fishery conservation program or (ii) whether the countries were directly or indirectly engaged in trade or taking which diminished the effectiveness of any international program for threatened or endangered species to which the United States was party. The amendment covered the ICRW as well as other conservatory treaties relevant to whale conservation. Once the Commerce Department certifies the information, the United States can ban the importation of fish products from the offending country.<sup>58</sup>

Next, in 1979, Congress passed the Packwood-Magnuson Amendment to the Magnuson Fishery Conservation and Management Act (FCMA).<sup>59</sup> The amendments supported the United States moratorium

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regulations, see GREENPEACE INT'L, *OUTLAW WHALERS* (1979, 1980, 1981 & 1982), and PEOPLE'S TRUST FOR ENDANGERED SPECIES (PTES), *PIRATE WHALING: A REPORT BY THE PEOPLE'S TRUST FOR ENDANGERED SPECIES ON WHALING UNDER FLAGS OF CONVENIENCE OUTSIDE THE JURISDICTION OF THE INTERNATIONAL WHALING COMMISSION* (1979) [hereinafter cited as PTES REPORT]. States involved in pirate whaling have included the Bahamas, Somalia, Honduras, Cyprus, Taiwan, and Panama.

52. Endangered Species Preservation Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified at 16 U.S.C. §§ 1531-1543 (1982)).

53. 16 U.S.C. § 1531(a)(3).

54. *Id.* § 1532(2).

55. *Id.* § 1532(15).

56. 50 C.F.R. §§ 17.11, 222, 227 (1984).

57. The Fishermen's Protective Act of 1967, Pub. L. No. 92-219, 85 Stat. 786 (1971) (codified as amended at 22 U.S.C. §§ 1971-1980 (1982)); Pelly Amendment, Pub. L. No. 95-376, 92 Stat. 714 (1978) (codified at 22 U.S.C. § 1978 (1982)).

58. 22 U.S.C. § 1978(a)(4).

59. Pub. L. No. 96-61, 93 Stat. 407 (1979) (amending 16 U.S.C. § 1821(e) (1976)).

proposals in the IWC,<sup>60</sup> encouraged nonmember states to join the IWC, and discouraged IWC members from resorting to procedural objections to defeat conservatory amendments to the ICRW.<sup>61</sup> The Packwood-Magnuson Amendment provided that a permit to fish in the United States 200-mile zone established by the FCMA would not be issued to any foreign government that the Commerce Department certified (under the Pelly Amendment) was acting in a way which diminished the effectiveness of an international fisheries program or endangered species protection program to which the United States was party.<sup>62</sup> The amendment to the FCMA also mandates a reduction of at least fifty percent of any allocation of fish that may be caught.<sup>63</sup>

The United States could impose under the ESPA and the FCMA sanctions against both developed and developing states, but the sanctions are most likely to be used against developing states because the United States has more economic and political leverage with such countries than with, for example, the USSR or Japan.<sup>64</sup> The sanctions proved particularly effective against Latin American countries which are particularly dependent on fishing opportunities and markets in the United States. For example, the mere threat of certification was enough to persuade both Chile and Peru finally to join the IWC in 1979.<sup>65</sup>

The United States delegation to the IWC immediately introduced, as the Acts required, this new perspective on international management of endangered species. Supported by sympathetic noncommercial whal-

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60. See *infra* notes 66-69 and accompanying text.

61. 16 U.S.C. § 1821(c).

62. *Id.* § 1821(e)(2)(A).

63. *Id.* § 1821(e)(2)(B).

64. In a recent case concerning United States negotiations with the Japanese to ensure they withdraw their objections by 1986 to the moratorium on commercial whaling adopted by the IWC in 1982, the United States District Court for the District of Columbia held that the obligations of the Commerce Department to impose certain sanctions under the Pelly Amendment are mandatory. *American Cetacean Society v. Baldrige*, 604 F. Supp. 1398 (D.D.C.), *aff'd*, 768 F.2d 426 (D.C. Cir. 1985).

65. Threats of certification under these amendments are recorded in the Marine Mammal Commission's (MMC) annual reports to Congress. The 1979 MMC Report, at 78-81, notes the Commission's determination early in 1977 that Peru and the Republic of Korea had diminished the effectiveness of the IWC conservation program and summarizes the Commission's advice to the Secretary of Commerce to this effect. The Secretary eventually certified to the President on December 14, 1978, that nationals of Peru, Chile and Korea were so acting. Korea, which conducted most of its whale trade with Japan, also joined the IWC in 1979 after encouragement by Japan, which wanted to buy its whale products from Korea and could not do so because the IWC prohibited its members from trading with nonmembers. Korea ratified the ICRW on December 29, 1978; Chile on July 6, 1979; and Peru on June 18, 1979 (see Appendix B). The 1980 MMC Report, at 81-82, disclosed the Commission's further investigation of Korea's activities within the IWC and indicated that the MMC might invoke both amendments if Korea did not withdraw its formal objections to the ban adopted by a majority in the IWC on the use of the cold harpoon. The 1981 MMC Report, at 29, records that the threat of the use of these amendments resulted in Korea's withdrawal of its objection in April, 1981. Korea still does not, however, accept international observers on its vessels.

ing states, the United States began to urge the IWC to adopt conservation rather than exploitation as its primary objective. The United States also proposed ecological principles of management and preservation of species habitats. The United States urged the Commission to adopt a perspective on environmental factors affecting population estimates much broader than the IWC or its Scientific Committee ever before considered. In the next decade, several other members, following the lead of the United States, began to ask the IWC to consider the interrelationship and interdependence of whales with other species and their food chains, and to take into account when estimating stock yields the impact of pollution and the effects of current and temperature changes.

These increasingly sophisticated scientific considerations put new pressures on developing states, which generally lacked scientific expertise because it became more difficult for them to provide the data to justify continued whaling. These new considerations also revealed that even the smaller catches from land stations were seriously affecting already depleted stocks.

*D. The Impact of the United Nations Conference on the Human Environment: The Call for a Moratorium on Commercial Whaling*

*1. The Moratorium*

In 1972, the United Nations Conference on the Human Environment (UNCHE), held in Stockholm, recommended that all countries ban commercial whaling for the next ten years. This recommendation, although not enforceable, exerted even more pressure on states that were still whaling, and provided the banner under which nonwhaling states, both developed and developing countries, could unite. The ranks of the nonwhaling forces in the IWC increased in the late 1970's when many developing countries, prompted by the UNCHE, decided to join the Commission.

The UNCHE made three proposals to increase international efforts to conserve whales. The Conference recommended that countries strengthen the International Whaling Commission, increase international research efforts, and "as a matter of urgency . . . call for an international agreement under the auspices of the International Whaling Commission and involving all Governments concerned, for a 10-year moratorium on commercial whaling."<sup>66</sup>

Before the UNCHE adopted the moratorium proposal in 1972, the

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66. United Nations Conference on the Human Environment, Stockholm, 1972, at 23, U.N. Doc. A/Conf. 48/14 [hereinafter cited as UNCHE]. The Conference introduced in its Declaration on the Human Environment several general principles of significance to conservation of living resources. *Id.* at 2.

Scientific Committee of the IWC had discussed the worldwide moratorium at its twenty-third meeting in 1971. The Scientific Committee had, however, recommended *against* a ban, suggesting instead that there should be a decade of intensified cetacean research.<sup>67</sup> Not surprisingly, when the moratorium resolution was reintroduced at the next meeting of the IWC in 1972 (one month after the UNCHE), the IWC rejected the moratorium by a vote of four in favor, four against, and six abstentions. The IWC did, however, implement the UNCHE's proposal to strengthen the IWC by appointing a full-time Secretary (an experienced whale scientist) and other officials, and by increasing research efforts.<sup>68</sup> Despite this improvement, though, the Secretariat still does not include an administrator from a developing country.

