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NOTES AND COMMENTS

Commercial Whaling and Ocean Resource Management

The hunt for the great whale dates back as far as 4,000 years ago when early Norsemen used stone harpoon heads. Other early hunters of the whale were the Eskimos and the Basques, who developed the first organized whale fishery in the 12th century. As a matter of fact, they set a pattern to be followed by future whalers. By overfishing the Bay of Biscay, the Basques virtually eliminated the entire stock of the Biscayan right whales.

American whalers gradually extended their efforts beyond coastal waters to the open seas in the early 1700's. This transformed what had been a local enterprise into a worldwide industry. American fleets would spend three and four years at sea, returning with a product ready for sale. From the 1820's to the 1860's, the United States dominated the field, commanding 700 of the 900 whaling vessels in 1846.¹

The whaling industry brought great wealth to this country because parts of the whale could be used for making candles and producing oil for lamps. However, profits declined steadily with the discovery of petroleum, which was a much cheaper fuel source. In addition, by the 1800's, the whale population had already greatly declined, the result of the overfishing of their stocks. The commercial hunt for the whale might have ended then if not for the introduction of a new invention.

In the late 1860's, a Norwegian whaler named Svend Foyn developed a "harpoon gun" with a range of over fifty yards. It fired an explosive-tipped harpoon into the whale, which shattered into shrapnel and secured itself by means of heavy steel barbs. The harpoon gun, along with the introduction of steam-powered ships, revitalized the whaling industry. Moreover, the new, sophisticated

1. Graves, *The Imperiled Giants*, NAT'L GEOGRAPHIC, December 1976, at 730.

techniques made it easier to obtain a large catch and tipped the balance strongly in favor of the whalers and against the whales.

The factory ship, invented in 1905, allowed whalers to fully process their catch while at sea. The whale would be butchered in the sea alongside the ship, treated wholly or in part, and prepared for sale while on board the factory ship. This invention was further developed in 1925, when these ships were outfitted with ramps to haul the catch aboard for butchering and processing. The refinement of this invention, as well as other technological and systemic advances, enabled the hunters to keep increasing their catch.

Today's modern whalers, with additional refinements, use virtually the same methods as those used by early whalers. The explosive-tipped harpoon is still used, aided today by sonar and helicopters which sight the whale. Through these methods, over two million whales have been reported taken over the past fifty years.²

Throughout the history of whaling, the number of whales taken was unfortunately determined by market conditions, with little or no recognition of the need for conservation. Commercial whalers hunted their prey until a certain region of the ocean was no longer profitable because of the elimination of the whale population in that area. Prior to the onset of commercial whaling, 210,000 blue whales were estimated to live in oceans around the world; today, only 3,000 - 4,000 remain.³ A specific example of this depletion is evidenced by comparing the 100,000 humpback whales which once existed to 7,000 of that species surviving at the present date.⁴ Commercially extinct species are entitled to total protection from hunters.⁵

The whaling controversy is an example of a conflict which will be repeated many times in the future. A previously abundant resource has been depleted to near extinction by those claiming their share of the *res communis*. The high seas and their resources traditionally have been considered *res communis*, belonging to and open to use by all nations. Under this concept of international law, all nations have been free to navigate, trade and exploit marine

2. THE WHALE PROBLEM 372 (W.E. Schevill ed. 1979).

3. *The Blue Whale*, THE WHALE REPORT 5 (Winter 1979) (a publication of the Center for Environmental Education, Inc.).

4. *Current Estimate of Whale Stocks*, THE WHALE REPORT 4 (Autumn 1979) (a publication of the Center for Environmental Education, Inc.).

5. Friedman, *Legal Aspects of the International Whaling Controversy: Will Jonah Swallow the Whales?*, 8 N.Y.U.J. INT'L L. POL. 211 n. 4 (1975).

resources such as the whale.⁶ The lack of any international regulations governing the capture and use of whales will result in the total extinction of whales in the nearby future.

Commercial Use of the Whale

Whalers claim that their need for whale products is sufficient justification for their exploitation; conservationists assert that this commercial need is outweighed by the danger of irreparable damage to the ecological balance of the oceans which would result from the unregulated slaughter of the whale. In light of these conflicting demands, the actual use of whales by the whaling nations is a topic for conjecture.

