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## The International Organization of Whales

### Keywords

Fishing, International Organization, Evidence, Law of the Sea, Natural Resources Law, Science and Technology, Scientific Evidence, Animal Law, Marine Resources, Regulation

# The International Organization of Whales

PATRICIA BIRNIE\*

## I. THE CHANGING PERSPECTIVE OF WHALE MANAGEMENT

The great whales are the largest living creatures on earth and their preservation presents a major challenge to international law. For hundreds of years the exploitation of whales<sup>1</sup> remained unorganized at the international level. Whales have been regarded as a common property resource of the high seas,<sup>2</sup> subject to the prevailing doctrine of freedom of fishing. This doctrine of open access to living resources led to overexploitation and the decline of several stocks of whales,<sup>3</sup> endangering even those captured by Alaskan Eskimos. Whales, as warmblooded marine mammals,<sup>4</sup> have many characteristics which make them particularly vulnerable and attractive to capture.

Until the twentieth century there were no management bodies for the protection of whales from overexploitation. During the present century the need for international conservation, at least to sustain the industry, began to be appreciated by most whaling states. This was first evidenced by the League of Nations activities in the 1930's and later by the establishment of the International Whaling Commission (IWC) in 1946). Uni-

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1. Including blue, fin, sei, sperm, humpback, gray, Bryde's, minke, North Atlantic, North Pacific, Greenland, and Southern Right whales. These cetaceans in general are a small group of 80-100 species of marine mammals with special characteristics rendering them unique. There are two sub-orders: (1) Mysticetes - baleen whales feeding mainly on the shrimp-like krill, and (2) Odontocetes - toothed whales feeding on fish, birds and other cetaceans. For further details, see: INTERNATIONAL WHALING COMMISSION, THE LIVES OF WHALES FACTSHEET; Gambel, *Whale Conservation - Role of the International Whaling Commission*, 1 MARINE POLICY 301 (1977); T. VAUGHAN, MAMMALOGY (1972); J.N. TONNESSEN and A.O. JOHNSEN, THE HISTORY OF MODERN WHALING (1982); Scarff, *The International Management of Whales, Dolphins and Porpoises: An Interdisciplinary Assessment*, 6 ECOLOGY L.Q. 323 (1978) [which includes comprehensive bibliographic references].

2. For a full account of the problems of common property resources, see F. CHRISTY & A. SCOTT, THE COMMON WEALTH IN OCEAN FISHERIES (1965), especially Ch. 3, "The Characteristics of the Common Property Resources," and Ch. 6, "Common Property, Open Access and the Common Heritage."

3. For the background to this problem, see Scarff, *supra* note 1, at 623-3. For a current understanding of this problem, see, *Preparations for the 34th International Whaling Commission Meeting: Hearing Before the Subcomm. on Human Rights and International Organization of the House Comm. on Foreign Affairs*, 97th Cong., 2nd Sess. 343 (1982). See also publications of the International Whaling Commission: *U.S. Report on Aboriginal Subsistence Whaling of the Bowhead Whale by Alaskan Eskimos*, IWC Doc. IWC/34/37 (June, 1982); *Alaska Eskimo Whaling Commission First Conference on the Biology of the Bowhead Whale Balaena Mysticetus*, IWC Doc. IWC/34/11E (January, 1982).

4. For the special characteristics of marine mammals, see Vaughan, *supra* note 1.

lateral action could not solve the problem because whales migrate through the jurisdictional zones of many states and are found (though not necessarily commercially exploited) in the waters of most coastal states. International cooperation is essential to conservation. This cooperation is especially imperative in view of factors such as pollution and harassment which affect recovery of stocks.

The United Nations Conference on the Human Environment (UNCHE, described *infra*)<sup>5</sup> in 1972 focused public attention on the overexploitation of whale-related environmental problems. It laid down several principles concerning the preservation of habitats, the need for states to prevent activities under their control from causing damage to other states' environments, coordinating efforts of international organizations to protect the environment.

The UNCHE principles are not binding but have provided important norms for the development of international environmental law and preservation of wildlife. An Action Plan of Recommendations<sup>6</sup> was adopted in conjunction with the principles which directly commended to governments appropriate national action. The principles provide that Governments should enact international conventions: to protect species which inhabit international waters or migrate from one territory to another, to protect representative ecosystems of international significance; to strengthen the IWC; to increase international research efforts on whales; and to urgently call, under IWC auspices, for a ten year moratorium on commercial whaling. The principles stressed the need for governments, the UN and its organizations, especially the Food and Agriculture Organization (FAO), to support the recommendations of the various international fisheries organizations (e.g. the ICCAT<sup>7</sup> and ITTC<sup>8</sup>). Participating in the Third United Nations Conference on the Law of the Sea (UNCLOS III) was also considered crucial.<sup>9</sup>

The UNCHE realized that the protection of marine resources requires collaboration among international regional and national fishery bodies, and that the collecting and sharing of data on living aquatic resources are essential. The UNCHE therefore urged governments and U.N. bodies to strengthen existing international and regional machinery for the development and management of fisheries. It asked that a conference be convened to adopt a convention on the export, import and transit of cer-

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5. Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June, 1972, U.N. Doc. A/CONF.48/14/Rev. 1 [hereinafter cited as *UNCHE Report*], 3-5.

6. The Action Plan consisted of 109 recommendations. See *UNCHE Report, supra* note 5, at 6-27. Relevant recommendations are at 16-17.

7. International Commission for the Conservation of Atlantic Tuna. See *infra* note 51.

8. International Tropical Tuna Commission. See *infra* note 52.

9. United Nations Convention on the Law of the Sea, Oct. 7, 1982, U.N. Doc. A/CONF.62/1982 and Draft Final Act of the U.N. Conf. on the Law of the Sea, Oct. 21, 1982, U.N. Doc. A/CONF. 62/121 (1982).

tain species of wild animals and plants. The strengthened IWC, and the conventions in the fields of Trade in Endangered Species,<sup>10</sup> Conservation of Migratory Species,<sup>11</sup> Antarctic Marine Living Resources,<sup>12</sup> and European Habitats<sup>13</sup> all subsequently followed, yet both the IWC and the UNCHE are popularly supposed to have failed. This article proposes that the UNCHE provided the impetus for new guidelines, conventions and institutions to protect whales. It also proposes that the IWC is but one International organization which is equipped to deal with whale-related environmental problems. Conservationists should become aware of the variety, breadth and interrelationship of measures now available in order to achieve the UNCHE objectives. As part of a global strategy, the new measures require wide adoption, application and enforcement.

The role of major existing organizations concerned with whale conservation will first be examined, including those with broad conservation concerns, those concerned with regulating whaling for maintenance of food supply, and those concerned with industrial or cultural potential. After examining the organizations' approach and progress, new conventions contributing to the protection of cetaceans will be considered.