At the 1972 meeting of the IWC, regarded as the beginning to a new era in IWC affairs, the Minister for the United Kingdom introduced the new perspectives on whale conservation in his opening remarks. The United Kingdom shared the anxiety about the whales' future expressed at the UNCHE "not only because they are an important natural resource for man's use but also because they occupy an important place in the ecological system."<sup>69</sup>

## 2. *New Breakthroughs*

Other breakthroughs at the IWC's twenty-fourth meeting in 1972 further demonstrate the influence of the UNCHE on IWC policies. An international observer scheme was at last adopted under which all Antarctic whaling countries agreed to exchange observers appointed by the IWC on the basis of bilateral agreements.<sup>70</sup> The program, however, was never entirely successful. Extending the scheme to whaling operations of developing countries based at land-stations proved difficult. Some countries never followed through on their promise to implement the program. For example, after rejoining the IWC in 1974, Brazil frequently announced that it was negotiating an exchange of observers, but in fact neither Brazil nor any other developing country ever concluded such an agreement.<sup>71</sup> Another proposal intended to strengthen the IWC,

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67. TWENTY-THIRD REPORT 38 (1973). The Scientific Committee took the view that a blanket moratorium was another attempt to regulate stocks as a group whereas prudent management required that stocks be regulated individually. It noted also that the absence of commercial catching operations would make it impossible to get certain kinds of information essential to stock assessment.

68. TWENTY-FOURTH REPORT 6 (1974). For a discussion of the UNCHE Recommendations, see *id.* at 23-26.

69. *Id.* at 21.

70. *Id.* at 22, 27.

71. Observer schemes existing in 1970-73 covered Antarctica (Japan and the USSR), the Southern Hemisphere (Australia and South Africa), the North Pacific (Japan and the USSR (pelagic); the United States (land stations)), and the North Atlantic (Canada, Iceland, and Norway). No developing state operations were covered. TWENTY-FOURTH REPORT, *supra*

to admit the press and public to its meetings, was successfully resisted by both developed and developing states.

Another change in policy significant to developing states still whaling outside the IWC—including Brazil, Chile, Korea, and Peru—was the IWC's adoption of a resolution recommending that its members, to the extent possible under national laws, withhold the sale, registration, or chartering of whaling equipment and vessels to these renegade states until they adhered to the ICRW.<sup>72</sup> Although still critical of the whaling states not participating in the IWC, the Commission decided to re-approach them to join, and it urged IWC members to support its efforts with diplomatic pressure. The IWC also adopted an Argentinian resolution proposing that the U.N. Secretary-General urge all members of the United Nations engaged in whaling to adhere to the ICRW and follow the "Stockholm Spirit."<sup>73</sup>

Mexico responded to these initiatives by announcing that it planned to declare Scammon's Lagoon, in the Gulf of California, a whale sanctuary, within which whales could not be caught or harassed.<sup>74</sup> Mexico's announcement was the first major conservatory initiative in the IWC by a developing country. Since then, Mexico has continued to take a more overt conservatory line in the IWC while also trying to retain solidarity with other developing countries and good relations with its neighbors, especially concerning coastal state rights in 200-mile zones.

### 3. *The Growing Split in the IWC*

The whaling moratorium originally proposed in 1972, was not adopted until 1982, by which time a large number of developing states interested in conservation rather than exploitation had joined the IWC. Although overexploitation of whales was beginning to generate immense public concern in developed countries, it had little impact in those developing states concerned primarily with the economic value of whaling.<sup>75</sup> Peru and Chile in particular continued to undermine IWC efforts in the 1970's to regulate the Antarctic catch. Their position was not without

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note 68, at 27; TWENTY-FIFTH REPORT 30 (1975). For details on the operation of the observer schemes, see IWC Doc. 25/14. *The Chairman's Report of the 35th Meeting*, 118-13 July 1983, at 5, indicates that Peru, Brazil, and Korea are still merely "examining the possibilities" of establishing observer schemes.

72. TWENTY-FOURTH REPORT, *supra* note 68, at 35.

73. *Id.* at 27.

74. *Id.* at 35.

75. M'Gonigle criticizes the low level of interest in conservation also shown by Argentina, Mexico, and Panama until 1980. He notes in particular that, though Panama at one point allowed a nonnational, Mr. Fortom-Gouin (a conservationist opposed to killing whales in principle) to represent it at two meetings, it dismissed him following Japanese diplomatic pressure. M'Gonigle also notes that the Argentine commissioner, though generally casting conservationist votes at London meetings, voted with the whaling industry when the IWC meeting was held in Tokyo. M'Gonigle, *supra* note 2, at 191.

some international support. First, the United Nations has in various resolutions accepted the concept of states' permanent sovereignty over their own natural resources and extended this to marine resources.<sup>76</sup> Second, the UNCHE Declaration of Principles recognizes that states have the right to pursue their own environmental policies, albeit accompanied by the responsibility of ensuring that living resources are safeguarded.<sup>77</sup>

In light of these sovereignty concerns, the United States pressures on the developing countries implicit in the new American laws adopted at the end of this period are open to some criticism. Principle 11 of the UNCHE Declaration can be interpreted to require the United States to give more consideration to the economic effects of eliminating the whaling industries of the Latin American states before urging a moratorium.<sup>78</sup> A more incremental approach might have brought about earlier acceptance of the moratorium by those whaling states instead of increasing their dependence on the Japanese market for their whale products.

Developing countries played a critical role in the adoption of the moratorium in 1982 (discussed below in Section II), but their role in the IWC's first twenty years was not an important one. In the third and fourth decades of the IWC, developing countries began to play a more important role in moving the Commission toward more conservatory policies.

## II

### THE CHANGING MEMBERSHIP OF THE IWC AFTER 1972: THE INCREASING INFLUENCE OF DEVELOPING COUNTRIES

From 1972 until 1979, developed rather than developing countries spearheaded efforts within the IWC to promote the UNCHE proposal for a ten-year ban on commercial whaling. The United States, guided by its national legislation, led this movement toward more conservatory policies. Not until the Seychelles joined the IWC in 1979, though, did a developing country join the call for a moratorium. Even then, the Seychelles' efforts were frustrated when Chile, Korea, and Peru—all still whaling, still very sensitive to sovereignty concerns, and still of the view

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76. The sovereignty movement began with G.A. Res. 1803, 17 U.N. GAOR (1194th plen. mtg.) at 1133, U.N. Doc A/PV.1172-1202 (1964). See also I. BROWNLIE, *BASIC DOCUMENTS IN INTERNATIONAL LAW* 230-33 (3d ed. 1983).

77. UNCHE, *supra* note 66, at 2.

78. Principle 11 states:

The environmental policies of all states should enhance and not adversely affect the present or future development potential of developing countries, nor should they hamper the attainment of better living conditions for all and appropriate steps should be taken by states and international organizations with a view to reaching agreement on meeting the possible national and international economic consequences resulting from the application of environmental measures.

UNCHE, *supra* note 66, at 2.

that whales were an economically exploitable resource—joined the IWC in 1979. For the most part, even nonwhaling developing countries continued to display little interest in whale conservation. For example, Somalia and the Bahamas continued to allow pirate whalers to use their flags of convenience,<sup>79</sup> and other countries failed to send statistical and other information to the IBWS as required of all signatories to the ICRW.<sup>80</sup>

During this period, more developing countries became sympathetic to the whales' plight. Signs that some developing countries were responding to the same ecological and conservatory principles that underlay the UNCHE and the United States domestic legislation were present as early as 1973 when the United States reintroduced to the IWC the proposal for a ten-year moratorium on commercial whaling. Argentina, Mexico, and Panama were among the nine states voting in favor of the proposal, although the ban again failed to attract the necessary three-quarters majority.<sup>81</sup> These three countries also voted in favor of zero quotas for fin whales and against high quotas for minke whales (two measures that were also defeated).

In 1974, Mexico seconded the United States' proposal for a ten-year moratorium, but the measure was again defeated. Instead of adopting a ban, the IWC approved a proposal for New Management Procedures (NMP) introduced by Australia.<sup>82</sup> The NMP required classification of certain exploited discrete whale stocks according to criteria based on the current level of stocks in relation to their estimated sustainable yield, with some allowance for environmental factors. The NMP compromise was supported by the developing state members, including Brazil which had rejoined the IWC that year. Not until 1979, when scientists began to find the NMP unworkable because of inadequate data, and when the Seychelles emerged as an active member of the IWC, were the moratorium proposals again seriously considered.