Of all the whaling nations, Japan and the Soviet Union consistently take the largest annual whale catch.⁷ Japan justifies its catch based on its reliance on whale meat as an alternative source of protein in that nation's diet. Despite this purported justification, at least two-fifths of the Japanese catch is sperm whale, an inedible species.⁸ Moreover, Japan continues to export canned whale meat, rather than keep it for consumption in Japan.⁹

The Soviet Union uses whales for their sperm oil and spermacetti (a solid wax form) which is then used as a lubricant for sophisticated industrial machinery. American scientists, however, forced by law to forgo the use of whale products, have found a highly effective substitute lubricant derived from the jojoba desert shrub. Development of the jojoba may be able to eliminate the need for sperm oil once it is marketed worldwide.¹⁰ In such circumstances, the Soviet Union should find it difficult to justify its need to slaughter sperm whales for lubricant.

Other purportedly indispensable uses of whale include the production of animal feed, fertilizer, perfume, soap, shampoo, gelatin and margarine. All of these products may be produced by alternative sources which are often more than adequate substitutes for

6. Browning, *Exploitation of Submarine Mineral Resources Beyond the Continental Shelf*, 4 TEXAS INT'L L.F. 1, 10-16 (1968), reprinted in H. KNIGHT, *THE LAW OF THE SEA: CASES, DOCUMENTS, AND READINGS* 545 (1978).

7. THE COMMITTEE FOR WHALING STATISTICS, *INTERNATIONAL WHALING STATISTICS* LXXXI 13 (1978).

8. Friedman, *supra* note 5, at 215; *INTERNATIONAL WHALING STATISTICS*, *supra* note 7, at 43.

9. *Id.*

10. Graves, *supra* note 1, at 739.

whale.

Even if it could be shown that whaling nations need the whale products for the usages claimed, a fundamental question remains: does any one country have the right to exploit a free resource to such a degree that the future utilization of that resource by others is precluded? This question has continued to be the subject of lengthy international debate, concurrently with the increasing exploitation, and resulting extinction, of the whale. Despite the aforementioned continuing philosophical conflict, even those who support continued commercial whaling agree that some form of regulation is needed. As mentioned above, unregulated commercial whaling eventually would lead to exhaustion of the resource, completely obviating any whaling in the future. The difficulty underlying a resolution of the problem has been the inability to agree upon an acceptable and enforceable conservation program.

International Attempts at Regulation

The international community recognized the need to regulate the whaling industry by 1931. The League of Nations prompted the signing of the first international treaty, which established limits on the killing of certain species of whales. This treaty was the Convention for the Regulation of Whaling (hereinafter referred to as the 1931 Convention), concluded at Geneva on September 24, 1931.¹¹ The 1931 Convention was applicable only to baleen or whalebone whales, a category which includes the bowhead, right, blue, finback, humpback and gray whale.¹² The Convention prohibited the taking of right whales from "all the waters of the world, including both the high seas and territorial and national waters."¹³ Additionally, the taking of calves or suckling whales, immature whales, and female whales accompanied by calves or suckling whales was prohibited.¹⁴ The Convention does not apply to limited whaling engaged in by aborigines.¹⁵

To regulate the continued taking of the other species (bowhead, blue, finback, humpback and gray whales), the 1931 Convention required licensing or certification of every vessel taking or

11. Convention for the Regulation of Whaling, September 24, 1931, 49 Stat. 3079; T.S. 880; 15 L.N.T.S. 349; 3 Bevans 26 (hereinafter cited as 1931 Convention).

12. 19 WORLD BOOK ENCYCLOPEDIA 214 (1962).

13. 1931 Convention, *supra* note 11, art. 4 & 9.

14. *Id.* art. 5.

15. *Id.* art. 3.

treating whales.¹⁶ Each participating government would be responsible for the licensing and certification of vessels flying the flag of the particular nation. Upon taking a catch, participants would be subject to Convention provisions requiring extensive cataloging of statistical and biological information for each whale.¹⁷ In 1937, this treaty was extended by an Agreement for the Regulation of Whaling (hereinafter referred to as the 1937 Agreement).¹⁸

The 1937 Agreement specified limited whaling periods of six months and declared the use of a factory ship or whale catcher to be forbidden in areas of the South Atlantic, South Pacific and the Indian Ocean.