## II. UN ORGANIZATIONS

### A. *The United Nations Environmental Programme (UNEP)*

#### A.1. *The Action Programme*

The UNCHE established the United Nations Environmental Programme (UNEP) to further its objective of environmental protection. Its component parts are: Governing Council of 58 states which promotes international cooperation, creates policy guidelines, and reviews implementation of environmental programs within the UN system; an Environment Secretariat which puts forward environmental programs, and coordinates within the UN system to ensure effective management; and lastly, a modest Environment Fund.

The work of the UNEP and other environment-related UN bodies is coordinated by the UN's Administrative Co-ordinating Committee (ACC). Although its Standing Sub-Committee on Marine Affairs has been disbanded, it reconvenes if required.

The UNEP has established priority areas for its activities. One priority area is the oceans, monitoring the effects of pollutants upon aquatic

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10. Convention on International Trade in Endangered Species of Wild Flora and Fauna, March 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249, *reprinted in* 12 I.L.M. 1085.

11. Convention on the Conservation of Migratory Species of Wild Animals, June 3, 1979, 19 I.L.M. 11 (not in force).

12. Convention on the Conservation of Antarctic Marine Living Resources, May, 1980, 19 I.L.M. 837.

13. Convention on the Conservation of European Wildlife and Natural Habitats, Sept. 19, 1979, Council of Europe Treaty Series No. 104.

living resources<sup>14</sup> Another priority area is the problem of common resources. UNEP's first Executive Director, Maurice Strong, was quick to point out that the "tragedy of the commons"<sup>15</sup> i.e., the lack of responsibility for common resources (such as whales) and the "what belongs to everyone belongs to no one" syndrome.<sup>16</sup> A crucial link in the environmental strategy of UNEP is the development of international instruments, including international environmental law.<sup>17</sup> UNEP has therefore taken part in most of the conferences and organizations concerned with whale conservation referred to in this article, and has gained observer status at the IWC.

#### A.2. *UNEP's Guiding Principles for Shared Natural Resources*

In 1978, UNEP adopted a set of 15 Guiding Principles for Natural Resources Shared by States.<sup>18</sup> They are not binding per se. Rather, they set forth guidelines for those states which want to encourage cooperating in research, scientific information and management. A few states regard the principles as part of customary international law, while others have declared reservations.<sup>19</sup> The principles were expressed in disappointingly general terms representing political compromises. Nonetheless, they are a set forward since they stress the need for cooperation among states. Cooperation is encouraged in conserving shared natural resources, controlling adverse environmental effects, concluding bilateral and multilateral agreements to apply the principles in a legally binding manner, and in establishing institutional structures to enable consultation on resources.

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14. United Nations Environmental Programme, 3rd Session, 1975, Proposed Programme, UNEP/GC/31, 11 February 1975 at 37. The UNEP Governing Council entrusts surveying of marine living resources, however, to the U.N. Food and Agriculture Organization.

15. See Hardin, *The Tragedy of the Commons*, 2 SCIENCE 1243 (1968), No. 3859. Hardin concluded, *id.* at 1244, that "the inherent logic of the commons remorselessly generates tragedy."

16. United Nations Environmental Programme, Proposed Programme, *supra* note 14.

17. *Id.* at 54.

18. Draft Principles of Conduct in the Field of the Environment for the Conduct of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States, 31 (COM) UNEP/GC.6/17, 10 March 1978. The Principles were developed by an inter-governmental group of experts convened by UNEP pursuant to the UN-CHE Principles and Recommendations. The Report was noted by the UN General Assembly, which recognized states' rights to provide specific solutions on a bilateral or regional basis and was transmitted to governments for consideration, GAR 33/78, 19 January 1979 (XXXIII), adopted 15 December 1978. The Report does not define "shared natural resources".

19. Report of the Intergovernmental Group of Experts on Natural Resources Shared by Two or More States on the Working of its Fifth Session Held at Nairobi from 23 January to 7 February 1978, UNEP/IG.12/2, 8 February 1978. India, Poland, Rumania and the USSR regarded the principles as recommendations only. These countries felt that bilateral and multilateral agreements would be needed to translate them into binding obligations, and that, until such agreements were signed, the sovereignty of states over national resources would be unaffected.

Other principles emphasize the need for environmental assessment, exchange of information, advance notification of use of shared resources, and execution of joint scientific studies. Principle 10 recommends that "states sharing a natural resource should, when appropriate, consider the possibility of jointly seeking the services of any competent international organization in clarifying the environmental problems relating to conservation or utilization of such natural resources."

### A.3. *UNEP-FAO Draft Global Plan of Action for Marine Mammals*

In 1981, the UNEP again took the initiative by preparing, in collaboration with the FAO, a Draft Global Plan of Action for Conservation, Management and Utilization of Marine Mammals.<sup>20</sup> This ambitious document identifies the main species of marine mammals, the values placed upon them (including consumptive exploitation for human benefit), the threats to them, and their interaction with fisheries. It points out the inadequacies of the present situation and outlines the basis for international action. It isolates certain objectives while recognizing that at present there is no widely accepted policy for marine mammals. A major objective of the Plan is to formulate a policy for conservation of whales. Primary objectives include prevention of further extinction of taxonomically identifiable forms or distinct populations; maintenance of populations which can be used and enjoyed by mankind on optimal states;<sup>21</sup> assurance that high and low consumptive uses are conducted in a humane and non-disruptive way; and consideration of the cultural and economic needs of communities especially dependent upon marine mammals. Secondary objectives include promotion of research on marine mammals and their ecosystems, and the creation of a broader understanding by the public of their role in and the nature of marine ecosystems, so that governmental policy and practices will correspond at the national and international level.

The Plan also sets forth measures necessary to achieve these objectives and suggests various areas of concentration.<sup>22</sup> These include a more

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20. United Nations Environmental Programme/Food and Agriculture Organization Draft Global Plan of Action [hereinafter cited as UNEP/FAO Action Plan], FAO/UNEP Project No. 6502-78-02, FAO, Rome, 1981.

21. The concept of optimum population levels is a key factor of the plan. The optimum level for each population is ideally regarded as that in which it contributes its part to maximizing the benefits from the ecosystem as a whole.