During the late 1970's, environmental groups also began to lobby both at and outside IWC meetings for an increase in membership of nonwhaling states to augment the vote in favor of the moratorium. The UNCHE and the United States legislation in the early 1970's had strongly encouraged environmental groups in the United States and elsewhere, and many were formed specifically for the purpose of conserving whales. New and older groups added the moratorium to their objectives

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79. TWENTY-FOURTH REPORT, *supra* note 68, at 37 (statement by Vangstein, spokesperson for Norwegian International Bureau of Whaling Statistics (IBWS)). For further evidence of pirate whaling, see PTES REPORT, *supra* note 51, and GREENPEACE INT'L, *supra* note 51. See also TWENTY-FIFTH REPORT, *supra* note 71, at 34-35.

80. TWENTY-FIFTH REPORT, *supra* note 71, at 35-36.

81. *Id.* at 6.

82. TWENTY-SIXTH REPORT 5 (1976).

and began in increasing numbers to attend IWC meetings as nongovernmental observers (NGOs).<sup>83</sup> Conservationist NGO groups also began to establish themselves in some developing states like Argentina and Uruguay. As Appendix A indicates, these lobbying efforts eventually bore fruit, particularly from 1981 onward.

*A. Proposals for Reform of the ICRW: Developing States Divided*

At the twenty-sixth meeting of the IWC in 1974, the United States proposed that a Plenipotentiary Conference be convened to reform the structure of the ICRW. The United States hoped to bring the Convention's objectives and powers more in line with new perceptions of conservation. The United States also wished to extend the ICRW's application to all cetaceans to ensure that the IWC could, if necessary, regulate the smaller cetaceans should they also become overexploited.<sup>84</sup>

For three years, discussions on reform took place informally outside the IWC because the ICRW itself does not provide for amendment procedures. Then, at the twenty-ninth meeting in 1977, member nations agreed that although any new conference should be held outside the auspices of the IWC, the Commission would send the invitations and invite not only IWC members but also all states with substantial exploitable stocks off their coasts and all states that conducted significant whaling operations.<sup>85</sup> These latter countries would have included Argentina, Brazil, Chile, the People's Republic of China, Indonesia, the Republic of Korea, the People's Democratic Republic of Korea, Mexico, Panama, Peru, and Tonga. Many other states, including coastal developing states, have enough stocks of unexploited cetaceans (both large and small) off their shores to make them eligible for IWC membership, but only the more important potential or already whaling countries were invited.

Reaching agreement on reform proved difficult even for this somewhat select group of participants. One obstacle to agreement proved to be the expansion of states' sovereign power through Exclusive Economic Zones (EEZs). The proposals arising from the Third United Nations Conference on the Law of the Sea (UNCLOS) for 200-mile EEZs that would recognize the sovereign rights of coastal states over living re-

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83. Over 50 NGOs attended the thirty-fifth meeting in 1983. Sir Peter Scott, a well-known and distinguished naturalist and director of the World Wildlife Fund, and Dr. Holt, a distinguished cetologist and former Director of FAO's Fisheries and Environment Division, among others, successfully persuaded many developing nonwhaling states eventually to become IWC members. For an analysis of the role and importance of NGOs, see M'Gonigle, *supra* note 2, at 192-202.

84. TWENTY-SIXTH REPORT, *supra* note 82, at 14. Some scientists were convinced that certain stocks were already threatened.

85. TWENTY-NINTH REPORT 8 (1979); REVISION OF THE INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING 1946, Progress Report by the Chairman, IWC Doc. 29/24 (1977).

sources in these zones prompted many more states to assert such exclusive jurisdiction in a series of major policy changes.<sup>86</sup> These actions were initiated by both developed and developing states. The consequence of the increasing number of EEZs was to put far larger areas previously subject to ICRW regulation under national jurisdiction. This movement potentially undermined the global scope of the ICRW that is essential for effective conservation because whales are highly migratory and habitually traverse the zones of many states.

During the series of "revision" meetings, developing states proved to be particularly jealous of their sovereign rights in fisheries zones. Some states wanted to use the new zones to ban all whaling. Others wanted to use them to continue whaling, at least for small cetaceans, and wanted to reduce any new role of the Commission to a purely advisory one. Canada was the leader of this latter group of countries hoping to retain the right to exploit certain stocks.

Although the IWC Secretariat drafted a composite text for preparatory meetings for the Revision Conference<sup>87</sup> in Copenhagen in 1978, Estoril in 1979, and Reykjavik in 1981, all these meetings ended in an impasse. The meetings revealed widely disparate views, along the lines discussed above, with respect to every article of the proposed revisions and even to the objectives stated in the preamble.<sup>88</sup>

Some developing states were particularly concerned about protecting their rights in the 200-mile zones because of the increasing international interest in protecting small cetaceans. The IWC had established a subcommittee merely to gather information on a limited number of these species and to consider possible conservationist strategies. The information gathered by the subcommittee indicated, in the view of some subcommittee members, that some species of small cetaceans should be considered for regulation.<sup>89</sup> The informal reports of the revision meetings do not attribute the views expressed to particular states, yet it is obvious from discussions at recent IWC meetings about certain small cetaceans (such as the Baird's Beaked Whale), that states such as Argen-

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86. For a table summarizing coastal states' claims over sea areas, see U.N. Food Agric. Org'n (FAO), *Legislation on Coastal State Requirements for Foreign Fishing*, FAO Legislative Study No. 21 (1981) (Table A, Limits of Territorial Seas, Fishing Zones, and Economic Zones).

87. The composite text was based on a Canadian draft with alternatives added by South Africa and Brazil.

88. See, e.g., Revision of the Text of the International Convention for the Regulation of Whaling, 1946, as developed at the Preparatory Meeting, Copenhagen, 4-7 July 1978 (January 1979); Rapporteur's Report of the Preparatory Meeting to Improve and Update the International Convention for Regulation of Whaling 1946, Reykjavik, 6-9 May 1981.

89. For an account of the problems concerning proposals for the regulation of small cetaceans by the IWC, see Birnie, *Small Cetaceans*, 5 *MARINE POL'Y* 277 (1981), and Meath, *Saving the Small Cetaceans*, 7 *AMBIO* 2 (1984). The Meath article discusses the small cetaceans in detail as does Scarff, *supra* note 6, at 372-80.

tina, Brazil, Chile, and Peru are resistant to any extension of the ICRW to such species, whether by interpretation of the existing Convention or through changes to the Protocol. The countries oppose not only the general inclusion of such species within the ICRW's ambit but also the addition of other species to the Schedule on a case by case basis as the need arises for international regulations for their conservation.

### B. *Impact of the Seychelles Membership on the IWC*

In retrospect, the thirty-first meeting of the IWC in 1979 marked a watershed in the history of whaling regulation. Six new members joined,<sup>90</sup> bringing the total membership to its highest level ever. Most importantly, the Seychelles, a nonwhaling developing country in the Indian Ocean, joined the Commission. The strong environmental policies the Seychelles brought to the IWC emerged as a forceful counterweight to the traditional attitudes of the developing member states that were dominated by economic and sovereignty considerations. At this meeting, the Seychelles immediately proposed that the entire Indian Ocean be declared a whale sanctuary.<sup>91</sup> The Seychelles also proposed a worldwide moratorium on sperm whaling.<sup>92</sup> In addition, it took a hard line against the pirate whaling prevalent in its region.<sup>93</sup> The Seychelles' report on the problem called for strict implementation of ICRW regulations and for new sanctions to discourage this activity.<sup>94</sup>

In his opening statement before the IWC, the Seychelles Commissioner remarked disarmingly: "The accession of the Seychelles to the International Whaling Commission may have come as a surprise to you. The very existence of the Seychelles may even have come as a surprise to some of you. We are a small nation easily overlooked."<sup>95</sup> The participation of the Seychelles in the IWC proved, however, to be quite dramatic. Faced with the charge that it was acting as a "state of convenience" for the environmental movement,<sup>96</sup> the Commissioner for the Seychelles insisted that his country's actions in the IWC would be determined purely

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90. The six new members were Chile, the Republic of Korea, Peru, the Seychelles, Spain, and Sweden. Birnie, *31st Meeting of the International Whaling Commission*, 4 MARINE POL'Y 72 (1980) [hereinafter cited as Birnie, *31st Meeting*].

