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INTERNATIONAL REGULATION OF WHALING: THE U.S. ROLE

I. INTRODUCTION

The history of whaling dates back thousands of years, but it was technological developments in the eighteenth and nineteenth centuries that made very efficient whale hunts possible.¹ Before this great increase in whaling, there were an estimated 3.9 million whales in the world's oceans. By 1975, the number of whales was reduced to approximately 2.1 million, with proportionately greater reductions in the populations of the larger baleen species demanded by the whaling industry. For example, some species in the Antarctic have declined as much as ninety-six percent during the twentieth century.²

Originally, whales were considered a valuable resource for oil and baleen (whalebone). Since the 1960's the whale meat has been used for pet food, agricultural feed, and in a few countries for human consumption. After World War II, whales became an even greater resource for oil for use as high grade industrial lubricants and industrial waxes.³ Today, whales are also recognized as valuable aesthetic, recreational, and scientific resources.

The following is a review of the

history of international attempts to manage whale populations and a report of a major controversy between the U.S. and Japan concerning an international effort toward whale conservation. Also discussed is an update of recent developments, including the commercial whaling moratorium and its exemptions for aboriginal subsistence and scientific whaling.

II. INTERNATIONAL AND DOMESTIC LEGAL FRAMEWORK

A. The ICRW and the IWC

In 1946, fifteen nations formed the International Convention for the Regulation of Whaling (ICRW) "to establish a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks"⁴ While some countries joined with a general interest to protect the whale, most became members to further their commercial interests in whaling.⁵ The ICRW now has forty-one member nations, most of which either have discontinued or have never participated in commercial whaling. The eight countries still identified as commercial whaling nations are Japan,

1. S. Frost, The Whaling Question (1979).
2. Scarff, The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment, 6 Ecology L.Q. 323 (1977).
3. S. Frost, The Whaling Question (1979); G. Smith, The International Whaling Commission: An Analysis of the Past and Reflections on the Future, 16 Nat. Resources Law 543 (1983-84); P. Birnie, International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale Watching, Vol. 1 (1985).
4. International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849 (hereinafter Convention), Preamble.
5. G. Smith, The International Whaling Commission: An Analysis of the Past and Reflections on the Future, 16 Nat. Resources Law 543 (1983-84).

the Soviet Union, Korea, Iceland, Norway, Peru, Chile, and Spain. Japan is generally recognized as the most significant. On the other hand, the U.S. has been a predominant force in the movement to protect whales from commercial exploitation.

The ICRW has two primary objectives--conservation and commercial development of whale stocks--which lie at the heart of the controversies within the international body. In recent years, the member-nations have shown an increasing concern with conservation and protection goals, with the exception of several whaling nations who strive to strengthen the economic development of the whaling industry.

The nation-parties to the ICRW established the International Whaling Commission (IWC) to study whales and whaling practices, to adopt regulations, and to set harvest quotas. A "schedule" of specific requirements and prohibitions regarding whaling practices is included in the treaty and is amended from year to year by the IWC to provide harvest limits for various whale species. The IWC is composed of a commissioner from each member nation and convenes once a year to evaluate catch limits and determine the necessity of new regulations.

The IWC has played a central role in whale conservation and protection, but its international structure creates difficulties in the enforcement of regulations and quotas. The terms of the ICRW do not provide the IWC with power to impose sanctions for quota violations. In addition, any member of the IWC may exempt itself from an otherwise binding quota by filing an objection within ninety days of the adoption of the regulation or quota. Once a nation files a timely objection, it is not bound by the quota unless the objection is withdrawn. Furthermore, the ICRW does not provide an international legal means of enforcing compliance among nations bound by the quotas. The ICRW imposes on each member nation the responsibility to prosecute "infractions against or contraventions of" the ICRW by persons under its jurisdiction.⁶

B. The Pelly Amendment

In an effort to provide leverage for the enforcement of international fishery conservation programs, the United States Congress enacted the Pelly Amendment in 1971.⁷ Congress' principal intention was to respond to Denmark's fishery practices which depleted North Atlantic Salmon stocks in excess of the fishery quotas set by the International Convention for the Northwest Atlantic Fisheries (ICNAF). However, through express language in the Act and legislative history, Congress intended this amendment to protect whale populations as well.

The Pelly Amendment provides that "[w]hen the Secretary of Commerce determines that the nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President."⁸ Upon certification, the President has discretionary authority to "direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of fish products . . . from the offending country."⁹

Certification, or knowledge of the possibility of certification, places an offending nation in the position to choose between abstaining from the particular fishing activity or being prohibited from exporting fish products to the U.S. The objective is to encourage the foreign country to choose the less damaging economic alternative, which in most cases would be to terminate the offending practice and retain the ability to export.

Although the Pelly Amendment has led to several certifications, the President has never imposed sanctions against the offending country. However, the U.S. government has used these certifications to extract conservation agreements from the nations subject to sanctions. Where certification has not occurred, the Pelly Amendment has been valuable as an implied threat of American retaliation against whaling nations reluctant to follow IWC regulations.

6. Convention Article IX.

7. 22 U.S.C. § 1978 (1982) (amendment to the Fisherman's Protective Act of 1967).

8. 22 U.S.C. § 1978(a)(1) (amendment to the Fisherman's Protective Act of 1967).

9. 22 U.S.C. § 1978(a)(4) (amendment to the Fisherman's Protective Act of 1967).