22. For a detailed list of the recommendations and suggestions, see UNEP/FAO Action Plan, *supra* note 20, at Appendix 1, 74-84. Recommendations for actions to improve legal protection are assigned for action to the U.N. and its specialized agencies generally, and to UNEP, FAO and IUCN in particular. The latter include renegotiation of agreements, interim action pending entry into force of the Law of the Sea Convention, coordination between overlapping international organizations, stimulating new members of the IWC, producing an inventory of legislation sources, promoting measures concerning sanctuaries, incidental take, live capture and harassment, and the holding of a legal workshop to study conservation and management of marine animals.

detailed formulation of objectives, regulatory and protective measures, improvement of scientific knowledge, law and enforcement, and enhancement of public understanding. Actions the Plan address have been classified according to their priority. Classified first are urgent situations in which species or populations are known to be in a critical state requiring immediate action to alleviate the most serious threats. Second are situations potentially threatening resources where more information is required. Finally, in some situations there is a general need to improve conditions for conservation of marine mammals by increasing scientific capability, improving legal and administrative machinery, or adding to public awareness.

Problems to be considered include: organization of machinery to implement the Plan; study of important situations requiring information to determine appropriate measures; execution of scientific recommendations; and fund-raising for activities, possibly through UNEP or FAO, supplemented by non-governmental organization sources. After the Plan's first draft,<sup>23</sup> non-governmental organizations convened to make several recommendations for legal developments.<sup>24</sup>

Institution of a Plan Group is proposed with a secretariat, and ad hoc planning and coordinating committee, and a scientific committee. These are ambitious proposals, but in the context of institutional progress, are not unrealistic. The organization of a Plan Group, perhaps assisted by UNEP or FAO, would improve coordination of the plethora of new treaties and principles. The UN's ACC does not seem suited to the role, and the UN Law of the Sea Conference has provided no new machinery for cetacean conservation.

#### B. *UN Food and Agriculture Organization (FAO)*

The FAO is a specialized agency of the UN, and therefore reports to the UN. It is also a much larger body than the UNEP with more resources at its command. It is required by its constitution to promote and recommend, national and international action with respect to the conservation of natural resources and the adoption of improved methods of fisheries production.<sup>25</sup> The FAO Conference submits conventions to its members and approves arrangements placing other public international organizations dealing with these questions under FAO's general authority. It can provide for cooperation with related organizations and enter into agreements with them for this purpose. Its Fisheries Department furthers

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23. Report of the Group of Experts in Reviewing First Draft Plan of Action for Conservation of Marine Mammals, May 28-31, 1979, Karen, Nairobi.

24. Report of Workshop, Legal Aspects of Conservation of Marine Mammals, December 10-14, 1979, Quissac, France, Center for Environmental Education Monograph Series.

25. FAO Constitution, 1 A. PEASLEE, INTERNATIONAL ORGANIZATIONS, 489-511. For a full description of sea-related current activities of the FAO, see *World Fisheries and the Law of the Sea: The Challenge to Fisheries Development and Management under the New Legal Regime*, FAO, Rome (1979).



research and cooperation in fisheries matters (which include whale hunting and conservation of aquatic resources), by operating through a Committee on Fisheries (COFI) which is composed of member states. The COFI annually reviews the state of world fisheries bodies, including the IWC, the nine regional fisheries commissions and councils established by FAO itself, and others.<sup>26</sup>

The FAO has also established a number of committees and working groups on specific issues which report to it on all aspects of fisheries. For instance, the Advisory Committee on Marine Resource Research (ACMRR) gives independent advice. Its scientist members are appointed in their independent personal capacity. ACMRR established a working group on marine mammals which initiated the unique Consultation on Marine Mammals held in Bergen, Norway in 1976. It surveyed all species and made numerous recommendations, especially concerning whales.<sup>27</sup> The ACMRR also advises UNESCO's Intergovernmental Oceanographic Commission<sup>28</sup> on appropriate matters and can thus relate research on pollution and other factors affecting whales' habitats to conservation strategies.

The FAO takes the view that there is no scientific justification for a global moratorium on whaling at present and that present catch levels should be sustained indefinitely.<sup>29</sup>

### III. INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS

#### A. *International Union for the Conservation of Nature and Natural Resources (IUCN)*<sup>30</sup>

This organization, which is not part of the UN system, is unusual in that its membership includes non-governmental conservation organiza-

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26. For a summary of the activities of regional fisheries bodies, see UNEP/FAO Action, *supra* note 20, App. 8, *International Organizations, Agreements and Programmes Concerned with Marine Mammals and their Environment*, 131-139.

27. *Mammals in the Seas, Report of the FAO Advisory Committee on Marine Resources Research, Working Party on Marine Mammals*, 1 FAO Fisheries Series No. 5 (1978); this work includes most of the papers submitted at the Bergen Consultation.

28. The United Nations Educational, Scientific and Cultural Organization (UNESCO) has responsibilities for scientific research in the ocean which it implements through a marine science program in its Division of Oceanography and in the Secretariat of the Intergovernmental Oceanographic Commission (IOC). The IOC was established by UNESCO and serves as a "joint specialized mechanism" for marine research for UN organizations participating in the Inter-Secretariat Committee on Scientific Programmes Relating to Oceanography (ICSPRO). UNESCO has also adopted a Convention Concerning the Protection of the World Cultural and Natural Heritage (1972), which may have some relevance to habitat preservation. For more information on this Convention, see UNEP/FAO Action Plan, *supra* note 20, at 133-4.

29. Statement by FAO observer at IWC Special Meeting, March 1982, unnumbered text circulated at 34th Meeting, 1982.

30. On the IUCN, see UNEP/FAO Action Plan, *supra* note 20, at 138.

tions, such as the World Wildlife Fund.<sup>31</sup> It has established various specialized coordinating groups which are concerned with marine mammals. One notable group is the Survival Service Commission (SSC) which includes a specialist group on whales, one on trade in endangered species and their products (TRAFFIC), and a Committee on Marine Mammals which has members from other IUCN commissions such as Law, Ecology and Parks. IUCN's Marine Steering Committee (MSC)<sup>32</sup> of specialists and nominated members of IUCN Commissions advises on IUCN's and the World Wildlife Fund's Marine Programmes. Following the advice of these bodies the IUCN General Assembly has adopted policies for marine mammals and has passed various resolutions on the preservation of great whales in particular. These policies are presented to the IWC, where the IUCN has observer status.<sup>33</sup> IUCN also engages in several other activities directly affecting marine mammal conservation<sup>34</sup> such as production of its Red Data book listing endangered species, which includes some whale species. Its World Conservation Strategy calls for a moratorium on all commercial whaling until the full ecological consequences of whaling can be predicted.<sup>35</sup>

#### IV. REGIONAL INTERNATIONAL ORGANIZATIONS

##### A. *International Council for the Exploration of the Sea (ICES)*<sup>36</sup>

Although it is not the only regional body concerned with whales,<sup>37</sup> ICES has been one of the most historically important to their conservation and management, and is the oldest of the regional marine scientific

31. On the World Wildlife Fund, see UNEP/FAO Action Plan, *supra* note 20, at 138-9.

32. Now subsumed into a new "Programme and Policy Advisory Group" (PPAG).

33. On these policies, see *Principles replacing maximum sustainable yield as a basis for management of wildlife resources*, IUCN Res. 8, 12th Session of the General Assembly (1976); cited in Report of the IWC Scientific Committee (SC), IWC 28th Report, 43. These policies include the principles that: (1) ecosystems should be maintained to permit survival of the species even when maximum "yields" by fishermen or hunters are allowed, and (2) management decisions should include a safety factor to allow for limitations on knowledge and imperfections in management. Insofar as the points were within its competence, the IWC's Scientific Committee thought the present IWC Convention and policies could adequately take account of those principles. See also IUCN Res. 15/19, 15th Session of the General Assembly (1981).