The parties to the 1931 Convention were responsible for the enforcement of its provisions within the limits of their jurisdiction. Unfortunately, enforcing these provisions was not possible on a larger scale. For example, the Convention prohibited taking right whales; however, in the 1936-1937 whaling season more than fifteen right whales were reported killed.¹⁹ Although clearly in violation of the 1931 Convention, no sanctions were imposed as the whales had been killed by nationals of states which were not participants in the agreement. This problem thwarted international attempts at regulation of whaling, as the lack of participation by *all* whaling nations resulted in an incomplete and ineffective regulation. Therefore, excessive whaling not only continued, but unfortunately increased.

Concern over the exorbitant levels of whale catches led the United States to call for a conference to deal with the situation. Subsequently, in 1946, an International Whaling Conference was held at Washington, D.C. resulting in the International Convention for the Regulation of Whaling (hereinafter referred to as the 1946 Convention).²⁰ At the 1946 Convention, a proposal set forth by the United States was adopted which established the International Whaling Commission (hereinafter referred to as the IWC).

Representatives of nineteen countries participated in the Conference. Their objective was:

16. *Id.* art. 8.

17. *Id.* art. 10-12.

18. International Agreement for the Regulation of Whaling, June 8, 1937, 52 Stat. 1460; 1937 T.S. 933; 190 L.N.T.S. 79.

19. *Victory at Sea*, NEWSWEEK, July 30, 1979, at 69.

20. International Convention for the Regulation of Whaling, December 2, 1946, 62 Stat. 1716; T.I.A.S. 1849; 161 L.N.T.S. 72; 4 Bevans 248 (hereinafter cited as 1946 Convention).

to consider the codification and possible modification of existing regulations on whaling in the light of the necessity for proper conservation of whale resources and orderly development of the whaling industry and to devise effective administrative machinery for the modification of these regulations from time to time without calling a new international conference and concluding a new agreement or protocol in each instance.²¹

Although referring back to the earlier 1937 Agreement, the 1946 Convention recognized the need to move beyond its structural limitations and provided for a means by which there could be constant review and revision of regulations as required by the fluctuating levels of whale stocks.

The IWC was to be composed of one member from each participating government. Each such member would have one vote on the IWC, and could be accompanied by experts and advisers. It attempted to "provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry."²² The IWC was given the power to designate hunting seasons and waters, size limitations, methods and allowable types of gear, as well as to determine which species could be taken and numerical quotas limiting catches. These powers were to be exercised concurrently with fulfillment of the responsibility to research and study whales and the effects of whaling.

The 1946 Convention was originally signed by Argentina, Australia, Brazil, Canada, Chile, Denmark, France, Great Britain, Northern Ireland, the Netherlands, New Zealand, Norway, Peru, South Africa, the Soviet Union, and the United States, which passed implementing legislation in 1949. Annual meetings of the IWC began in 1949 and have continued into the present.

The 1946 Convention greatly expanded the scope of international regulation of commercial whaling activities. Still, the same enforcement problems faced by the previous 1931 Convention continued to exist along with a few new problems in the 1946 Convention and the IWC.

21. Leonard, *Recent Negotiations Toward the International Regulation of Whaling*, 35 AM. J. INT'L L. 90, 109 (1941).

22. 1946 Convention, *supra* note 20.

*Problems With the 1946 Convention and the IWC***A. Flaws in the 1946 International Convention**

The 1946 Convention is a more comprehensive document than the earlier whaling agreements, however, it has two major defects: the lack of any mechanism for enforcement (a problem similar to that faced by the 1931 Convention) and the freedom of Convention members to object to decisions of the IWC amending original "schedule" of regulations and, according to an "opt-out" provision, their ability to withdraw at will from compliance with new amendments.