C. The Packwood-Magnuson Amendment

While the Pelly Amendment has been a useful tool in persuading foreign countries to comply with international fishery conservation programs, Congress became impatient with the President's delay in making decisions to certify and reluctance to impose sanctions. Congress responded in 1979 by passing the Packwood-Magnuson Amendment, which is designed to narrow Executive Branch discretion allowed by the Pelly Amendment.¹⁰

The Packwood Amendment provides, among other things, that if the Secretary of Commerce certifies an offending nation, the Secretary of State must impose a sanction of an immediate reduction, by not less than fifty percent, of any effective allocation of fishing rights in the U.S. exclusive fishery zone. This amendment was specifically directed toward the protection of whales and automatically triggers sanctions once the Secretary of Commerce certifies that a nation is directly or indirectly conducting fishing operations or engaging in trade or a taking that diminishes the effectiveness of the ICRW. The Packwood Amendment does not alter the initial certification process, except that it adds a requirement for expedition. Certification under the Packwood Amendment also serves as certification under the Pelly Amendment.

III. A MAJOR CONTROVERSY: JAPAN WHALING ASSOCIATION V. AMERICAN CETACEAN SOCIETY

The IWC agreed in July of 1981 to ban the commercial killing of sperm whales in the Southern Hemisphere and North Atlantic Ocean. For the Western North Pacific areas, a quota was to be determined at a later time to allow for an update of scientific data, and no sperm whaling would be permitted until and unless a specific quota was set.¹¹ Out of concern that no quota would be

set, Japan objected to the IWC's decision and, therefore,¹² was not bound according to the ICRW.

The increase in membership by non-whaling nations enabled the IWC to take a significant step toward whale protection in 1982 by adopting a five-year moratorium on all commercial whaling to begin in 1986 and end in 1990.¹³ The purpose of the whaling moratorium was to permit regeneration of depleted whale populations and allow time for scientists to gather further information on whale stocks. The moratorium was accompanied by a provision calling for review and leaving open the possibility of resumption of whaling if the reassessment of whale populations indicated that they could sustain harvest catches.

Also at the July 1982 meeting of the IWC, Japan obtained quotas for the 1982-83 and 1983-84 harvest seasons. Such quota allocation had been contemplated by the IWC when providing for the three-year phase-in period prior to the beginning of the moratorium. The quota allocation was also part of a compromise effort to aid passage of the general whaling moratorium. Nevertheless, Japan filed a timely objection, and claimed that the moratorium lacked scientific justification and was inconsistent with the objectives of the convention.¹⁴ At the 1984 meeting, the IWC was unable to set a quota for the 1984-1985 season because of the lack of scientific data necessary to adequately estimate the population of the sperm whale stock.¹⁵ This resulted in a zero quota pursuant to the 1981 resolution and, therefore, any whaling during that season would be in excess of the permitted take. Japan's previous filing of a timely objection to the 1981 resolution released it from any obligation under the ICRW to comply with the zero quota.

Pursuant to its objections, Japan planned to continue harvesting whales in excess of the zero quota limits for the

10. 16 U.S.C. § 1821 (1982) (amendment to the Magnuson Fishery Conservation and Management Act).
11. Report of the United States Delegation to the 33rd Annual Meeting of the International Whaling Commission (1981).
12. Whaling Nations Object to IWC Regulations, 6 Whale Report No. 1 (Winter, 1982).
13. Report of the United States Delegation to the 34th Annual Meeting of the International Whaling Commission (1982).
14. 8 Marine Mammal News No. 11, Nov. 1982.
15. Report of the United States Delegation to the 36th Annual Meeting of the International Whaling Commission (1984).

1984-1985 season. Subsequently, the U.S. informed Japan that these actions could trigger the Pelly and Packwood amendments. Under the Packwood Amendment, certification would cost Japan an estimated \$230 million in fishing revenue.¹⁶

In response to the possibility of certification, Japan's Charge d'Affaires contacted Malcolm Baldrige, the Secretary of Commerce, in October of 1984 in an effort to avoid sanctions. Although the U.S. was concerned with enforcement of international whale conservation agreements, it also had an interest in avoiding certification. U.S. fish processors feared that Japan would retaliate by prohibiting fish exports from the U.S. into Japan. This strategy would have severe adverse economic repercussions in Alaska where two-thirds of the processors would face bankruptcy if the Japanese discontinued buying their fish.¹⁷ In addition, Japan could revoke existing salmon treaties with the U.S. at a cost of \$100 million to U.S. trade.¹⁸

Following a series of discussions and letters, the U.S. and Japan reached an executive agreement on November 13, 1984. Under the agreement, the Secretary agreed to forego certification if Japan withdrew its objection to the IWC quotas for the 1984-1985 and 1985-1986 harvest seasons of 400 each season. Furthermore, the U.S. agreed to permit Japan to harvest up to 200 sperm whales during each of the 1986-1987 and 1987-1988 seasons if Japan agreed to cease all commercial whaling by April 1, 1988, and withdraw its objection to the general moratorium by April 1, 1985. Finally, if Japan abided by its above agreements and conducted whaling activities in

accordance with the permitted quotas, the U.S. would not consider Japan to be diminishing the effectiveness of the IWC program for the purposes of U.S. law.¹⁹

Five days prior to the November 13, 1984 executive agreement, wildlife conservation groups filed suit in Federal District Court to compel certification of Japan and enforcement of sanctions.²⁰ The plaintiffs claimed that whaling in excess of IWC quotas diminished the effectiveness of the IWC conservation program, and, therefore, automatically triggered certification under the Pelly Amendment. The District Court ruled in favor of the plaintiffs, holding that the Secretary of Commerce had a nondiscretionary duty to certify Japan for whaling in excess of the IWC quota for sperm whales. The Court of Appeals affirmed the District Court's decision and ordered the Secretary of Commerce to certify Japan under the Pelly Amendment.²¹

The Japan Whaling Association appealed this decision to the U.S. Supreme Court²² and advanced three main arguments: First, Japan argued that the Pelly and Packwood amendments grant discretion to the Secretary in determining whether to certify a nation whose citizens whale in excess of an IWC quota. Second, once a nation files a timely objection to an IWC quota and exempts itself from the duty to abide by the quota, it is not in violation of the ICRW; and since Congress intended the Pelly and Packwood amendments to authorize certification only when a nation has violated the ICRW by failing to enforce lawfully binding quotas, certification would be inconsistent with the right to object under the ICRW. Third, the courts do not have the authority to

16. Nole, The U.S.-Japanese Whaling Accord: A Result of the Discretionary Loophole in the Packwood-Magnuson Amendment, 19 Geo. Wash. J. Int'l Law and Econ. 577 (1985).