34. On these activities, see UNEP/FAO Action Plan, *supra* note 20, at 138.

35. World Conservation Strategy - Priorities for International Action, IWC/34/34, Section 18. The Global Commons (1980).

36. For a historical account of ICES, see A.E.J. WENT, SEVENTY YEARS AGROWING: A HISTORY OF THE INTERNATIONAL COUNCIL FOR THE EXPLORATION OF THE SEA, 1902-1972 (1972). For an account of ICE's modern role, see M. Tambs-Lych, ICES General Secretary, General Information on the International Council for the Exploration of the Sea, ICES (Jan. 1979). By 1979, ICES had 18 member states: Belgium, Canada, Denmark, Finland, France, Federal Republic of Germany, German Democratic Republic, Iceland, Ireland, Netherlands, Norway, Poland, Portugal, Spain, Sweden, U.K., U.S., U.S.S.R. For a critical assessment of present changes at ICES, see J. Gulland, *Long-term Political Effects from Management of the Fish Resources of the North Atlantic*, 40 J. CONS. INT. EXPLOR. MER 8 (1982).

37. On other such bodies, see UNEP/FAO Action Plan, *supra* note 20, at 132, 134-37.

bodies. It was one of the first to raise the question of over-exploitation of whales in the 1920's and drafted the League of Nations 1931 Convention on Whaling.<sup>38</sup> It now advises, on request, the Northeast Atlantic<sup>39</sup> Baltic Sea Fisheries Commissions<sup>40</sup> the Oslo Commission for the Prevention of Pollution by Dumping at Sea,<sup>41</sup> the Paris Commission for Prevention of Pollution from Land-Based Sources<sup>42</sup> and the European Economic Community.

ICES was founded informally in 1902 to further international cooperation in marine scientific research. Its scientific investigation was accompanied by a practical expose of the steps to be taken in order to bring exploitation of fisheries more in accord with the natural conditions regulating the growth and increase in fish. It has remained faithful to these objectives though it now investigates pollution and other exploitative activities and assesses their effects on living resources. The ICES plans research programs and publishes the results as reports. Its area covers the Atlantic Ocean and its adjacent seas, primarily the North Atlantic, but also the Baltic Sea and Arctic Ocean. However, the ICES field of interest can best be delineated in scientific rather than geographical terms.

The ICES permanent staff is small, and it does most of its work through Standing Comittess and ad hoc Working Groups<sup>43</sup> of scientists from its member states. They meet separately from any other commission or conference, and thus are free from political pressures. The scientific advice given through ICES reports is widely respected because it comes from experts who do not fear to criticize. At ICES's 69th Meeting in 1981, its special topic was the interactions between fisheries and food requirements.<sup>44</sup> It reports to an Advisory Committee on Fishery Management.<sup>45</sup>

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38. On that Convention, see Went, *supra* note 36, at 78-79; L. Leonard, *Recent Negotiations towards the International Regulations of Whaling*, 35 AM. J. INT'L L. 90 (1941); International Convention for the Regulation of Whaling, 1931, 102 L.N.T.S. 349.

39. Northeast Atlantic Fisheries Convention, January 29, 1959, No. 7078, 486 U.N.T.S. 157; now superseded by the Convention on Future Multilateral Cooperation in Northeast Atlantic Fisheries, November 8, 1980, unpublished.

40. International Baltic Sea Fishery Commission, *done at Gdansk*, Sept. 13, 1973, *entered into force* July 28, 1974; Annotated Directory of Intergovernmental Organizations Concerned with Ocean Affairs, at 108, U.N. Doc. A/CONF.62/L.14 (1976) (distribution limited).

41. Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, Feb. 15, 1972, *reprinted in* 11 I.L.M. 262 (1972).

42. Convention for the Prevention of Marine Pollution from Landbased Sources, Feb. 21, 1974, *reprinted in* 13 I.L.M. 352 (1974).

43. For details of these committees and working groups, see Tambs-Lych, *supra* note 36. There are 5 Standing Committees and 12 Area and Subject Committees.

44. See Observers' Report on the 69th Statutory Meeting of the International Council for the Exploration of the Sea (ICES), IWC/34/11A (1982).

45. One of these reports, Reports of the ICES Advisory Committee on Fishery Management, 1979, ICES Cooperative Research Report No. 93 (1980), includes an assessment of interactions between gray seal populations and fish species. It points out that the multi-species inter-relationships concerned were poorly understood, and that there was no satisfactory method of modelling them.

There is thus ample time for matters to be fully and critically discussed by a highly respected group of international scientists so that a wide range of environmental factors can be considered.

ICES also has an excellent reputation for the collection, dissemination and assessment of data which presents a detailed picture of both organizations, including the FOA, UNEP, the IWC (with which it exchanges observers), UNESCO, WMO (World Meteorological Organization), and SCOR (Scientific Committee for Oceanographic Research). ICES could well be the model of a network of similar regional bodies as part of a global strategy to advise on whale management. Regional fisheries commissions are more politicized and therefore less suitable.

### B. *Regional Fisheries Organizations*

There are a large number of regional bodies, the constitution and work of which have been described elsewhere.<sup>46</sup> None is directly engaged in conservation and management of whales, but some are concerned with marine mammals which share the whales' habitat and food supplies, and others are concerned with controlling the incidental catching of small whales and dolphins which are frequently ensnared in tuna nets.

For example, the Northwest Atlantic Fisheries Organization (NAFO)<sup>47</sup>, which replaced ICNAF,<sup>48</sup> provides advice on the setting of seal quotas for Canada and Denmark (for Greenland). Canada considers it a more appropriate organization through which to cooperate, as required by Article 65 of the Law of the Sea Convention, for the conservation of small cetaceans in the region than the IWC (which has not yet been allowed to regulate their catching). This Canadian proposal, circulated informally at the UNCLOS III,<sup>49</sup> remains controversial.