91. For the background to the Indian Ocean Sanctuary, see S. Holt, *The Indian Ocean Whale Sanctuary*, 12 AMBIO 345 (1982).

92. See Ferrari, *Of Whales and Politics*, 12 AMBIO 348 (1983). The Seychelles had closed its own last land station in 1915, during the British colonial rule, and on May 29, 1979, it enacted a Marine Mammals Sanctuary Decree, banning the taking of sperm whales in its 200-mile EEZ.

93. Birnie, *31st Meeting*, *supra* note 90.

94. *Id.*; Ferrari, *supra* note 92.

95. Opening statement by the Commissioner for the Republic of the Seychelles, IWC Doc. 31/03.

96. See, e.g., M'Gonigle, *supra* note 2, at 190 (suggesting that the Seychelles was aided by the Threshold Foundation, a conservationist group).

by its national interests. He emphasized that his country stood at the center of an Exclusive Economic Zone of almost one-half million square miles and that it maintained a vital interest in the ocean and the conservation of its maritime resources. The Seychelles insisted it would speak for itself and not "as a client state for any strong cause without a country."<sup>97</sup>

The Seychelles' then Foreign Minister, Dr. Maxine Ferrari (who has since on occasion acted as Seychelles Commissioner at the IWC), later explained why the Seychelles decided to take the lead in opposing the major whaling states (Japan, Norway, the USSR) despite the country's tiny population.<sup>98</sup> First, the island had much to gain by maintaining a rich marine life. Second, it was nonaligned, without strong political ties to any whaling nation. And, third, its national policy placed a high value on environmental protection. The Seychelles could thus "advocate conservation in ways which might be difficult for many, more populous, Third World nations for which the only unchallenged values are purely economic ones."<sup>99</sup>

The Seychelles carefully and strategically prepared its Indian Ocean sanctuary proposal and was rewarded for its efforts. It first sent a scientific and legal team to visit each of the twenty-one affected states in the region. It then convened a meeting in Mahe to coordinate the proponents' strategy. In addition, the Seychelles enlisted support from the Organization for African Unity (OAU). At the 1979 IWC meeting, after Panama amended the proposal to redraw the sanctuary's boundary above the fifty-five degree South Parallel, excluding the pelagic Antarctic minke whaling grounds for an initial period of ten years (thus decreasing much potential opposition to the idea), the sanctuary was approved by the IWC by vote of sixteen to three.<sup>100</sup>

The Seychelles' proposal for a three-year worldwide moratorium on commercial sperm whaling fared less well.<sup>101</sup> The proposal failed to get a three-quarters majority vote in the Plenary Session even though it was supported by the preliminary Technical Committee. Notably, Chile and Korea voted against the proposal in the Technical Committee; in the Ple-

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97. *Id.*

98. Ferrari, *supra* note 92.

99. *Id.* at 348.

100. *Id.* See also Birnie, *31st Meeting, supra* note 90, at 72-75; THIRTIETH REPORT (1980). Details of voting at this and subsequent IWC Meetings can be obtained from a newsheet entitled ECO published jointly by Friends of the Earth—England and other conservationist groups on each day of each annual meeting (available from Friends of the Earth, London, England).

101. The Seychelles again submitted well-prepared papers and reports in support of its proposals. See, e.g., The Seychelles Initiative, IWC Doc. 31/6; A History of Whaling in the Seychelles, IWC Doc. 31/8. The former report explains both the Indian Ocean Sanctuary proposal and a proposal for a three-year moratorium on the commercial taking of sperm whales.

nary Session, Korea again voted against it and Chile abstained. Korea pleaded legal difficulties. The Korean Constitution was said not to permit approval of the ban. Korea indicated that objective scientific evidence supporting such a ban was insufficient, and that such a ban would destroy both the industry and the IWC. It also questioned the wisdom of such terms as "an ecological approach." Chile, favoring an economic study proposed by Australia instead of the ban, considered it too soon to pronounce the New Management Procedures dead.<sup>102</sup> Chile concluded that, because scientists could not agree on the evidence for or against a moratorium, it would be imprudent to adopt one and it favored a compromise that would have allowed limited whaling.<sup>103</sup>

Despite the opposition of Chile and Korea, some progress toward a moratorium was made. After the members amended the proposal, again at Panama's suggestion, to cover only factory ships engaged in pelagic whaling, it was adopted. The resolution effectively ended sperm whaling in Antarctica.

Chile's opposition to conservation measures was not confined to the Seychelles' proposal for a moratorium on commercial sperm whaling. Chile also opposed a modest proposal made by the United States and later accepted by a majority of IWC members that the ICRW Schedule be amended to require review by the Scientific Committee of permits that IWC members are allowed to issue under the ICRW for purposes of scientific research on species otherwise completely protected. Chile regarded such review as an infringement of its sovereignty within its EEZ. This argument is unconvincing, though, because these submissions would be for comment only—leaving the decision to issue the permit to the member states concerned—and the Scientific Committee would have no power to refuse the permit. Nonetheless, Korea and Japan joined Chile in opposing the review proposal.<sup>104</sup>

After the arrival of the Seychelles, IWC meetings were never again dominated by the whaling states. The Seychelles had fluent, knowledgeable advisers well-versed in IWC procedure and able to manipulate IWC rules, procedure, and agenda to their country's advantage. The Seychelles dramatic entrance coincided with a point at which the United States, previously the leader of the conservationist states, found its hands tied by the need to oppose Scientific Committee advice in favor of zero quotas on Alaskan Bowhead whales.<sup>105</sup> The Seychelles entrance into IWC affairs was soon followed by a larger number of developing states generally sympathetic to conservationist aims. Appendix A shows this expansion: Oman (the first Middle Eastern member) joined in 1980;

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102. Birnie, *31st Meeting*, *supra* note 90, at 74.

103. See ECO, *supra* note 100; see also Birnie, *31st Meeting*, *supra* note 90.

104. Birnie, *31st Meeting*, *supra* note 90, at 73.

105. THIRTIETH REPORT, *supra* note 100, at 30.

Dominica, China, India, Jamaica, St. Lucia, St. Vincent and the Grenadines, and Uruguay became members in 1981; and Antigua, Barbuda, Belize, Costa Rica, Egypt, Kenya, Monaco, the Philippines, and Senegal arrived in 1982. By 1983, forty countries belonged to the IWC, although four developing states—Jamaica, Kenya, Uruguay and Mauritius—were not represented at the thirty-fifth meeting held that year.

Although most of the IWC's new members were developing states usually supportive of conservationist measures, these states were nevertheless divided on some the major issues before the IWC. Issues such as the regulation of small cetaceans faced solid opposition from the Latin American states. At recent meetings, Peru, Chile, Brazil, and Uruguay have all emphasized that IWC policy should be based on "rational utilization," that a period of transition is needed to adjust to new obligations, that economic and social reasons prevent them from dismantling their industries, and that higher quotas are an economic imperative.

For several years after Peru and Chile first entered the IWC, other members were prepared to compromise on these questions despite that Peru admitted that its catch was not used exclusively for local consumption but was partly exported. Korea also sought and received exceptions on the grounds that its industry was on a small-scale subsistence level, unchanged since the late nineteenth century and allegedly an important source of nutrition.<sup>106</sup> But, as concern about the whale populations and the unreliability of theories for estimating sustainable stocks persisted, pressures by other members on these states increased. Pressure took several forms, including threats of certification under United States laws, the proliferation of new treaties and principles outside the ICRW (e.g., the large number of states joining the CITES), the conclusion of the more ecologically based Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR), and the Convention on Conservation of Migratory Species of Wild Animals.<sup>107</sup>

### C. *The Variety of Moratoria Proposals*

The most important issues before the IWC in the early 1980's concerned moratoria proposals which variously called for worldwide bans on all forms of whaling, on all commercial whaling, and on all sperm whaling. These three proposals surfaced at the thirty-second meeting in 1980,<sup>108</sup> with the Seychelles and Sweden as their most forceful advocates. Chile, Peru, Korea, and Spain strongly opposed the bans. These coun-

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106. IWC Doc. 31/05 (1979) (opening statement of Republic of Korea).