17. 8 Marine Mammal News No. 7, July 1982.

18. Nole, Enforcement Questions of the International Whaling Commission: Are Exclusive Economic Zones the Solution?, 14 Cal. W. Int'l L. J. 114 (1984).

19. Letter from Yasushi Murazumi, Charge d'Affaires ad interim of Japan, to the Honorable Malcolm Baldrige, Secretary of Commerce (Nov. 13, 1984) and letter from Malcolm Baldrige to Yasushi Murazumi (Nov. 13, 1984), reprinted in Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, apps. K and L.

20. American Cetacean Society v. Baldrige, 604 F. Supp. 1398 (D.D.C.), aff'd, 768 F.2d 426 (D.C. Cir. 1985), rev'd, 106 S.Ct. 2860 (1986).

21. 768 F.2d 426 (D.C. Cir. 1985).

22. Japan Whaling Assoc. v. American Cetacean Soc'y, 106 S.Ct. 2860 (1986).

compel the executive branch to dishonor an international agreement; foreign relations is a matter exclusively entrusted to the Executive and Legislative Departments.²³

The American Cetacean Society responded with three main arguments. First, Congress has the power to pass legislation in the area of foreign affairs, and the courts have authority to review executive conduct that is contrary to legislative intent. Second, a congressional act is a declaration of public interest and public policy. When "any person" sustains an injury because an executive branch officer refuses to perform a non-discretionary duty, the courts have the authority to command action in compliance with that duty. Third, a nation's contravention of the IWC moratorium and nonobservance of a zero quota set by the IWC, by definition "diminishes the effectiveness" of the IWC's program of whale conservation. Under these circumstances, certification is mandatory and the Secretary may not ignore the plain language of the statute.²⁴

The Supreme Court first addressed whether, under the political question doctrine, the Court lacked authority to review the case because it involved foreign relations. In finding that it has proper authority to review, the Court stated that the Constitution and prior case law empower the Court to interpret treaties, executive agreements, and congressional legislation. Although the political doctrine excludes from judicial review controversies surrounding policy choices and value determinations constitutionally reserved to Congress or the Executive Branch, not every matter affecting politics is a political question. This challenge of the Secretary's duty under the Pelly and Packwood amendments presents a purely legal question of statutory interpretation and, therefore, is held to be within the purview of the Court's review.

Having established justiciability, the Court reached the merits of the case and focused on statutory construction. The Court addressed a two-part question: First, does whaling in excess of an IWC quota necessarily diminish the effectiveness of the ICRW? If not, then the issue becomes whether the Secretary construed the statutes reasonably when

he concluded that under these particular circumstances, certification was not required.

The Court concluded that Japan's whaling in excess of the IWC quota did not per se diminish the effectiveness of the conservation program and, therefore, the Secretary was not required to certify Japan. Furthermore, the Secretary reasonably construed the statutes in determining under the circumstances that conservation ends would be better served by accepting Japan's promises to limit its catches for four years and to ultimately cease all commercial whaling by 1988 rather than imposing sanctions and risking continuation of Japanese whaling.

While it is possible that Congress intended that any nonobservance of an IWC quota "diminishes the effectiveness" of the ICRW, it is also possible that Congress contemplated that the Secretary consider all the circumstances surrounding a nation's conduct before making a determination. Here, the Secretary first consulted with the U.S. Commissioner to the IWC and reviewed the Scientific Committee's opinions, then determined that conservation ends would be best served by accepting Japan's promises rather than imposing sanctions and risking continued Japanese whaling. The Court concluded that the Secretary was reasonable in construing the statutes to allow for consideration of the circumstances.

The next step in the Court's analysis was an examination of the Packwood Amendment, designed to remove executive discretion once the Secretary has made a certification. In Senator Packwood's words, the purpose was "to put real economic teeth into our whale conservation efforts," by imposing an automatic economic penalty until the offending nation rectifies its transgression. Nevertheless, the certification standard under the Pelly Amendment, requiring the Secretary to determine whether the particular whaling operation diminishes the effectiveness of the ICRW, is the same standard for certification under the Packwood Amendment. The Court found no indication that the certification standard was modified to require certification upon each and every departure from an IWC whaling schedule. The Court also noted that in 1984, Packwood proposed

23. Brief for Appellant, Japan Whaling Association, Japan Whaling Assoc. v. American Cetacean Soc'y, 106 S.Ct. 2860 (1986).

24. Brief for Respondant, American Cetacean Society, Japan Whaling Assoc. v. American Cetacean Soc'y, 106 S.Ct. 2860 (1986).

mandatory, automatic certification if a nation exceeds an IWC quota, but Congress defeated the proposal. Thus, the legislative history behind the Packwood Amendment did not indicate congressional intent that the Secretary certify a nation every time its nations take more whales than is permitted under an IWC schedule.

Thus, although the Court found in the legislative history of the two amendments "scattered statements hinting at the per se rule," read as a whole, there was no clear indication that all nonobservances of IWC quotas, regardless of the circumstances, automatically trigger certification. Therefore, the Court found the Secretary's construction of the statutes reasonable and not contrary to either Congress' express language or its intent and upheld the agreement with Japan.