The International North Pacific Fisheries Commission (INPFC),<sup>50</sup> though concerned with regulating high seas salmon fishing, provides for cooperative research to ascertain the effects of the Japanese salmon fishery upon marine mammals and to reduce the incidental catch of marine mammals in the North Pacific and the Bering Sea. It has instituted an ad hoc Committee on Marine Mammals which is investigating competition between man and mammal for fish resources. The Inter-American Tropi-

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46. Annotated Directory, *supra* note 40; M. Savini, Report on International and National Legislation for the Conservation of Marine Mammals, Part 1. International Legislation, FIRD/C326, FAO Fisheries Circular No. 326 (1974) (distribution restricted); and M. Savini, Report on International Agreements Related to the Conservation of Marine Mammals, FIPL/C (1982) (distribution restricted).

47. Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, Oct. 24, 1978, App. 1, text made available by the government of Canada.

48. International Convention for the Northwest Atlantic Fisheries, Feb. 8, 1949, 1 U.S.T. 477, T.I.A.S. No. 2089, 312.

49. Written statement by the Delegation of Canada, Apr. 2, 1980, A/CONF.62/WS/4.

50. International Convention for the High Seas Fisheries of the North Pacific, Mar. 14, 1952, No. 2770, 205 U.N.T.S. 65.

cal Tuna Commission (I-ATTC)<sup>51</sup> is particularly concerned with the incidental killing of dolphins in the purseseine nets used for tuna fisheries in the eastern tropical Pacific, as is the 1967 International Commission for the Conservation of Atlantic Tuna (ICCAT)<sup>52</sup> in its area. The Permanent Commission for the South Pacific (PCSP)<sup>53</sup>, of which Chile, Peru, Ecuador and Columbia are members, has, since its inception in 1952, regulated whaling in that area. Peru and Chile have, since 1979, been parties to the International Convention for the Regulation of Whaling (ICRW) and are therefore subject to its regulations as well. ICRW regulations are generally more stringent than those of the PCSP. There are a few regional commissions directly concerned with regulation of seals only, but only the PCSP is exclusively concerned with whales. Most whaling and many non-whaling states are now members of the International Whaling Commission.

#### V. THE INTERNATIONAL WHALING COMMISSION (IWC)<sup>54</sup>

The over-exploitation of whales during the World War I-II period led the industry itself to establish a permanent institution in 1946. Neither private inter-company agreements to control whale oil production nor the 1931 League of Nations Convention on Whaling and subsequent Protocols,<sup>55</sup> had been able to slow down the slaughter. In the absence of a permanent body, without flexible amendment procedures, and for lack of full participation by all whaling states, little progress was made. The history of this period and of the early years of the International Whaling Commission established by the International Convention for the Regulation of Whaling (ICRW)<sup>56</sup> has been well documented elsewhere.

51. Convention for the Establishment of an Inter-American Tropical Tuna Commission, Apr. 23, 1949, No. 1367, 99 U.N.T.S. 3. See also J. JOSEPH & J.W. GREENHOUGH, INTERNATIONAL MANAGEMENT OF TUNA, PORPOISE AND BILL FISH: BIOLOGICAL, LEGAL AND POLITICAL ASPECTS (1979).

52. International Convention for the Conservation of Atlantic Tunas, Oct. 11, 1967, No. 9587, 673 U.N.T.S. 63, reprinted in 6 I.L.M. 293 (1967). For current activities, see Observers' Report on the Seventh Regular Meeting of the ICCAT, IWC/34/11B (1981).

53. The Permanent Commission for the Conference on the Use and Conservation of the Maritime Resources of the South Pacific, U.N. Leg. Ser. ST/LEG/SER.B/6 (1979).

54. For a history of whaling and of the Commission, see Tonnessen, *supra* note 1. For a shorter history coupled with a highly critical analysis of the Commission's scientific and economic work, see Scarff, *supra* note 1, and Gambel, *supra* note 1. For an economic and political analysis of international whaling, see M'Gonigle, *The "Economizing" Ecology: Why Big Rare Whales Still Die*, 9 Eco. L.Q. 120 (1980). See also INTERNATIONAL COMMISSION ON WHALING, FIRST REPORT OF THE COMMISSION (1950) through THIRTY-SECOND REPORT OF THE COMMISSION (1982).

55. A good account of these is given in P. BOCK, A STUDY IN INTERNATIONAL REGULATION: THE CASE OF WHALING (1966), at 84-99 (unpublished thesis, New York Univ.). See also Leonard, *supra* note 38, at 96; and W. VAMPLEW, SALVESEN OF LEITH (1979), at 198.

56. INTERNATIONAL WHALING COMMISSION, INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING, 1946 (1964); and INTERNATIONAL WHALING COMMISSION, PROTOCOL TO THE INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING SIGNED AT WASHINGTON UNDER DATE OF DEC. 2, (1956).

Though the Preambular objective states that the Contracting Governments recognize the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks, the ICRW was primarily established to provide a mechanism for maintaining the whale industry. It established a permanent institution with powers to make and amend regulations incorporated into a flexible schedule which forms an integral part of the Convention. Regulations under Article V must be based on scientific findings, must provide for conservation, development and optimum utilization of whale resources, and must take into consideration the interests of consumers of whale products and the industry. The regulations cannot restrict the number of nationality of factory ships or land stations, or allocate specific quotas to them. The regulations can include: the usual fishery conservation techniques; the continued pre-war Protocol measures determining protected and unprotected species; open and closed seasons and areas (including sanctuaries); size limits; specification of gear used; catch returns; and biological methods. Regulations are binding once adopted by the required three-quarters majority but are subject to lengthy objections procedure under Article V(3). Parties can also withdraw after due notice under Article XI and some have done so from time to time, most recently Canada in 1981.

In addition, the IWC can make non-binding recommendations to its members on any matters relating to whales or whaling which are within the IRCW's aims. Article 1 of the ICRW, notably, applies not only to "factory ships, land stations and whale catchers under the jurisdiction of the Contracting Governments" but also "to all waters in which whaling is prosecuted by them." Thus it applies in the high seas, in the territorial sea, in the new fisheries, and in the exclusive economic zones (though some states, including the Latin American states, France, Japan and the USSR, have reserved their positions in the Commission on this last area in light of the Law of the Sea Convention's provisions, described *infra*).