This opt-out provision states:

Each of such amendments shall become effective with respect to the Contracting Governments . . . except that (a) if any Government presents to the Commission objection to any amendment . . . the amendment shall not become effective with respect to any of the Governments for an additional ninety days; . . . (c) thereafter, the amendment shall become effective with respect to all Contracting Governments which have not presented objection but shall not become effective with respect to any Government which has so objected until such date as the objection is withdrawn.²³

For several years, Japan and the Soviet Union have exercised this option to object to amendments and then ignore them. Their actions were always in response to the imposition of more stringent regulations, reflecting their desire to retain higher annual whale stock quotas. In effect, these actions negate the ability of the IWC to carry on the "modification of these regulations from time to time." The impact is amplified as Japan and the Soviet Union are the primary whaling nations in the world.

II. Problems With The International Whaling Commission

Much of the whaling controversy understandably centers around the IWC, its failures and its attempts at constructive modifications. In its early years, the IWC was dominated by whaling nations, such as Japan and the Soviet Union, whose representatives often were closely aligned with commercial whaling interests. As often happens, the industry which was to be regulated was, in

23. 1946 Convention, *supra* note 20, art. V § 3.

fact, guiding its regulators. For example, one Japanese commissioner to the IWC was also the head of the Japanese Whaling Association, an industry group. It follows logically therefrom that any attempt at comprehensive conservation was easily defeated.

In recent years, however, scientists and conservationists have gained increasing influence; they have been included in many delegations to the IWC and are now routinely in attendance as independent observers at the IWC's annual meetings.

Another problem, mentioned earlier in discussing the 1931 Convention, is that complete international regulation requires compliance by all parties involved in commercial whaling. In the past, the IWC did not have participation by all whaling nations. Chile and Peru originally signed the 1946 Convention, but subsequently withdrew from the agreement and, along with other non-signatory whaling nations, often exceeded quotas set forth by the IWC.

At the present time, the countries bound by the 1946 convention and the IWC regulations are Argentina, Australia, Brazil, Canada, Chile, Denmark, France, Iceland, Japan, South Korea, Mexico, the Netherlands, New Zealand, Norway, Panama, Peru, Seychelles, South Africa, Spain, Sweden, the Soviet Union, Great Britain, Northern Ireland, and the United States.²⁴ Of these nations, South Korea, Seychelles, Spain and Sweden have joined, and Chile and Peru have rejoined the IWC between July 1978 and July 1979. With this recent surge in membership of the IWC, greater compliance with international whaling regulations will hopefully be obtained in the near future.

It has been estimated that non-signatory nations are responsible for killing 3,000 to 4,000 whales in disregard of the IWC quotas.²⁵ No statistics are available regarding the catch of pirate whaling ships which fly under flags of convenience to circumvent the jurisdiction of those countries which are party to the whaling conventions. These pirate ships are often financed or completely owned by nationals of a state within the IWC; however, the ship itself is registered in a non-party country.

The final area of discussion, perhaps an inevitable problem, is the inherent conflict of the IWC's mutual goals to reconcile conser-

24. TREATY AFFAIRS STAFF, OFFICE OF THE LEGAL ADVISER, DEP'T OF STATE, TREATIES IN FORCE 351 (1978).

25. 1946 Convention, *supra* note 20.

vation and continued exploitation. The 1946 Convention had sought "to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry."²⁶ The two objectives were considerations which conceivably led to the IWC's policy of reliance upon the concept of Maximum Sustainable Yield (hereinafter referred to as MSY) as the basis for the determination of proper whale catch quotas.

The theory of MSY reflects a marketplace mentality with a goal of achieving maximum production without exhausting the resource for future utilization.²⁷ This choice of using MSY reflected the IWC's desire to achieve conservation without hampering development of the industry. The ineffective application of the concept to management of whaling resources led many observers to complain that the IWC should be abolished. Quotas were widely recognized as too high, as well as failing to alleviate the danger of depletion of whale stocks from excessive fishing.²⁸

The MSY defines the largest number of whales that can be caught, in successive years, without further depleting the stock. The IWC originally determined, on the basis of their data, that the MSY for a whale population occurred when the population reached a level of fifty per cent of its original number.