IV. SUBSEQUENT DEVELOPMENTS: THE IWC MORATORIUM REMAINS IN EFFECT, WHALING CONTINUES UNDER EXEMPTIONS, AND THE U.S. IMPOSES SANCTIONS IN SOME CASES

The U.S.-Japanese agreement, as upheld, binds Japan to cease all commercial whaling by April 1988. Japan post-dated withdrawal of its objection to the moratorium with three separate dates for Antarctic minke whaling (May 1987), coastal Bryde's and minke whaling (October 1987) and coastal sperm whaling (April 1988).²⁵ However, conservationists expect Japan either to seek renegotiation as the 1988 commercial whaling deadline approaches, or to attempt to re-characterize its whaling as "research" or "aboriginal subsistence." Conservationists also believe that the Supreme Court has opened the door for other whaling nations to seek similar relief from U.S. sanctions.²⁶

A. The Commercial Whaling Moratorium: Whaling Nations' Activities and U.S. Responses

The year 1986 marked the beginning of a new phase for the IWC as the com-

mercial moratorium went into effect and will continue until 1990. The general objective of the ban is to enable an in-depth evaluation of the status of whale stocks and an examination of alternative management plans. Specifically, a special committee of the IWC Scientific Committee (SC) advises the IWC which, in turn, must undertake a comprehensive assessment of the moratorium's effect on whale stocks and consider modification of any catch limits.²⁷

The SC met in April 1986 to plan for the comprehensive assessment, identify specific tasks and priorities, and set a timetable for the assessment. Representatives of the Marine Mammal Commission and the National Marine Fisheries Service attended the SC meeting on behalf of the U.S. The special committee proposed, and the full SC endorsed, a seven-point work plan for the comprehensive assessment which will involve recurring reviews of individual whale stocks. The plan includes the following steps: an inventory of current knowledge of whale stocks; a study of methodological problems involved in determining stock identity and population trends; a parallel examination of the availability of relevant data; a review of scientific aspects of alternative management procedures; preparation of a second-round inventory; an examination of general aspects of whale population dynamics; and preparation of a third-round inventory. The SC also approved a timetable that allows for completion by 1990 of an interim report on the comprehensive assessment covering the major whale stocks.²⁸

Three member governments--Japan, Norway, and the U.S.S.R.--continued to have outstanding objections to the moratorium and technically were under no obligation to comply. During 1986, all three nations exercised rights arising out of their objections to take whales commercially. All other members refrained from commercial whaling.²⁹ In accordance with the U.S.-Japan agreement, Japan adhered to its promise to limit its commercial harvesting of whales, and the Secretary has not certi-

25. 11 Marine Policy No. 1, Jan. 1987.

26. 4 CEE Report No. 3, Aug. 1986.

27. 11 Marine Policy No. 1, Jan. 1987.

28. Report of the United States Delegation to the 38th Annual Meeting of the International Whaling Commission (1986); Marine Mammal Commission, Annual Report of the Marine Mammal Commission, a Report to Congress (1986).

29. Id.

fied Japan under the Pelly or Packwood amendments.³⁰

The Soviets announced at the 1985 IWC meeting that they would temporarily suspend commercial whaling beginning in the 1987-1988 Antarctic whaling season due to technical reasons and subsequently announced they had halted commercial whaling as their ships departed the Antarctic grounds.³¹ However, other whaling activities conducted by the Soviet Union and Norway have been certified by the Secretary of Commerce as diminishing the effectiveness of the IWC conservation program.

On April 1, 1985, the Secretary of Commerce certified the Soviet Union for whaling activities that diminished the effectiveness of the IWC conservation program. According to a Presidential message, the Secretary based his determination on the following: (1) the Soviet harvest of Southern Hemisphere minke whales was greater than the level considered by the U.S. to be the U.S.S.R.'s traditional share; (2) the U.S.S.R. exceeded the 1984-1985 IWC quota for Southern Hemisphere minke whales; and (3) there was no indication that the Soviets intended to comply with IWC standards. Although the Soviet Union has objected to this quota and consequently is not bound by it, exceeding the quota is inconsistent with the international conservation standard and, in the absence of any indication of compliance with IWC standards, diminishes the effectiveness of the program.³²

The President exercised his discretionary power under the Pelly Amendment by choosing not to embargo Soviet fish products. This decision was based on

the following factors: (1) trade sanctions would not aid other administration efforts to change the Soviet whaling policy; (2) trade sanctions would have a negligible effect on the Soviet Union because most of the products imported into the U.S., such as king crab, are highly marketable elsewhere; and (3) an embargo could seriously harm U.S. fishing interests, causing a \$12 million loss in joint venture catches, subjecting the U.S.-U.S.S.R. joint-venture company to dissolution, and causing unemployment of U.S. fishermen and related workers. On the other hand, the mandatory sanctions of the Packwood Amendment operated to cut in half Soviet fishing allocations in the U.S. exclusive economic zone.³³

In 1986, Soviet whalers again exceeded the IWC quota for minke whales, and as a result, the U.S. withheld the entire fishery allocation for the Soviet Union. However, because the Soviet Union did not request a U.S. fishery allocation for 1986, this sanction had negligible effect in curtailing the offending whaling practices.³⁴

Norway also exercised its rights, preserved by its formal objection to the moratorium, and issued permits in 1986 to its coastal fishermen to harvest minke whales in the Northeast Atlantic.³⁵ When the U.S. discovered that Norwegian whalers had taken whales under their permits, Secretary Baldrige certified to the President on June 9, 1986, that Norwegian nationals were conducting fishing operations in a manner which was diminishing the effectiveness of the IWC.³⁶ The basis for the Secretary's decision was that Norway exceeded IWC quotas, conduct that was inconsistent with the international conservation

30. 4 CEE Report No. 2, May 1986.

31. See Report of the United States Delegation to the 37th Annual Meeting of the International Whaling Commission (1985); 29 Ocean Science News No. 20, May 1987; 13 Marine Mammal News Nos. 4/5, April/May 1987.

32. Message from the President of the United States, Whaling Activities of the Soviet Union, 99th Cong., 1st Sess., H. Doc. 99-74 (1985).