Whales are not defined in the Convention; thus it could apply to all whales, large and small. Some states, however, now take the view that it does not apply to small cetaceans. In fact, there appears to be no legal reason why small cetaceans cannot be added to the Convention, if scientific findings support the need for regulation to prevent over exploitation. At present a few small cetaceans are mentioned in the Convention, but only for purposes of collection of information on directed fisheries, not for regulation.<sup>57</sup>

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57. At present the IWC collects information on certain small cetaceans under the description of "small-type whaling" operations. INTERNATIONAL WHALING COMMISSION, INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING, 1946, SCHEDULE, Part V, at 18 (1982). As defined in the Schedule at 4, Interpretation, C. Generally, only the minke and bottlenose whales in the Southern Hemisphere are included in the substantive regulations, where the latter is merely listed as an unclassified stock. The minke has for some years been regarded as the smallest of the large whales, hunted mainly by Japan and the USSR under

Despite the accelerating decline in stocks over which the IWC presided during its first 25 years, it almost always sets quotas on exploited stocks too high, due to political and economic pressures. Nonetheless, compared to other fisheries bodies, the IWC has remarkable powers and scope. Now that efforts to bring its objectives more into line with the aims and perspectives of conservationists have failed, its parties (which over the years have swelled from 14 to 37 states, most of them non-whaling) have used the flexibility of the Convention, the open-endedness of recommendations, and the ambiguity of the ICRW's objective to bring about remarkable changes in direction.

Article IX left enforcement to national means and inspection. The IWC introduced an International Observer Scheme. Although belated and limited to exchange of observers under bilateral agreements, observers are appointed by and report to the Commission on infractions. Following the UNCHE, in response but in resistance to the moratorium then pressed upon it, the IWC adopted New Management Procedures<sup>58</sup> (NMP). Instead of setting an overall figure for the Total Allowable Catch (TAC), it began to classify stocks in particular areas on the basis of the advice of its scientific committee, according to estimated stock levels. It began to discuss, regulate or make recommendations upon a large variety of topics. The agenda at its most recent (34th) meeting<sup>59</sup> in 1982 included: the ending of commercial whaling; revisions of the NMP; review of regulatory measures other than catch limits; the concept and characteristics of whale sanctuaries; infractions reports and the International Observer Scheme; whale stocks and catch limits; aboriginal and subsistence whaling; small cetaceans; measures to discourage "pirate" whaling; an International Decade of Cetacean Research; humane killing; a conference on non-consumptive uses of cetaceans; and cooperation with other organizations.

The 34th Meeting adopted a three year phase-out of commercial whaling<sup>60</sup> by amending the Schedule to set zero catch limits for this pur-

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quotas.

58. These procedures require the Scientific Committee to categorize stocks into: Protection Stocks (on which all catching is prohibited), Initial Management Stocks, and Sustained Management Stocks — depending on the extent to which populations are estimated to be below or at or above their maximum sustainable level. The Commission decides the quotas on the basis of this scientific classification. However, because of the increasing uncertainty of the information and of the models used to calculate populations, the Scientific Committee frequently finds either that it cannot agree on the classification or that it cannot advise on any classification whatsoever — thus making the NMP unworkable.

59. 34th Annual Meeting of the International Whaling Commission, Provisional Agenda, IWC/34/2 (July, 1982). For a summary of events, see XXI ECO Int'l Whaling Comm., Nos. 1-7 (July 19-24, 1982).

60. The vote was 25 for and 7 against. Voting in favor were: Antigua, Argentina, Australia, Belize, Costa Rica, Denmark, Egypt, France, Germany, India, Kenya, Mexico, Monaco, Netherlands, New Zealand, Oman, St. Lucia, St. Vincent, Senegal, Seychelles, Spain, Sweden, U.K., U.S.A., Uruguay. There were 5 abstentions: Chile, China (People's Republic), Phillipines, South Africa, and Switzerland. (Switzerland explained that it did not regard the ban as justified by the scientific advice available.) Dominica and Jamaica were absent.

pose on all stocks for the 1986 coastal and 1985-86 open sea seasons. This decision is subject to review based on scientific advice, a comprehensive assessment of its effects, consideration of any modifications, and imposition of further catch limits by 1990 at the latest. Several states, despite voting in favor of the cessation, made formal statements that this was without prejudice to their sovereign rights over marine resources of their exclusive economic zone.<sup>61</sup> Some added "according to the Law of the Sea Convention"<sup>62</sup> to their vote.

This is not the end of the IWC's history. Many of the seven states still whaling can either object to this amendment or withdraw from the Convention. In any event, the status of stocks and observance of the zero quotas will require continuous surveillance. Most other items now on the IWC agenda will continue to be relevant. However, the Commission's role will certainly be vastly changed and the relevant measures of protection and enforcement under other Conventions will achieve increasing importance and prominence. There is now a considerable range of these conventions at both global and regional levels, as illustrated infra.

#### VI. UNITED NATIONS CONVENTION ON THE LAW OF THE SEA<sup>63</sup>

The Law of the Sea Convention provides in Part V, Articles 55-75, for the establishment of an Exclusive Economic Zone (EEZ), extending to 200 nautical miles from the baselines of the territorial sea of coastal states. Within the EEZ, Article 56 guarantees sovereign rights for the purposes of exploring and exploiting conserving and managing the natural resources of the sea-bed, subsoil and superjacent waters. States may enter another's EEZ to exercise residual freedoms of the sea under Article 8. It is these zonal rights that some states formally reserved when voting for the cessation of whaling from 1985/6.

In the EEZ the coastal state must promote optimum utilization and can establish the Total Allowable Catch of fisheries, determining for itself its own harvesting capacity. It is required to make available to other states' TAC in its EEZ. However, in determining the TAC, the coastal state must take into account environmental as well as other factors, including interdependence of stocks, effects on dependent species, and generally recommend international minimum standards. The coastal state must consider the best scientific evidence available, to which it must contribute by regularly supplying information through competent international organizations.<sup>64</sup>

Article 65 on Marine Mammals which under Article 120 also applies

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61. *E.g.*, Uruguay. Author's notes of the 34th Meeting, Plenary Session, *Countdown to Zero, 34th Meeting of International Whaling Commission, Brighton, U.K.*, July 19-24, 1982, *MARINE POLICY* 64, 65 (Jan. 1983).

62. *E.g.*, Mexico. *Id.*

63. United Nations Convention on the Law of the Sea. See *supra* note 9.

64. *Id.*, Articles 61 & 62.



to the conservation and management of marine mammals on the high seas, eliminates the optimum use requirement and orders all states to conserve whales on an international basis. It states:

Nothing in this Part restricts the right of a coastal state or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall cooperate with a view to conservation of marine mammals and *in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study.*<sup>65</sup> (emphasis added)

There are ambiguities in this article evidenced by use of such general phrases as "work through" and "with a view to" and the plural reference to organizations. However, the drafters' intention, clearly understood during the negotiation of this Article, was to recognize that the cetaceans' special characteristics, which distinguish them from fish, necessitate full international management through the International Whaling Commission, through other organizations might deal with the incidental catch problem. Canada, as mentioned earlier, before withdrawing from the IWC, circulated a different interpretation at UNCLOS which would allow coastal states to work through only one organization of their own choice, seeking its advice only.