Regulation Efforts Move Away From the IWC

The 1960's and 1970's brought increasing concern about the diminishing whale population and an increasing awareness of the failure of the IWC. International resource regulation in this area was not considered a great success. In 1972, the United Nations Conference on the Human Environment (hereinafter referred to as UNCHE) recognized the gravity of the whale conservation problem and stated:

It is recommended that governments agree to strengthen the international whaling commission, to increase international research efforts, and as a matter of urgency, to call for an international agreement, under the auspices of the international whaling commission and involving all governments concerned for a 10-year moratorium on commercial whaling.²⁹

26. THE WHALE PROBLEM, *supra* note 2, at 376.

27. Friedman, *supra* note 5, at 219-220; McHugh, *Rise and Fall of World Whaling: The Tragedy of the Commons Illustrated*, 31 J. INT'L AFF. 23 (1977).

28. U.N. Doc. A/CONF. 48/14 Corr. 1, Recommendation 33 (1972).

29. U.N. Doc. A/CONF. 48/14 2 (1972).

Although UNCHE still relied primarily on a strengthened and active IWC, it constituted the first international call for a complete moratorium which actually generated action to that end.

The UNCHE recommendation was part of a comprehensive "Action Plan" which sought to deal with the side effects of man's activities and the need to protect and enhance the human environment for present and future generations. The recommendation states:

Man has constantly to sum up experience and go on discovering, inventing, creating and advancing. In our time, man's capability to transform his surroundings, if used wisely, can bring to all peoples the benefits of development and the opportunity to enhance the quality of life. Wrongly or heedlessly applied, the same power can do incalculable harm to human beings and the human environment. We see around us growing evidence of manmade harm in many regions of the earth: dangerous levels of pollution in water, air, earth and living beings; major and undesirable disturbances to the ecological balance of the biosphere; destruction and depletion of irreplaceable resources. . . .³⁰

One hundred and ten nations adopted the UN recommendations, including the United States. Japan and the Soviet Union opposed the proposal in so far as it attempted to set forth a moratorium on commercial whaling.

The IWC, when presented with a proposal for a blanket moratorium, found that it could not be "justified scientifically" and suggested its alternative: conducting further research and implementation of a variation of the MSY concept.³¹ The IWC subsequently began a system of categorizing whale stocks as Initial Management Stocks which could be reduced in a controlled manner to maximum sustainable yield or optimum levels, Sustained Management Stocks, which should be maintained at or near MSY or optimum levels, and Protection Stocks, which should be fully protected. The IWC would permit the continuation of commercial whaling, but would exclude the exploitation of the Protection Stocks. The IWC was still trying to preserve and develop whale stocks without cheating consumers of whale products and the industry's profit.

The entire package of UNCHE recommendations were also di-

30. International Whaling Commission Report 1974-1975, 1976 Twenty-Sixth Report of the Commission 5 (International Commission on Whaling).

31. 16 U.S.C. §§ 1361-1407.

rected to the attention of individual governments and recommended action at the national level. Unilateral action by individual governments became the most progressive. The United States was the first to enact national legislation in line with the recommendations. Spurred on by the concern of its citizenry, the United States demonstrated its strong commitment to conserving the whale population by enacting the Marine Mammal Protection Act of 1972 (hereinafter referred to as the Mammal Act).³²

Section 1371 of the Mammal Act imposes a strict ten year moratorium on the taking or importation by a United States citizen of marine mammals and their by-products. This section makes commercial killing of a whale a crime if committed by a person subject to United States jurisdiction, with certain limited exceptions for Alaskan Eskimos. The ban on importation of by-products is a significant provision, as it bars the purchase of whale products from those who are not subject to United States jurisdiction or who disregard other commercial whaling regulations.

The Mammal Act also reflects congressional disillusionment with the existing international whaling agreements and methods of regulation. Section 1378 directs the Secretary of Commerce, through the Secretary of State, to initiate negotiations, encourage new agreements and the amendment of any existing international agreements in order to bring other countries into conformity with the stricter United States policy.