33. Id.

34. Marine Mammal Commission, Annual Report of the Marine Mammal Commission, a Report to Congress (1986).

35. Id.

36. 4 CEE Report No. 3, Aug. 1986; Marine Mammal Commission, Annual Report of the Marine Mammal Commission, a Report to Congress (1986); Message from the President of the United States, Whaling Activities of Norway, 99th Cong., 2d Sess., H. Doc. 99-251 (1986).

standard, and Norway had taken no remedial or mitigative actions.³⁷

The U.S. advised Norway of the certification action. Subsequently, on July 3, 1986, Norway announced that it would suspend commercial whaling after the 1987 whaling season. Norway also stated that it would reduce its 1987 domestic quota to less than the 1986 quota of 400 whales.³⁸ Norway expressed its intention to phase out commercial whaling in a manner which parallels the course of conduct negotiated between the U.S. and Japan for Japanese whaling. However, the phase-out plans of Norway and Japan differ in that Norway's announcement lacks a formal commitment to withdraw its objection to the moratorium.³⁹

Pursuant to the Pelly Amendment, the President notified Congress on August 4, 1986 of the actions taken in response to the certification. Because Norway's decision contemplates compliance with IWC objectives, and the effectiveness of the IWC conservation program depends on the voluntary compliance of member governments, the President reported that he would not impose sanctions. The President based his decision on the premise that Norway will cease commercial whaling after 1987 unless the IWC authorizes resumption. However, the certification will remain in effect until Norway withdraws its objections to the moratorium. During that time, the Secretary will monitor Norwegian whaling operations to determine whether sanctions become warranted.⁴⁰

Brazil's whaling activities were also the subject of concern in 1985, despite the fact that it filed no objection to the moratorium. However, Brazil declared in December of 1985 that it

would ban whale hunting off the Brazilian coast for five years as of January 1, 1986 in response to thousands of letters sent by school children.⁴¹

Although the government of the Philippines had not filed a timely objection to the moratorium, it had initially announced that it did not feel bound by the IWC program. Subsequently, the Philippine government changed its view and announced that a license for whaling was not reissued and that there would be no whaling in 1986. It also stated its policy to abide by the moratorium.⁴²

The moratorium on commercial whaling has been the most significant step taken by the IWC toward whale protection. However, the ICRW provides exemptions for certain aboriginal subsistence whaling and for taking whales for scientific research. Although whaling for these two purposes has been generally accepted by member nations, it is now feared that whaling nations may attempt to circumvent the moratorium and continue to whale commercially under the guise of one or both of these exemptions.⁴³

B. Aboriginal Subsistence Whaling Exemption

After the IWC decided in 1977 to ban all hunting of the bowhead whale, including hunts by native peoples, seventy whaling captains from nine Alaskan villages formed the Alaskan Eskimo Whaling Commission (AEWC). The Commission has three objectives: to ensure that the hunt is conducted in a traditional, non-wasteful manner; to educate the outside world as to the subsistence and cultural importance of the bowhead; and to promote scientific research on the bowhead

37. Id.

38. Id.

39. Marine Mammal Commission, Annual Report of the Marine Mammal Commission, a Report to Congress (1986).

40. Id.; 11 Marine Policy No. 1, Jan. 1987; Message from the President of the United States, Whaling Activities of Norway, 99th Cong., 2d Sess., H. Doc. 99-251 (1986); 4 CEE Report No. 4, Nov. 1986.

41. 4 CEE Report No. 2, May 1986.

42. 11 Marine Policy No. 1, Jan. 1987; Report of the United States Delegation to the 38th Annual Meeting of the International Whaling Commission (1986).

43. 4 CEE Report No. 4, Nov. 1986; 12 Marine Mammal News No. 11, Nov. 1986; 12 Marine Mammal News No. 12, Dec. 1986; Council on Ocean Law, Oceans Policy News, Oct.-Nov. 1986.

so as to ensure its continued existence.⁴⁴

From 1977 to 1981, the AEWG proposed catch limits to meet the subsistence and cultural needs of the Alaskan natives. Each year, a compromise was struck at the annual meeting of the IWC and the Eskimos' quota was much lower than hoped for. The AEWG twice sought judicial relief in the U.S. to no avail due to the complex foreign policy considerations at stake.⁴⁵

As a result of determined U.S. efforts to set satisfactory quotas for the Alaskan Eskimos, the IWC in 1982 established management principles and procedures to govern aboriginal subsistence whaling. The IWC formally recognized the distinction between commercial and aboriginal subsistence whaling and resolved to strike a proper balance between the needs of aboriginal people who depend on limited whaling to meet subsistence, cultural, and nutritional needs and the conservation needs of the affected whales. The IWC agreed to appoint a subcommittee on aboriginal subsistence whaling to develop management principles, review needs, and set allowable catches.⁴⁶ Although the IWC has never formally defined "aboriginal subsistence," the term is generally applied to whaling for subsistence, cultural, and nutritional needs.

The IWC must now confront defining and limiting aboriginal subsistence whaling. Originally, native peoples hunted within a limited area near their settlements and used traditional primitive techniques for the purpose of securing food, clothing, and material for constructing dwellings and tools. However, the modern day native community

generally has a different structure due to regional development and competition with commercial hunting of the same resources. Since natives now sometimes hunt with technologically advanced weaponry, it becomes more difficult to distinguish aboriginal from commercial whaling.⁴⁷

Another issue the IWC faces concerns the methods used by native peoples in their hunts. The IWC recognizes that all whaling should be conducted in a humane manner with up-to-date technology, but this can conflict with aboriginal whaling practices. Nevertheless, the IWC recently agreed that an effort should be made to achieve humaneness in all whaling activities.⁴⁸ The Alaskan Eskimos have funded research in Norway that has led to a new harpoon bomb that will undergo testing. If successful, it may be used in Alaska by 1988.⁴⁹