107. For an account of the growing range of measures available to protect whales, see Birnie (IUCN), *supra* note 2.

108. For an account of this meeting, see Birnie, *32nd Meeting of the International Whaling Commission*, 5 MARINE POL'Y 79 (1981) [hereinafter cited as Birnie, *32nd Meeting*], and THIRTY-FIRST REPORT 17-28 (1981).

tries supported continued whaling and rejected any limitations on activities within their own 200-mile EEZs.

The wide divergence between these two positions frustrated attempts to reach a consensus on the moratoria proposals. In 1980, the IWC consisted of nine commercial whaling and fifteen noncommercial whaling states, with developed and developing states found in both groups. Two states from the noncommercial group, the United States and Denmark, however, were influenced by the interests of their native and subsistence whalers. Proposals for a worldwide moratorium on all whaling and on all commercial whaling both failed to get the necessary majority to be adopted. The Seychelles then pushed again for a comprehensive ban on sperm whaling, arguing that the Scientific Committee's annual report revealed the uncertainty surrounding all estimates for these stocks and that, for all uses of sperm oil, substitutes were now available. This proposal was also rejected; Chile and Korea voted against it and Peru abstained. Chile then supported Peru's request for sperm whale quotas higher than those advocated by the conservationists. Deadlock resulted until the conservationists, faced with the prospect that the Peruvian sperm whale hunt would go entirely unregulated if no quota were set, agreed to a compromise quota.

Whether to regulate the exploitation of small cetaceans also caused sharp divisions among IWC members at the thirty-second meeting. At one end of the spectrum, the Seychelles argued that the IWC should gradually begin to regulate the small cetacean catch as necessary. In contrast, countries such as Argentina supported Canada's proposal for a revision of the ICRW to make the Convention more like the Northwest Atlantic Fisheries Organization (NAFO).<sup>109</sup> The NAFO gives preferential rights to exploit living resources in 200-mile EEZs to the coastal state, but institutes a scientific council to advise on their conservation and management. Adding new species to NAFO's regulatory schedule also requires the consent of the coastal state. Faced with another impasse, the IWC resolved only to ask its Scientific Committee to continue considering the status of small cetaceans and to offer such advice as may be warranted in the future.

In response to the frustrations conservationist states experienced at the thirty-second meeting—wasted time, inconclusive blockages leading to unsatisfactory compromises, and little attention paid to quotas and other important issues—these countries and NGOs redoubled their efforts to bring more states into the IWC that would support their positions. In particular, they focused on acquiring the three-quarters majority necessary to pass the proposed moratorium on commercial

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109. Convention of Future Multilateral Cooperation in the Northwest Atlantic Fisheries, Oct. 24, 1978 (entered into force Jan. 1, 1979).

whaling. This effort was substantially hindered by the fact that every one of the world's whaling states, except Portugal, which has only a small local industry in the Azores, was already a member of the ICRW, thus it was not possible for this group to create more votes among the whaling nations. Appendix A illustrates the fruits of this effort, as more and more developing states were persuaded to join.

Not all of the new member states, however, brought with them the same sense of purpose as veteran IWC members. Examples of their lesser commitment abound. Dominica never even appointed a commissioner; Jamaica did so for only one year; Egypt and several other countries merely sent a delegate from their local embassy for a single day to cast a crucial vote; and many countries still have not paid their contributions (see Appendix A). In addition, until very recently, few developing states participated in the work of the Scientific Committee, despite the requirement of Article V(3) of the ICRW that regulations be based on "scientific findings." More developing countries (Chile, Peru, Brazil, the Seychelles, St. Lucia, Korea, and Mexico) are now involved with the Committee, and others intend to increase their participation. Some, like St. Lucia and the Seychelles, rely on foreign experts for their information. Canada, faced with the likelihood of eventual adoption of the moratorium and divided internally on how to vote on it, decided to leave the IWC in 1982.

The "membership drive" enlisted seven new developing state members and led to two principal consequences for the IWC at its thirty-third meeting in 1981.<sup>110</sup> First, the increase in membership made possible the adoption of an indefinite moratorium on all sperm whaling. This proposal, put forward by the Seychelles in conjunction with France, the Netherlands, and the United Kingdom, called for zero quotas on all stocks. The issue provoked prolonged debate and crowded out discussion of other important issues, but it still passed by an overwhelming margin, twenty-five in favor and one (Japan) against, with China, Iceland, and the USSR abstaining. Second, the new members also brought new perspectives, often expressed broadly as countries' opening statements at the IWC meeting. These statements, in conjunction with United States certification threats, may have prompted Chile to announce that despite its long whaling tradition it was reconsidering its position on the global commercial moratorium in the interests of stock preservation.

The opening remarks of St. Lucia's Commissioner to the IWC provide one example of the distinctive views propounded by the new IWC members. He announced that his country considered the oceans and all

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110. See Birnie, *33rd Meeting of the International Whaling Commission*, 6 MARINE POL'Y 74 (1982) [hereinafter cited as Birnie, *33rd Meeting*]; THIRTY-SECOND REPORT 17-35 (1982). For an account of this meeting, see Birnie, *Countdown to Zero*, 7 MARINE POL'Y 64 (1983).

their flora, fauna, and mineral resources to be humankind's "common inheritance."<sup>111</sup> Consistent with this view, the Commissioner asked whether the time might be ripe to amend the ICRW to "declare the whale as our common inheritance." In a similar vein, he also suggested "that discussion on the Law of the Sea and the delineation of sea boundaries specifically make reference to the whale as the common inheritance of mankind."<sup>112</sup>

Some developing countries also used a similar rhetorical approach. Costa Rica's commissioner stated his country's firm conviction that "[n]atural resources are mankind's heritage and that we are all responsible," but added "under no circumstances would we allow any irrational utilization of these resources," implying that Costa Rica did accept "rational utilization."<sup>113</sup> India also seemed to accept "utilization" even though it supported the moratorium. In his opening statement, the Indian Commissioner noted that Prime Minister Indira Gandhi supported the concept of conservation coupled with sustained development, as enunciated in the World Conservation Strategy, which also called for a moratorium on whaling. He also emphasized India's support for the CITES.<sup>114</sup> St. Vincent, another new member, broke ranks somewhat by drawing attention to its existing subsistence whaling operations and stating its expectation that, if they recovered as a result of conservation, the whales "will be useful to us again."<sup>115</sup> Uruguay also made it clear that it also considered animals such as whales to be a natural resource "that must be managed according to rational principles, in accordance with the laws that regulate its conservation. . . . [E]comanagement is essential in order to preserve the sustainable management of the ecosystem and to yield optimum harvest."<sup>116</sup>

In short, though most developing states members were united in

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111. Opening statement by St. Lucia, IWC Doc. OS/33, St. Lucia.

112. *Id.* The ICRW can be amended only by a Protocol unanimously approved because the Convention makes no provision for amendment in its substantive articles. Its preamble, however, already recognizes "the interest of the nations of the world in safeguarding for future generations *the great natural resources* represented by whale stocks." *Id.* (emphasis added). Whatever the merits of this suggestion, its timing for UNCLOS III was inappropriate. The Conference, then in the middle of its Tenth (penultimate) Session, had reached an advanced stage and its negotiating texts made no mention of any "common heritage" status for whales in particular. It did declare the resources of the deep sea bed beyond national jurisdiction to be the "common heritage of mankind," and appointed an International Authority established under the Convention to act on their behalf. The declaration did little for whales, however, and confined this "common heritage" status to the *nonliving resources* of international waters. See *The Law of the Sea: Official Text of the United Nations Convention on The Law of the Sea, Part XI*, at 42-69 (1983) (U.N. Sales No. E.83.V.5). The progress of the UNCLOS III and development of its series of informal negotiating texts is outlined in the Final Act, 1958-174.