Subsequent legislation has been passed which should further increase the responsibility undertaken by the United States to achieve effective international regulation of whaling activities. The United States has amended the Fishery Conservation and Management Act of 1976 (hereinafter referred to as the Fishery Management Act), in an effort to close enforcement loop-holes in currently existing whaling agreements.³³ The amendment creates stiff penalties for nations which violate or engage in activities which would diminish the effectiveness of the International Convention for the Regulation of Whaling or other multilateral agreements in force with respect to the United States which attempt to conserve or protect, "the living resources of the sea."³⁴

This new law, signed by President Carter on August 15, 1979,

32. 16 U.S.C. §§ 971, 1362, 1801, 1882.

33. 25 U.S.C. § 1978.

34. 38 U.S.C. § 1821.

provides for immediate and mandatory sanctions against nations that fail to observe IWC quotas and regulations. The law requires the Secretary of State to reduce, by at least half, the number of fish a country's nationals could otherwise catch in United States waters (the areas of ocean within 200 miles of shore) if the Government determines that the nation's fishermen have been "engaging in trade or taking which diminishes the effectiveness" of the 1946 Convention.³⁵ This covers actions such as the taking of whales in excess of IWC limits or in disregard of other IWC regulations. The transgressing nation may eventually lose *all* fishing privileges in United States waters if no action is taken to seek an end to these activities.

These sanctions should provide an incentive for countries, such as Japan and the Soviet Union, to comply with the regulations and catch limitations set forth by the IWC despite their power to exercise the "opt-out" provision of the 1946 Convention. Thus, although a nation may choose to ignore the IWC, such nation must then face certain penalties imposed by the United States. Japan and the Soviet Union, in particular, would have a great deal to lose, as both nations currently fish in United States territorial waters. Moreover, whale products imported into the United States, or their monetary value, may be forfeited. This penalty would be specifically levied on individual violators. These sanctions, enforceable by the United States, will fill an enormous gap now existing in the enforcement of IWC provisions.

Despite the moratoriums attempted by other nations, the United States appears to be at the head of the international community in its decision to pass domestic legislation to encourage other governments to comply with international whaling agreements.³⁶

Private Conservation Groups

Public pressure has been an important force in the shift away from short-term exploitation of the whale, towards greater concern for conservation and intelligent management of the oceans' resources. Individuals have signed petitions, participated in letter writing campaigns and boycotted whale based products. Various

35. *U.S. Law Strengthens IWC Regulations*, THE WHALE REPORT 2 (Autumn 1979) (a publication of the Center for Environmental Education, Inc.).

36. Graves, *supra* note 1, at 738.

groups have undertaken international lobbying efforts and public education programs in whaling nations. Their impact has been deeply felt.

Two groups have even taken to the seas to face the whalers head on. Greenpeace and the Fund for Animals have taken their own vessels to sea to interfere directly with whalers' efforts. Greenpeace has chosen to place themselves between the hunters and the hunted. The Fund for Animals has more aggressively "attacked" the situation and one well-known pirate ship.

Greenpeace is an international organization with members in Australia, Canada, France, the Netherlands, New Zealand, Great Britain and the United States. The founding chapter is located in Vancouver, British Columbia. "Green" refers to their ecological interests and "peace" attests to their belief in non-violent protest. The group is also active in efforts to protect other forms of endangered wildlife. Greenpeace is a non-violent organization, but not by any means a passive one.

The group has gone out, since 1975, in rented boats with smaller Zodiac inflatable boats and "tracked" whaling ships. Their purpose is to interfere with whale hunting efforts. All of the boats are leased, with the exception of the Rainbow Warrior, which is owned by the organization and operates out of Great Britain. The crews aboard are Greenpeace members, usually citizens of the state harboring the boat.

According to Bob Hunter, one of the founders of Greenpeace, during one confrontation off the coast of California, "they [the whalers] got so mad they tried to ram one of our little Zodiac inflatable boats, and when they couldn't do that, they fired a harpoon four feet directly over it. We hope we cost them a number of whales."³⁷ The Greenpeace ships usually go out for a span of five weeks during the whaling season at a cost of \$100,000 per mission.

The Fund for Animals is a more aggressive organization, taking an offensive position in its confrontations at sea. The group owns a converted British trawler, known as the Sea Shepherd. The Sea Shepherd went after the Sierra, a well-known pirate whaler, in July, 1979. The Sierra flies under a Cyprus flag, is owned by a Liechtenstein-based company and is purportedly backed by Japanese interests. The Sierra operates in complete disregard of international regulations to protect whale stocks.