While the IWC deals with aboriginal subsistence, whaling needs continue to be recognized. The IWC Schedule specifies quotas for whale species that may be hunted for aboriginal or subsistence purposes. In addition to bowheads allocated to Alaskan Eskimos, aboriginal subsistence whaling is allowed for gray whales in the Eastern North Pacific, minke off West Greenland, and humpbacks in the Bering Sea for American and Canadian Eskimos.⁵⁰

In 1985, the IWC set a bowhead whale catch limit of 26 strikes per year through 1987 and allowed unused strikes to be carried over to the subsequent year with a maximum of 32 strikes in any one year. However, it was unclear whether the 1985 quota allocation's language permitted carrying over the unused strikes for two or more years

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44. O'Brien, Undercuts in International Law: A Tale of Two Treaties, 9-10 *Canada-U.S. L.J.* 1 (1985).
 45. Adams v. Vance, 570 F.2d 950 (D.C. Cir. 1977); Hopkins v. Kreps, 462 F. Supp. 1374 (D. Alaska 1979). See Ocean Law Memo No. 16, Nov. 1979.
 46. Report of the United States Delegation to the 34th Annual Meeting of the International Whaling Commission (1982).
 47. O. Hertz and F. O. Kapel, Commercial and Subsistence Hunting of Marine Mammals, 15 *Ambio* No. 3, 1986.
 48. Report of the United States Delegation to the 38th Annual Meeting of the International Whaling Commission (1986).
 49. 13 *Marine Mammal News* No. 3, March 1987.
 50. Report of the United States Delegation to the 38th Annual Meeting of the International Whaling Commission (1986); Report of the United States Delegation to the 37th Annual Meeting of the International Whaling Commission (1985).

until they are used, or if it only allowed them to be carried over to the following year.⁵¹

1987 marked the end of the three-year allocation and the AEWC hoped to receive approval of an increase in its bowhead allocation at the June 1987 meeting of the IWC. Although the AEWC has disagreed with estimates of bowhead stock size and has been dissatisfied with its bowhead allocations, the situation has improved based on the increased kill-to-strike ratio representing an increase in efficiency from thirty-three percent ten years ago to sixty-nine percent today. The IWC at its June 1987 meeting voted to allow 32 strikes in 1987 and 35 in 1988.⁵²

In addition to the U.S. interest in aboriginal subsistence whaling, the Soviet Union reported that it was conducting studies on the specific uses of whale products by its aboriginal population.⁵³ The Soviets planned to submit documentation of the studies at the June 1987 meeting.⁵⁴ Since May 1986 Japan allegedly has used gray whales taken pursuant to a Soviet "aboriginal" quota to feed mink at fur farms.⁵⁵ If true, this conduct is questionable under the aboriginal exemption and could be raised as an issue when the IWC considers further quota allocations.

Although Japan does not currently conduct whaling under the aboriginal subsistence exemption, it presented a paper at the June 1986 IWC meeting supporting reclassification of its coastal whaling as noncommercial. Japan claims that the small-type coastal whaling, important to its fishing communities,

has some characteristics similar to aboriginal subsistence whaling. The IWC responded with questions concerning the whaling operations and disposition of the whale meat and other products. Japan agreed to resubmit a revised paper at the June 1987 meeting to address these questions.⁵⁶

While the IWC could categorize Japanese coastal whaling as "aboriginal," or adopt a new category of permissible whaling covering traditional whaling by Japan's small coastal villages, it is not likely that Japan will get the required three-fourths majority to agree. Similarly, Norway has considered proposing a "subsistence" exemption for its coastal whaling, but presently Norwegian commercial whaling is being reduced in favor of research whaling.⁵⁷

C. Scientific Research Exemption

The ICRW allows nations to issue scientific permits for killing whales without obtaining prior approval of the IWC. In 1979 the Schedule was amended and paragraph 30 now requires a government wishing to conduct scientific whaling to submit the proposed scientific permits to the SC before issuance.⁵⁸ The proposals must be submitted in sufficient time to allow the SC to review and comment on them. In addition, the permits should specify: (a) the objectives of the research; (b) the number, sex, size, and stock of the animals to be taken; (c) opportunities for participation in the research by scientists of other nations; and (d) possible effects on conservation of the stock.

In 1985 the SC formulated a series

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51. 4 CEE Report No. 2, May 1986; 12 Marine Mammal News No. 11, Nov. 1986; 13 Marine Mammal News No. 3, March 1987.
 52. 29 Ocean Science News No. 24, June 1987; 12 Marine Mammal News No. 11, Nov. 1986.
 53. Report of the United States Delegation to the 37th Annual Meeting of the International Whaling Commission (1985).
 54. Report of the United States Delegation to the 38th Annual Meeting of the International Whaling Commission (1986).
 55. 4 CEE Report No. 2, May 1986.
 56. Report of the United States Delegation to the 38th Annual Meeting of the International Whaling Commission (1986); 4 CEE Report No. 2, May 1986.
 57. 4 CEE Report No. 2, May 1986.
 58. 11 Marine Policy No. 1, Jan. 1987; Report of the United States Delegation to the International Whaling Commission (1979).

of guidelines to improve its effectiveness in reviewing proposed scientific permits.⁵⁹ In reviewing permits, the SC would cover information on the status of stocks, comments on methodology, the likelihood of achieving the stated objectives, participation by scientists from other nations, and the possible effect on conservation of the stock.