113. Opening statement by Costa Rica, IWC Doc. OS/33, Costa Rica.

114. Opening statement by India, IWC Doc. OS/33, India.

115. Opening statement by St. Vincent, IWC Doc. OS/33, St. Vincent.

116. Opening statement by Uruguay, IWC Doc. OS/33, Uruguay.

their support for the global moratorium, at least on the basis of a ten-year proposal, many still wanted to retain the option of exploiting whales not yet regulated and also to leave open the long-term possibility of resuming whaling if stocks ever recover.

*D. The Role of Developing States in the Adoption of the Global Moratorium on Commercial Whaling*

With membership increased to thirty-nine by new recruits from the developing states, thirty-seven IWC members attended the thirty-fourth meeting in 1982.<sup>117</sup> This meeting proved to be an historic occasion. The new members provided the three-quarters majority necessary to impose zero quotas on all commercially exploited stocks for the 1986 coastal and 1985-86 pelagic seasons.

Five separate proposals were considered at the meeting. These included Costa Rica's suggestion for a two-year phase-out, the Netherlands' request for a ten-year moratorium on all whaling, and France's call for a permanent ban. The most important proposal, though, and ultimately the one adopted, was sponsored by the Seychelles.

The Seychelles' proposal called for zero quotas on all commercially exploited stocks,<sup>118</sup> allowed for review based on scientific advice from the Scientific Committee, and made the entire proposal contingent on the IWC's undertaking, by 1990, a comprehensive assessment of the effects on whale stocks of the proposal, a review of possible modifications, and the establishment of other catch limits.<sup>119</sup> The last element allowing for future modifications made the proposal more generally acceptable. The proposal was adopted by a vote of twenty-five to seven, with five abstentions. Twelve developing states voted for it: Antigua, Belize, Costa Rica, Egypt, India, Kenya, Mexico, Oman, St. Lucia, St. Vincent, Senegal, and the Seychelles; three—Brazil, Korea, and Peru—voted against; and Chile, the People's Republic of China, and the Philippines abstained.

Switzerland, and other states which voted against the ban, believed that zero quotas were already justified on *all* stocks by the "scientific findings" required by the ICRW. The Scientific Committee had, in fact, made no recommendations on the zero quotas although several of its

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117. Eight more supposedly nonwhaling states, seven of them developing countries, joined the IWC between 1981 and 1982. THIRTY-THIRD REPORT 13-15 (1983). One of these, the Philippines, actually sought a quota on Bryde's whales in 1983 at the thirty-fifth meeting, but the quota was already fully utilized by Japan, a problem which necessitated private negotiations between these two states outside the IWC. Chairman's Report of Thirty-Fifth Meeting of the IWC, in THIRTY-FOURTH REPORT 17 (1984). The Philippines justified this request by reference to its growing population, explaining it joined the IWC as part of a policy of rational management of marine resources.

118. IWC Schedule, Feb. 1983, para. 10(e), at 13. The term "commercial" was not defined.

119. THIRTY-THIRD REPORT, *supra* note 117, at 21.

members had individually supported them. The issue of adequacy of scientific findings remains a contentious one because the Scientific Committee has been unable to make any recommendations on several stocks due both to inadequate data and to deficient theories for assessment. In contrast to Switzerland, Norway regarded zero quotas in these circumstances as an abrogation of the IWC's management responsibilities under the ICRW.

Four states—Japan, Norway, Peru and the USSR—lodged formal objections to the amendment<sup>120</sup> though Peru officially withdrew its objection at the thirty-fifth meeting in 1984. Unless the remaining objectors do likewise, they will not be bound by the zero quotas as they come into force in 1985. Whether they will withdraw their objection or, following the Canadian precedent, withdraw altogether from the IWC, is difficult to predict. At the thirty-seventh meeting in 1985 it appeared that Iceland and Korea at least would make use of scientific permits to continue whaling. Japan did, however, reach an agreement with the United States allowing Japan to continue to take some minke whales until 1986 in return for a promise to withdraw its objection by then.<sup>121</sup>

Proponents of the moratorium obtained the support of most Latin American states only after intensive negotiation concerning any effects on their rights over other living resources in their 200-mile EEZs, and extensive discussion in both the Technical Committee and Plenary Session leading to amendments to take account of their problems.<sup>122</sup>

Thus, the impact of developing countries in the IWC was dramatic. Their participation changed both the nature of the Commission and its mission. As summarized by Dr. S. J. Holt, the Scientific Advisor to the Seychelles:

While some countries have perhaps joined the IWC primarily to cast a vote for a moratorium, other—I think most—of the new members have joined for a more important reason. That was to emphasize that the conservation and future use of the living resources of the sea, especially those which inhabit the high seas and are highly migratory, are the concern of all nations, not merely those developed nations that got in there first and, in the process of exploitation, deeply depleted those resources. . . . *There are very important lessons to be drawn from this process for other attempts, internationally, to bring misuse of the marine environment and its resources under control.*<sup>123</sup>

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120. ICRW Schedule, November 1983, 13, note to para. 10(e).

121. American Cetacean Society, 604 F. Supp. 1398.

122. THIRTY-THIRD REPORT, *supra* note 117, at 21.

123. 15 MARINE POLLUTION BULL. 161 (1984) (emphasis added). See also M'Gonigle, *supra* note 2, at 190; Ferrari, *supra* note 92, at 348.

*E. Remaining Issues: The Problems of 200-Mile EEZs and Small Cetaceans*

To presume that the support from developing countries, so instrumental to the success of the moratorium proposal, will be equally forthcoming with respect to many important issues that still confront the IWC would be unwise. In other international fora in which they participate, the Group of 77<sup>124</sup> continues to argue strongly for what they regard as their sovereign rights over their own resources.

Developing states in general and the Latin American bloc in particular seem particularly likely to oppose action on many of these issues. For example, developing countries are likely to oppose proposals for the gradual listing for regulation on the ICRW Schedule of any overexploited small cetaceans because these species are found and taken primarily in coastal waters. Discussion concerning the status of the Baird's Beaked whale at the thirty-fifth meeting in 1983 highlighted the difficulties of extending the scope of the ICRW.<sup>125</sup> Similar problems arose with respect to discussions of the concept and characteristics of whale sanctuaries,<sup>126</sup> the setting of quotas for stocks within the 200-mile zones of these states,<sup>127</sup> and small cetaceans in general. Argentina, Mexico, Chile, Brazil, Peru, and Costa Rica all recorded their reservations on the IWC's competence with respect to regulation of small cetaceans.<sup>128</sup> Not surprisingly, many of these countries found it easier to support the preservation of whales and their habitats from pollution and various forms of disturbance and harassment<sup>129</sup> than to support bans on whaling.

*F. Nonconsumptive Utilization of Cetacean Resources: Dawn of a New Era?*

In many of the more developed countries nonconsumptive uses of whales are outpacing interest in maintaining a whaling industry. For example, in the United States and Canada, whale-watching has replaced whaling as a commercial activity; this activity is also beginning to develop in Mexican waters, and is likely to develop elsewhere as whale

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124. See *supra* note 3.

125. *Id.* at 28; Chairman's Report of Thirty-Fifth Meeting of the IWC, in THIRTY-FOURTH REPORT, *supra* note 117, at 7-8. Whaling states (including the developing states) argue that an annex on the Nomenclature of Whales, which was added as a supplement to the ICRW in 1946 to enable species to be identified in various languages in relation to their scientific names, was in fact an integral and limiting part of the convention, *i.e.* that the ICRW applied only to the whales listed in this annex. Other states more appropriately suggest that it was the clear intention of the parties, as expressed at the Washington Conference in 1946 at which the ICRW was adopted, that the annex was intended only as a guide to identification of these species.

126. THIRTY-FOURTH REPORT, *supra* note 117, at 14-15.

127. *Id.* at 29.

128. *Id.* at 24.

129. *Id.* at 24-25.

stocks recover and whales became more prevalent in coastal waters. Small cetaceans are also being increasingly displayed for commercial purposes in "sea worlds" and "dolphinaria." In addition, "benign" research (*i.e.* not involving the killing of whales) continues to develop.