#### VII. WASHINGTON CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES (CITES)<sup>66</sup>

This Convention, which by January, 1982 had 79 parties, is now a powerful instrument for whale conservation. All large cetaceans are now listed on one or other of its Appendices, therefore requiring measures to be taken to prevent or control trade in whales and their products, through reservations are permissible.<sup>67</sup>

Appendix I covers the most endangered species; that is, all species which are or may be threatened with extinction or may be so affected by trade. Appendix I thus requires the most stringent protection. Appendix

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65. *Id.*, Article 65. Cetaceans are not defined in this Article, although most species are included in Appendix I, which lists the Highly Migratory Species covered by Article 64. Since Article 64 encourages utilization, and Article 65 removes marine mammals from Article 64, Appendix I has no legal, definitional significance for Article 65 with respect to marine mammals. The confusion arises from the negotiating and drafting history of this part of the UNCLOS text. Article 65 was inserted later than Article 64, in order to mitigate its effect on whales.

66. Convention on International Trade in Endangered Species of Wild Flora and Fauna, *supra* note 10. For an excellent critical analysis of the approach adopted in this Convention and in recent related developments in U.S. law, see Coggins, *Legal Protection for Marine Mammals: An Overview of Innovative Resource Conservation*, 6 ENVIRONMENTAL LAW 1 (1975).

67. Reservations have been entered for some stocks of fin and sei on Appendix I. Japan and Norway have entered reservations for sperm whales on Appendix II.

II covers two kinds of less endangered species: those which may become threatened with extinction unless trade is not strictly regulated, and other species which must be regulated so that trade in other more endangered species may be brought under effective control. Appendix III covers species regulated by individual nations to control trade and exploitation.

"Trade" is broadly defined in Article 1(c) to cover "export, re-export, import and introduction from the sea." CITES does not specify any general area of application. "Introduction from the sea" is, however, limited to transportation into a state of specimens taken in the marine environment not under the jurisdiction of any state. It seems likely that following the provisions in Part V and VII<sup>68</sup> of UNCLOS, states will consider this zone to be that commencing beyond the 200 mile EEZ, although the ambiguities concerning the zone's status remain. In practice this CITES provision has not been activated to date. If it is, the national Management and Scientific Authorities, which are required to be established under the CITES to operate the system of permits and certificates, will have the same responsibilities for controlling such imports as for others. For such specimens, however, the usual export/re-export/import permits required by Articles III and IV, which certify that CITES criteria have been complied with, are not required. Only a certificate authorizing "introduction from the sea" is required.

There is no CITES Commission. Continuing responsibilities are executed by the Secretariat and its Secretary-General. Because of its central role in receiving parties' reports on measures taken under Article VIII (7) and as disseminator of trading information (e.g. the country of origin of specimens), the Secretariat has become an effective enforcement instrument. The European Economic Community has also aided in enforcement by adopting a binding regulation controlling trade in whale products which provides a uniform listing for its ten member-states.<sup>69</sup>

CITES parties must take appropriate national measures to enforce the convention. Limited application to non-parties is permitted by Article X. They can be required to produce "comparable documentation" for export, import or re-export to CITES parties as required. Trade exclusively between non-parties is of course still possible.

Though CITES is an important component of the new strategy for protecting cetaceans it must be remembered that cetaceans are only one of hundreds of species listed needing regulation in trade. The growing scientific knowledge concerning the complexities of whale behavior, their

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68. Part VI, Article 86 of UNCLOS (United Nations Convention on the Law of the Sea, *supra* note 9), limits the high seas to all parts of the sea not included in the exclusive economic zone, in the territorial sea, or in internal waters of a state, or in the archipelagic waters of an archipelagic state, but it specifically does not affect the residual high seas freedoms enjoyed in the EEZ.

69. Regulation on Common Rules for Import of Whales and other Cetacean Products, Council on Regulation (EEC) No. 348/81, Co. J. EUR. COMM. (No. L39/1) (1981), *entered into force* Jan. 1, 1982.

role in their ecosystems, and their importance to man all require a more sophisticated approach to conservation and management. Other conventions are therefore being developed which partially cover these aspects.

#### VIII. THE BONN CONVENTION ON CONSERVATION OF MIGRATORY SPECIES OF WILD ANIMALS 1979<sup>70</sup>

This Convention was concluded on June 23, 1979. It requires fifteen ratifications for entry into force. At the time of writing it had been signed by 30 states, but ratified by only eight. It covers all migratory species, including marine mammals. It develops the UNCHE Principles and Action Plan and provides means for applying the UNEP Guideline Principles for Shared Natural Resources. The Preamble recognizes the special values of these species, the importance of conserving them, and the significance of "Range States" (states whose territory is within the range of such species) agreeing to take action to avoid endangering them.

The Convention applies to all territories within the range of migratory species as defined in Article I. Appendix I lists those species which require immediate protection or subsequent international action if their status for conservation purposes does not require immediate action. Appendix II lists species whose conservation status is unfavorable or which would benefit from conclusion of international agreements, and requires states within whose jurisdiction those species are found to conclude the necessary international agreements to protect them. Parties accept the need to take action and cooperate in doing so.

Article IV of the Convention specifies the duties of range states for species listed in Appendix I. They are to try to conserve and restore habitats, to prevent obstacles to migration, to control factors endangering them, and to prohibit capture (subject to some exceptions). For those species listed in Appendix II, range states must try to conclude agreements to benefit those with unfavorable conservation statuses, taking necessary action for those which periodically cross national boundaries. Guidelines for the relevant agreements are laid down in Article V. Special provisions in Article V require that parties should, at a minimum, prohibit any capture of cetaceans that is not permitted for that migratory species under any multilateral agreements. Thus, relevant ICRW regulations should be observed by Bonn Convention parties, whether or not they are parties to the IWC. Article V provides that access to the relevant agreement should be possible also for states that are not range states of those migratory species. Article V encourages exchange of information about species and coordination of actions to suppress illegal capture. Therefore, once the Convention enters into force, close relations with the IWC will need to be established.

The Bonn Convention's organs do not include a Commission but consist of a triennial Conference of the Parties with broad review and

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70. Convention on Conservation of Migratory Species of Wild Animals, *supra* note 11.

amendment powers, a secretariat (with an Executive Director to be appointed by UNEP), and a Scientific Council of qualified experts. Each party must also designate a specific national authority and any other machinery necessary to implement the agreements.