Other than the 1979 amendment and the 1983 guidelines, whaling for scientific research was rarely discussed at the IWC meetings until the moratorium's effective date approached and whaling nations began to consider alternative ways to continue whaling. For example, in 1981 the SC recommended permits not be issued for catching nine fin whales a year under a "scientific project" submitted by Greenland. Greenland rejected the SC's advice and took nine whales a year until 1985. Iceland, which did not file an objection to the moratorium, proposed in 1985 to issue scientific permits for the taking of 200 whales a year until 1990,⁶⁰ then reduced the figure to 120 in 1987. The stated purpose was to investigate the effect of the whale on the ecosystem, the repercussions of total protection of all whales, and the distribution of whale populations. The official Marine Research Institute of Ireland entered into a contract with a fisheries company whereby after scientific study, the company would process the whale carcasses, sell the meat for human consumption, market the whale products, and make a payment for each whale to offset the research costs.⁶¹ Iceland planned to sell the meat to Japan to finance the research, but argued that this conduct did not constitute "commercial whaling" as some IWC members viewed the arrangement.⁶²

The SC was divided on the questions of scientific justification for the proposal, the extent to which the proposal satisfied the guidelines adopted in 1985, and the appropriateness of providing advice to Iceland other than mere comments in accordance with the guidelines. A majority of the SC commented that the research proposed would provide only a marginal improvement in knowledge required for management purposes.⁶³

Similarly, South Korea's proposal for scientific research submitted in 1985 was found to be deficient in the information requested pursuant to paragraph 30 of the Schedule.⁶⁴ Subsequently, South Korea suspended its research whaling program after U.S. officials threatened certification.⁶⁵

At the 1985 IWC meeting, conservationists argued that if Iceland issued permits despite the SC's criticisms, the IWC should prohibit the sale of meat and products. Although the IWC has no authority to impose such a restriction under the ICRW, conservationists urged the IWC to adopt a commendatory resolution to this effect.

In light of the fact that other whaling nations including Norway have indicated a desire to conduct research whaling, and that all of these countries have consistently exported their whale meat to Japan, the IWC adopted a resolution in 1985.⁶⁶ The resolution establishes a working group to study a proposal by Sweden that further defines the basis on which scientific permits should be issued and recommends actions that the IWC should take concerning issuing permits and engaging in trade of products from whales taken under the permits. The resolution also urges govern-

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59. Report of the United States Delegation to the 37th Annual Meeting of the International Whaling Commission (1985).
 60. 11 Marine Policy No. 1, Jan. 1987; Report of the United States Delegation to the 37th Annual Meeting of the International Whaling Commission (1985).
 61. 11 Marine Policy No. 1, Jan. 1987.
 62. 4 CEE Report No. 3, Aug. 1986.
 63. Report of the United States Delegation to the 37th Annual Meeting of the International Whaling Commission (1985).
 64. Id.
 65. 4 CEE Report No. 4, Nov. 1986; Council on Ocean Law, Oceans Policy News, Oct.-Nov. 1986.
 66. 4 CEE Report No. 3, Aug. 1986; Report of the United States Delegation to the 37th Annual Meeting of the International Whaling Commission (1985).

ments proposing issuance of scientific permits during the period of the moratorium to take account of the serious concerns expressed by the IWC regarding the possibility that such "research" whaling could assume characteristics of commercial whaling. In addition, the IWC invited nations to ensure that any scientific whaling be conducted in strict accordance with scientific requirements and to take into account the advice and guidelines of the SC.

Scientific whaling was also the subject of much debate at the 1986 meeting of the IWC.⁶⁷ The Swedish resolution, first proposed at the 1985 meeting, was the lengthiest and most significant in the negotiations that took place. Generally, the IWC recommends that governments wishing to conduct scientific whaling comply with paragraph 30 of the Schedule as amended in 1979, take into account the SC's guidelines and comments, and limit their take to the need or completion of the research project at hand. The IWC also recommends that governments, when considering research whaling, and the SC, when reviewing the permits, take into account whether: (1) the research objective could be accomplished through non-lethal techniques; (2) the research is essential for management of whale stocks; (3) the number, age, and sex of whales taken are necessary to complete the research; and (4) whales will be killed in a permitted manner. Most importantly, the IWC recommends that "following the completion of scientific treatment the meat as well as the other products should be utilized primarily for local consumption." This resolution represents a compromise between those nations urging that international trade in products from scientific whaling be prohibited altogether and those nations opposing a prohibition because of either vested interests in whaling or concern about possible IWC infringement on sovereign rights of free trade.⁶⁸

In addition to the resolution, the IWC reviewed comments by the SC on a revised research program proposed by Iceland and another proposal by Korea.⁶⁹ The SC reaffirmed its comments from 1985 for both proposals. Korea terminated its research program in July of 1986 but may resume activity depending on whether the U.S. begins certifying countries for "diminishing the effectiveness" of the IWC by "research" whaling that results in whale meat exports to Japan.⁷⁰

Iceland, on the other hand, pursued its research whaling program shortly after the IWC meeting. On August 8, 1986, Secretary of Commerce Baldrige issued a statement that expressed U.S. disapproval of Iceland's continuation of whaling activities. The Secretary determined that certification and imposition of sanctions under the Pelly Amendment would not be necessary if Iceland limited its exports of whale meat to less than forty-nine percent of the total taken under research permits.⁷¹

Iceland now faces problems in using the whale meat produced by its research activities "primarily for local consumption" by exporting less than forty-nine percent to avoid U.S. sanctions. Its internal market for human consumption can only absorb about ten percent of the research catch. Because of this, Iceland has interpreted that "consumption" need not be by humans, and will end up feeding much of the meat to mink and fox on fur farms. The government of Iceland is trying to find new ways to utilize whale meat and is urging citizens to add more whale meat to their diets.⁷²

After the U.S. announced it would not certify Iceland if export limits were adhered to, Japan, which provides the largest market for whale meat, indicated an interest in importing whale meat and was concerned as to how the U.S. would respond.⁷³ It was reported

67. Report of the United States Delegation to the 38th Annual Meeting of the International Whaling Commission (1986).

68. 11 Marine Policy No. 1, Jan. 1987.

69. Report of the United States Delegation to the 38th Annual Meeting of the International Whaling Commission (1986).

70. 4 CEE Report No. 4, Nov. 1986; 12 Marine Mammal News No. 11, Nov. 1986.

71. 12 Marine Mammal News No. 11, Nov. 1986; Council on Ocean Law, Oceans Policy News, Oct.-Nov. 1986.