Forseeing the end of commercial whaling, the United States, supported by the Seychelles, proposed holding a special meeting and then a conference to consider the nonconsumptive uses of cetaceans, including research, recreation, education, and cultural uses. The IWC agreed, without dissent from its developing members, to co-sponsor and help plan this conference. The conference convened in Boston in July 1983.<sup>130</sup>

The conference report from the special meeting was introduced to the IWC at its 1984 meeting by St. Lucia and received strong support from several nonwhaling developing countries. Many of the recommendations of the report were addressed specifically to the IWC and proposed expansion of its role and activities.<sup>131</sup> The proposals included, for example, that the IWC study possible rules or standards for the whale-watching industry. Making such recommendations would require the IWC to adopt a broader interpretation of certain key terms in the ICRW—such as "whaling" and "industry"—than previously recognized by the Commission.

The IWC responded to this and other ambitious proposals only indirectly. It accepted a proposal introduced by India and the Seychelles to establish a Technical Committee Working Group for examining the recommendations in the report that were directed to the IWC. The IWC made clear, however, that establishing the Working Group would not prejudice the position of any government with respect to the objectives of the ICRW. The terms of reference, drafted by St. Lucia, which will chair this group, took careful account of the reservations of various governments and their amendments, including those of the Latin American developing states. The Working Group was further limited to examining the special meeting's recommendations, reporting to the IWC Technical Committee at the thirty-sixth meeting on matters within the IWC's competence, and identifying any financial implications of the moratorium of these proposals.<sup>132</sup> At the thirty-sixth meeting, the IWC merely noted the Working Group's report and took no further action.

Any expansion of the IWC's role that increases costs to its members is likely to be resisted by developed and developing countries alike. De-

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130. *Id.* at 26. See also Report of the Conference on Non-Consumptive Utilization of Cetacean Resources, held in Boston, Mass., U.S.A., on June 7-11, 1983 (available from the Connecticut Cetacean Society, Wethersfield, Conn.). The United States, India, Antigua, Argentina, Belize, and Oman were among those countries that congratulated this conference on its achievements.

131. Chairman's Report of Thirty-Fifth Meeting of the IWC, in THIRTY-FOURTH REPORT, *supra* note 117, at 29-30.

132. *Id.*

veloping states are as anxious as developed countries not to add to the costs of the IWC which have expanded in ratio to the increase in activities, membership, and the size of the Secretariat. Although the influx of new members after 1979 was expected to increase the IWC's budget, many of these newly joined countries have failed to pay their contributions, and IWC finances have so declined that a budget shortfall was anticipated for the first time in 1983.<sup>133</sup> In view of the considerable financial implications of expanded regulatory activity, it remains unclear whether the poorer and smaller new member states will sustain their membership unless financially assisted by richer NGOs or the conservationist states, but both types of assistance might have conservationist strings attached.

#### CONCLUSION

Most of the original developing state IWC members that engaged in whaling and that originally lacked serious interest in promoting conservation that required cutbacks in their industries, have slowly become more aware of the real dangers of overexploitation and the extent of scientific ignorance concerning the effects of exploitation. Others have maintained their strong reservations. Some which ratified the ICRW are still concerned with any effects that developments in the IWC might have on their rights in their 200-mile zones. Other developing state members that have potentially exploitable cetaceans—large or small—have supported their hesitation.<sup>134</sup> Moreover, during the IWC's history, as discussed above, developments outside the IWC—in the United Nations, the UNCHE, and the UNCLOS III—have all reinforced both the sovereign rights of states over their own natural resources and their right to conduct their own environmental policies.

These obstacles do not entirely diminish the chances that the IWC, in any post-moratorium period, will expand its role to include gradual regulation of small cetaceans or begin to consider, regulate, or make recommendations about nonconsumptive uses. Indeed, the IWC must do so if the Commission is to justify its continued existence. Even though the

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133. *Id.* at 3, 27. Only thirteen of the IWC's forty members had paid their full contributions by the due date of November 30, 1983. Twenty-one developing states had not paid, including: Antigua/Barbuda, Argentina, Belize, Brazil, Chile, the People's Republic of China, Egypt, India, Jamaica, Kenya, Korea, the Republic of Mauritius, Mexico, Oman, Peru, the Philippines, St. Lucia, St. Vincent and the Grenadines, Senegal, the Seychelles, and Uruguay. Of these, some had not yet paid their contributions for the previous year (Brazil, Jamaica, Kenya, Mauritius, Peru, Senegal, and Uruguay), or even for years previous to that. The amount owing by the 27 states in arrears at the end of 1983 was £328,919.73.

134. For an analysis of such reservations and their significance, see P. Birnie, *Relationship of the International Convention on the Regulation of Whaling to Coastal State Jurisdiction in Exclusive Economic Zones* (1983) (available from Wildlife Link Cetacean Group, London, England).

ICRW itself already lays down many requirements for research, provision of data, and monitoring of stock status that will continue to bind members even if no commercial, aboriginal, or subsistence whaling takes place, members are less likely to participate and pay their dues if they do not regard the remaining activities as sufficiently serious and important to justify their involvement.

Keeping the IWC membership intact, and even expanding it, is highly desirable in view of the special ecological values and highly migratory characteristics of most cetaceans. Fulfilling this new mandate requires a broader interpretation of the ICRW. In the absence of provisions for amendment of the ICRW, such generous interpretation could be accorded either by IWC practice within the ICRW or by negotiation of a Protocol. The negotiation of a new convention has proven politically impossible and divisive.

Reform can occur, however, only with the agreement of *all* members, whatever the method adopted; a new mandate cannot successfully be forced on them by "paper" majorities. Conservationist states and groups need to adjust their strategies to recognize this political reality. Until now, these groups have been using the pressure of majorities formed by developing countries against mainly richer developed states. In the future, it is likely that the objects of such pressure may include many members of this former majority group. This means that such states will slowly have to be persuaded of the virtues, if such virtues can be clearly established, of extending the IWC's regulatory role at least to some small cetaceans and nonconsumptive uses, and of the positive advantages this will bring to them, despite the contrary demands of their relevant industries.

NGOs and conservationist states will have to redirect their efforts and develop subtler methods of persuasion through education and research in the countries affected by a shift in commercial use of whales. If unanimous approval can be obtained in the IWC for such major changes in interpretation, one result might be that whale-watching industries and use of cetaceans for display purposes may come under increased scrutiny by IWC members. Some observers feel that these activities harass or otherwise disturb whales, are simply unethical, or an infringement of "animal rights."<sup>135</sup> Focus on these nonconsumptive uses would shift attention to "conservationist" countries such as the United States and Canada, and away from the traditional exploiters of whales such as Japan, Norway, and the USSR. These political considerations may effectively halt reforms in the ICRW. A continuing series of delicate political negotiations and new compromises are required if the members of the IWC

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135. T. REGAN, *THE CASE FOR HUMAN RIGHTS* (1984).

want the Commission to continue to be a viable forum for international negotiation into the next century.

The IWC has proven to be a flexible instrument, open to all states and to wide interpretation. New species and activities can gradually be added to its schedule of regulations. It took many decades of unregulated overexploitation to establish the IWC, and four more decades to set its policies on a mere conservationist basis. It would be a major setback if its supervisory role, its centralization of knowledge, discussion, advice, and its administrative facilities, were now to dissipate. The Boston Non-Consumptive Uses Conference adopted as its slogan "Whales Forever"; developing and developed states must now decide whether fulfillment of this aim also requires that the IWC be "forever."

The attitudes of developing states toward the continued viability of the IWC are crucial. Despite the unanimous support in the United Nations within the developing countries for the New International Economic Order, and at UNCLOS for extensive coastal states rights, developing countries in the IWC have been more strongly influenced by whether or not they have a whaling industry or economic relations with a whaling state than by solidarity with other developing countries.

Hunting of the great whales by developing states finally is coming to an end.<sup>136</sup> The IWC's future will depend more on the commercial interests of developed and developing states engaged in exploitation of small cetaceans and in nonconsumptive uses. All states, including the developing ones, should learn from their participation in the battle within the IWC for lower quotas and moratoria on whaling that compromise is as necessary to secure regulation of small cetaceans and nonconsumptive uses as it was to achieve the continuing conservation of all cetaceans.