37. *Victory at Sea*, *supra* note 19, at 69.

With its bow packed with cement, the Sea Shepherd battered the Sierra in waters off the coast of Portugal, leaving the Sierra incapacitated, and leading to violence between the crews once back on shore.³⁸ The Sierra has since been made available for sale.³⁹

The actions of the above two groups raise questions of liability under international and domestic law. What liability exists for damage to vessels or injuries to crew members? What legal action can be taken, if at all, by the coastal states?

The United States government, as well as other national governments, has chosen not to officially recognize or support the activities of these organizations. Each group operates on its own and, in case of any conflict involving international law, the United States will not accept responsibility. This leaves any possible conflict resolution outside the scope of the International Court of Justice, which can only hear disputes in which both parties are nation states. Legal proceedings would therefore have to be brought in some other, unascertained court.

Jurisdiction of domestic courts could conceivably be based upon the citizenship of the parties involved or the territory in which the incident occurred. A nation's territorial jurisdiction extends to its coastal waters as well as on board a vessel registered in its country. Therefore, suit could be brought in a domestic court.

The whalers could base their claim on two possible theories under international law. Under the Convention on the High Seas, every nation (and its nationals) has rights of freedom of navigation and freedom of fishing provided that these rights are exercised with reasonable regard for the interests of other States.⁴⁰ That Convention also includes a provision declaring the illegality of piracy on the high seas.⁴¹

Arguably, by interfering with the whaling efforts, these groups are also interfering with the whalers' rights to navigate and fish on the high seas. International law has long recognized the concept of unencumbered use of common property without interference.

As for the possibility of a piracy charge, Article 15 of the Convention on the High Seas describes piracy as: "Any illegal acts of violence, detention or any act of depredation, committed for pri-

38. *Id.*

39. Convention on the High Seas, September 30, 1962, 13 Stat. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82, art. 2.

40. *Id.* art. 15.

41. *Id.*

vate ends by the crew or the passengers of a private ship, . . . on the high seas, against another ship. . . ."⁴² An intent to rob the other ship is not necessary; thus, this definition is broad enough to cover the actions of the Sea Shepherd or the Rainbow Warrior. Piracy is also considered so serious an offense against the international community that *any* state has jurisdiction to prosecute the person or persons charged.

Criminal charges or civil suit could also be brought in the jurisdiction of the flag state where the vessel is registered or in the state where an individual party is a citizen. No legal action arising out of the Sierra/Sea Shepherd collision has yet been taken.

An International Moratorium

Finally, twenty-three years after the IWC was established to "provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry," the IWC was faced with the conclusion that these two goals of conservation and development are now irreconcilable. In August of 1979, the IWC imposed a total moratorium on factory ship whaling of all species but minke whales and has declared that the Indian Ocean, Arabian and Red Seas north of 55 degrees latitude will now be a whale sanctuary.⁴³ Although land-based whalers will still be able to legally continue to hunt the whale, the end result will most likely be "the beginning of the end of whaling."

This moratorium should bring an end to Soviet whaling since their whaling industry has always been primarily based on the use of factory ships. There is, however, no indication of the effect upon Japan's commercial whaling.

CONCLUSION

Large-scale commercial whaling appears to be finally coming to an end. Although the IWC began enforcing stricter quotas and regulations, it obviously came too late for some species which must now be protected by a complete moratorium and provided a sanctuary where they may replenish their stock. It is clear that the IWC took too long to adequately assume its responsibility to strictly regulate whaling. The commission was focused on the

42. *Los Angeles Times*, July 14, 1979.

43. *Moratorium Assault, THE WHALE REPORT* (Autumn 1979) (a publication of the Center for Environmental Education, Inc.).

needs of the industry which desired expansion and free, unrestricted exploitation of what is now recognized to be a limited resource.

These problems of international resource management in commercial whaling should provide an example of what the international community should do with regard to the future development of other resources. As technology increases our ability to retrieve resources from the oceans, we must recognize, at an early stage, the need to carefully allocate.

Wendy Watanabe