72. 11 Marine Policy No. 1, Jan. 1987.

73. Council on Ocean Law, Oceans Policy News, Oct.-Nov. 1986.

that there is an "understanding" between the U.S. and Japan that importation of whale meat in violation of the IWC moratorium would raise the possibility of certification and sanctions imposed on Japan. Accordingly, the U.S. responded to the Japanese inquiry by stating that it was not the policy of the U.S. to encourage importation of whale meat and the Pelly Amendment could be invoked if such trade occurred.⁷⁴ Meanwhile, Secretary of Commerce Malcolm Baldrige allowed Japan to import up to forty-nine percent of the whale meat produced by Iceland's scientific whaling and decided not to certify either Iceland or Japan.⁷⁵

Conservationists claim that under the 1984 U.S.-Japan agreement, Japan cannot import whale meat from whaling nations. In response, the Commerce Department argued that Japan's importation of whale meat was not contrary to the agreement because Iceland's whaling was "scientific," not commercial.⁷⁶

Norway has announced that it will employ "some vessels in scientifically based whaling."⁷⁷ Norway also has stated that if the IWC establishes criteria for scientific whaling, the IWC will be setting a precedent for restricting the freedom of scientific research.⁷⁸

Japan also has expressed interest in research whaling. Japan argues that scientific research on whales should be encouraged because whales are a renewable resource that should be utilized under conservation measures for future generations' benefit. In April 1987 the Japanese government announced that Japanese commercial whaling had ended in the Antarctic but that "research whaling" would continue there

with the taking of 875 minke and 50 male sperm whales late in 1987, roughly half of Japan's 1986-1987 commercial quota for those two species.⁷⁹

Similarly, the Philippine government issued a statement at the June 1986 meeting that hinted at possible plans to conduct research whaling.⁸⁰ Although the Philippine government had announced their intent to abide by the moratorium, it later stressed the need for its research community to understand the biological data on whales traversing its 200-mile exclusive economic zone. The statement came in 1985 just after the resolution on scientific permits was watered down, and conservationists believe that it was another attempt to circumvent the moratorium since virtually all Philippine whale meat is exported to Japan.⁸¹

The rationale for these scientific proposals is that the current IWC moratorium on commercial whaling calls for a comprehensive assessment of whale stocks by 1990, and the taking of whales is necessary to undertake the assessment.⁸² However, the IWC has not yet established a connection between the comprehensive assessment and the need to conduct scientific research by taking whales.⁸³ The U.S. will be in a difficult position as more whaling nations propose scientific research, possibly to circumvent both the moratorium and U.S. sanctions.

V. THE JUNE 1987 IWC MEETING

The major issues for the 39th annual meeting of the IWC were planning for the comprehensive assessment of world whale stocks as required by the moratorium, establishing quotas for

74. Council on Ocean Law, Oceans Policy News, Oct.-Nov. 1986.

75. 5 CEE Report No. 1, Feb. 1987.

76. 5 CEE Report No. 1, Feb. 1987.

77. 12 Marine Mammal News No. 12, Dec. 1986.

78. 12 Marine Mammal News No. 12, Dec. 1986.

79. 12 Marine Mammal News No. 11, Nov. 1986; 13 Marine Mammal News Nos. 4/5, April/May 1987; 29 Ocean Science News No. 36, Sept. 29, 1987.

80. 4 CEE Report No. 3, Aug. 1986.

81. 4 CEE Report No. 3, Aug. 1986.

82. 12 Marine Mammal News No. 12, Dec. 1986.

83. 13 Marine Mammal News No. 3, March 1987.

aboriginal subsistence whaling, and reviewing special permits for scientific research. While some countries proposed specific criteria for scientific research and a stronger resolution restricting export of the whale meat produced by the research, other nations claimed that the IWC should not restrict scientific freedom or international trade.

At the June 1987 meeting the IWC adopted a general resolution which sets out criteria for the SC to follow in reviewing research whaling proposals. Those criteria are that the research (1) address a question important to the comprehensive assessment or other critically important research needs; (2) be conducted without effect on the status, trends or comprehensive assessment of such stock; (3) address a question that can not be otherwise addressed and/or use non-lethal techniques; (4) be likely to yield reliable answers. Next, the SC will notify any government whose proposal does not meet IWC standards and ask that government not to issue or revoke existing permits.

The IWC passed three more resolutions asking Iceland, Japan, and South Korea to "refrain from issuing or revoke scientific permits either currently in force or proposed."⁸⁴ These three member nations had expressed plans to continue "research whaling" despite the commercial moratorium. Iceland contends that these were illegal actions under the 1946 International Convention on the Regulation of Whaling. Both Iceland and Japan said they may pull out of the IWC, with Japan's commissioner Tatsuo Saito announcing his resignation. In response the IWC created a new working group "charged with the responsibility of examining questions related to their operation of that convention."⁸⁵

The U.S.S.R. did not occupy a prominent position at this years meeting, but it has said that it will suspend its whaling. However, "scientific" whaling remains a possibility for Norway and will be carried out by Iceland pursuant to a September 1987 executive agreement with the United States under which the U.S. agrees not to seek sanctions so long as Iceland submits its program (under which 80 fin whales and 20 sei whales would be taken in 1987) to the IWC scientific committee for review and

follows whatever scientific recommendations the committee makes.⁸⁶

If IWC guidelines for scientific research are followed and enforced, and more specific criteria established so that whaling actually contributes to a greater understanding of whale stocks, then the U.S. probably will not certify countries for conducting scientific programs. However, the looser the criteria and compliance with them, and the more whale meat sold to Japan, the more "scientific" whaling will look like commercial whaling, diminishing the effectiveness of the IWC and giving rise to possible U.S. sanctions.

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updated by
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84. 13 Marine Mammal News Nos. 6/7, June/July 1987.

85. Id.

86. 29 Ocean Science News No. 34, September 16, 1987.

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