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136. Ironically, in 1985, at the thirty-seventh meeting of the IWC, a new developing state member, the Solomon Islands, joined apparently with a view to starting an industry.

## APPENDIX A

Participation by Developing States in the  
International Whaling Commission

Meeting	Commissioners	Observers
<u>First</u> 1949, London		Argentina Brazil Chile
<u>Second</u> 1950, Oslo	Brazil Mexico	Argentina Chile
<u>Third</u> 1951, Cape Town	Panama	Argentina Peru
<u>Fourth</u> 1952, London	Brazil Panama	Argentina Peru
<u>Fifth</u> 1953, London	Brazil Panama	Argentina Peru
<u>Sixth</u> 1954, Tokyo	Brazil Mexico Panama	Argentina Chile
<u>Seventh</u> 1955, Moscow	Mexico Panama	Argentina
<u>Eighth</u> 1956, London	Mexico Panama	
<u>Ninth</u> 1957, London	Brazil Mexico	Argentina
<u>Tenth</u> 1958, Hague		
<u>Eleventh</u> 1959, London	Mexico	Argentina
<u>Twelfth</u> 1960, London		
<u>Thirteenth</u> 1961, London	Argentina	Chile Mexico
<u>Fourteenth</u> 1962, London	Argentina Mexico	Chile
<u>Fifteenth</u> 1963, London	Argentina Mexico	Chile
<u>Sixteenth</u> 1964, Norway	Argentina	Chile
<u>Seventeenth</u> 1965, London	Argentina Mexico	Chile/PCSP <sup>1</sup>
		Peru
<u>Eighteenth</u> 1966, London	Argentina	Chile
<u>Nineteenth</u> 1967, London	Argentina Mexico	Chile
<u>Twentieth</u> 1968, Tokyo	Argentina	Chile Peru
<u>Twenty-first</u> 1969,	Argentina Mexico	Chile

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1. Permanent Commission for the South Pacific

<u>Meeting</u>	<u>Commissioners</u>	<u>Observers</u>
<u>Twenty-second</u> 1970,	Argentina Panama	Chile Peru
<u>Twenty-third</u> 1971, U.S.A.	Argentina Mexico Panama	Brazil
<u>Twenty-fourth</u> 1972, London	Argentina Mexico Panama	Chile Peru
<u>Twenty-fifth</u> 1973,	Argentina Mexico Panama	Brazil Chile Peru
<u>Twenty-sixth</u> 1974, London	Argentina Mexico Panama	Chile Peru
<u>Twenty-seventh</u> 1975, London	Argentina Brazil Mexico Panama	Korea, Rep. of Peru
<u>Twenty-eighth</u> 1976, London	Argentina Brazil Mexico	Chile Peru
<u>Twenty-ninth</u> 1977, Canberra	Argentina Brazil Mexico Panama	Chile Korea, Rep. of Peru
<u>Thirtieth</u> 1978, London	Argentina Brazil Mexico Panama	Chile Korea, Rep. of Peru
<u>Thirty-first</u> 1979, London	Argentina Brazil Chile Korea, Rep. of Mexico Panama Peru Seychelles	Costa Rica Indonesia Tonga
<u>Thirty-second</u> 1980, Brighton	Argentina Brazil Chile Korea, Rep. of Mexico Oman Peru Seychelles	Colombia Costa Rica Indonesia Sri Lanka

Meeting	Commissioners	Observers	
<u>Thirty-third</u> 1981, Brighton	Argentina	Colombia	
	Brazil	Egypt	
	Chile	Kenya	
	China		
	India		
	Jamaica		
	Korea, Rep. of		
	Mexico		
	Oman		
	Peru		
	St. Lucia		
	St. Vincent & Grenadines		
	Seychelles		
	Uruguay		
	<u>Thirty-fourth</u> 1982, Brighton	Antigua & Barbuda	Ecuador
		Argentina	Indonesia
Belize			
Brazil			
Chile			
China, P.R.			
Costa Rica			
Egypt			
India			
Kenya			
Korea, Rep. of			
Mexico			
Monaco			
Oman			
Peru			
Philippines			
St. Lucia			
St. Vincent			
Senegal			
Seychelles			
Uruguay			
<u>Thirty-fifth</u> 1983, Brighton	Antigua	Colombia	
	Argentina		
	Belize		
	Chile		
	China, P.R.		
	Costa Rica		
	Egypt		
	India		
	Korea, Rep. of		
	Mexico		
	Monaco		

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Meeting	Commissioners	Observers
	Oman Peru Philippines St. Lucia St. Vincent Senegal Seychelles	

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APPENDIX B<sup>1</sup>

## Status of Participation by Developing Countries in the International Convention for Regulation of Whaling

Government	Date of Deposit of Instrument of Ratification	Date of Receipt of Notification of Adherence	Date of Entry into Force
Antigua and Barbuda		July 21, 1982	July 21, 1982
Argentina	May 18, 1960 <sup>2</sup>		
Brazil	May 9, 1950 (withdrew)	Jan. 4 1974 <sup>3</sup>	Jan. 4, 1974
Belize		July 15, 1982	July 15, 1982
Chile	July 6, 1979 <sup>4</sup>		July 6, 1979
China		Sept. 24, 1980 <sup>5</sup>	Sept. 24, 1980
Costa Rica		May 6, 1981 <sup>6</sup>	May 6, 1981
Dominica	(withdrew on June 30, 1980)	July 9, 1981	July 9, 1981 (lapsed)
Egypt		Sept. 18, 1981	Sept. 18, 1981
India		Mar. 9, 1981	Mar. 9, 1981
Jamaica	(withdrew on June 30, 1983)	July 15, 1981	July 15, 1982
Kenya		Dec. 2, 1981	Dec. 2, 1981
Korea, Rep. of		Dec. 29, 1978	Dec. 29, 1978
Mauritius		June 17, 1983	June 17, 1983
Mexico		June 30, 1949	June 30, 1949
Monaco		Mar. 15, 1982	Mar. 15, 1982
Oman		July 15, 1980	July 15, 1980
Panama	(withdrew on June 30, 1980) <sup>7</sup>	Sept. 30, 1948	Nov. 10, 1948
Peru	June 18, 1979 <sup>8</sup>		June 18, 1979
Philippines		Aug. 10, 1981	Aug. 10, 1981
Saint Lucia		June 29, 1981	June 29, 1981
Saint Vincent and the Grenadines		July 22, 1981	July 22, 1981
Senegal		July 15, 1982	July 15, 1982
Seychelles		Mar. 19, 1979	Mar. 19, 1979
Uruguay		July 15, 1981	July 15, 1981

1. Based on information supplied to the IWC by the United States Department of State (the depository of the ICRW).
2. Argentina's ratification contained a statement designated as a reservation concerning its alleged sovereignty over the "Islas Malvinas" and the Falkland Islands Dependencies. The United Kingdom responded by refuting this statement and claim to sovereignty. The United States also informed both Argentina and the United Kingdom that it did not recognize claims to sovereignty over territory in Antarctica and reserved United States rights regarding this area.
3. Brazil withdrew on June 30, 1966, but rejoined in 1974.
4. Chile's ratification includes the reservation that none of the provisions of the Convention could affect or restrict the sovereign rights of Chile in its Maritime Zone.
5. China's notification of adherence includes a declaration to the effect that its Government declared illegal, null and void the application of Taiwan to accede to the ICRW in the name of China. The depository, the United States, rejected Taiwan's application.
6. Costa Rica retracted its first notification of adherence pending completion of its necessary national legislation.
7. Panama notified that it would withdraw effectively on June 30, 1969, but subsequently cancelled this notification in 1977. It gave new notice of withdrawal to be effective on June 30, 1978, but later cancelled this notice also. It gave further notice of withdrawal in 1979, which finally became effective on June 30, 1980.
8. Peru's ratification was accompanied by a statement that it could not be interpreted as detrimental to or in restriction of the sovereignty and jurisdiction that it exercised up to a limit of 200 miles off its coast. The Federal Republic of Germany formally objected to this statement on May 27, 1983.