The Bonn Convention is a framework instrument expressed in broad, open-ended terms. Article I defines some of them, but ambiguities remain<sup>71</sup> which will be removed only by state implementation. Parties to the Convention can include range states, meaning those exercising jurisdiction (often by flag vessels) over any part of the species' range. Additionally, regional economic integration organizations, such as the European Economic Community (EEC), which have competence to conclude agreements, can also be parties. States must enforce these agreements on vessels within their jurisdiction by national means.

This Convention takes a broader approach to protection of cetaceans than the ICRW. It introduces as a criterion of conservation the long-term viability of the species within its ecosystem. The ecosystem approach has now been related to the management of all marine living resources (including cetaceans) in Antarctica, though there are as yet no other regional treaties requiring eco-system management of cetaceans.

#### IX. CONVENTION ON THE CONSERVATION OF ANTARCTIC MARINE LIVING RESOURCES 1980 (CCAMLR)

This Convention, the first to take an ecosystem approach to management, was concluded in May, 1980. It recently entered into force and has been signed by fifteen states. Articles XVI and XIX limit the Convention to such states which have consultative status under the 1959 Antarctic Treaty,<sup>73</sup> states which participated in the Conference negotiating that treaty (only those with a demonstrated interest in the Antarctic were invited), and other states demonstrating an interest either by scientific research or by harvesting activities relating to the marine living resources to which the Convention applies. The first meeting of its Commission took place on April 7, 1982.<sup>74</sup>

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71. An example of such ambiguities is that "migratory species" are defined as "the entire population or any geographically separate part of the population of any species or lower taxon of wild animals a significant proportion of whose members cyclically and predictably cross one or more national jurisdictional boundaries." Another example is that "favourable conservation status" is described as the status which a species has which "maintains itself on a long-term basis as a viable component of its eco-system." Moreover, the Convention leaves undefined phrases such as "significant portion" of a range and "endangerment throughout its range" and "normal migration".

72. Convention on the Conservation of Antarctic Marine Living Resources, *supra* note 12.

73. The Antarctic Treaty, Dec. 1, 1959, No. 5778, 402 U.N.T.S. 71. Fourteen states have consultative status at present. 74. At this meeting, in Hobart, Australia, it was agreed that all signatories of the Convention which are not yet members of the Commission (*viz.*, Belgium, France, Norway, Poland) could participate in negotiations and discussions. Observers from FAO, IOC, IUCN and the IWC also attended.

Article I applies to the CCAMLR to living resources found south of 60° south latitude and in the area between that line and the Antarctic convergence which forms part of the Antarctic marine ecosystem. The marine ecosystem is defined as "the complex of relationships of Antarctic marine living resources with each other and with their physical environment." The resources are defined to include populations of fin fish, mollusks, crustaceans and all other living organisms. Though cetaceans are not specifically mentioned, they are covered as a component of the area's ecosystem. Conservation of cetaceans is also inextricably linked to the CCAMLR's main purpose—regulation of catches of kirl, the small crustacea which form the staple diet of the baleen whales which formerly existed in huge numbers in the area.

Article VI provides that nothing in the Convention shall derogate from the rights and obligations of parties under the ICRW. However, Article II(3) requires that any harvesting and associated activities in the CCAMLR area shall be conducted in accordance with the provision of the Convention and with specific conservation principles concerning prevention of decreasing populcations below levels enabling stable recruitment.

Article XXIII provides that the CCAMLR Commission and Scientific Committee "shall seek to develop cooperative working relationships, as appropriate" with the IWC. Al the large whales in Antarctica now have protected status under the ICRW's New Management Procedures except for minke whales, captured by Japan and the USSR. Tentative efforts at cooperation were taken at the IWC's 34th Meeting as we have seen, by exchange of observers and statements.<sup>75</sup> More will be required for effective coordination of the IWC with the Commission, Secretariat and Scientific Committee established by the CCAMLR.

The Commission consists of represented state parties and such regional economic organizations as have members which are qualified CCAMLR parties, e.g. the EEC. It has wide powers to collect and analyze information and to adopt any necessary conservation measure under Article XI(1), based on the best scientific advice. Questions of substance are decided by consensus. It can also draw the attention of parties and non-parties to activities of their nationals which defeat CCAMLR's aims. Article XXV requires implementation of the international system of observation and inspection outlined therein.

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75. See statement by Dr. J.A. Heap, Designated by the Commission [for the Conservation of Antarctic Marine Living Resources] to act as the Commission's Observer at the 34th Session of the Int'l Whaling Comm., IWC/34/OS CCAMLOR (1982); K.R. Allen & K.J. McNamara, Observers' Report on the Antarctic Marine Living Resources Preparatory Meeting, IWC/34/11D (1981); and a written statement submitted by Professor J.D. Ovington to this meeting on behalf of the IWC. This last written statement included, as Attachment A, "Recommendations from the Working Group on the Implications for Whales of Management Regimes for Other Resources" and a "Resolution on Cooperation and Coordination between the International Whaling Commission and the Proposed Commission for the Conservation of Antarctic Marine Living Resources."

Regulation of whaling will be left primarily to the IWC. The first CCAMLR Commission meeting instructed its Executive Secretary to discuss with the IWC Secretariat means of establishing a working relationship. ICRW objectives of achieving optimum levels of whale stocks may be defeated if krill is over-harvested. The IWC has suggested: that it should have "appropriate status" to enable its contribution to CCAMLR activities; that account should be taken of its responsibilities for whale stock management; that Scientific Committee (SC) representatives should be exchanged and a joint SC Working Group established; that a workshop on whale population dynamics sponsored by the IWC, CCAMLR and other concerned organizations should be held; that qualified whale spotters should be placed on vessels in the Southern Oceans; and that the IWC's IDCR (International Decade of Cetacean Research) cruises should be coordinated with the BIOMASS (Biological Investigation of Marine Antarctic Species and Systems) project.<sup>76</sup>

Closely regulated krill fisheries, conducted on an ecological basis backed by international inspection, could be coordinated with restoration of whale populations to stable levels if the CCAMLR can avoid becoming as politicized as other fisheries commissions and can coordinate fully with the IWC. Parties can, however, object to CCAMLR measures under Article XXIX procedures. The Convention can be amended, however, only by unanimity. Withdrawal from the Convention is permitted under Article XXXI.

## X. REGIONAL ORGANIZATIONS

Space does not permit a detailed analysis of the effect of regional conventions and the activities of regional organizations on cetaceans. Previously dormant regional conventions have been reactivated by recent events in the IWC and by growing pressures from non-governmental organizations. Relevant regional instruments and bodies include the following.

### A. *Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere 1940*<sup>77</sup>

This Convention was negotiated between 21 American states and is limited to North and South. Its Secretariat is provided by the Organization of American States (OAS). Its goal is to establish national sanctuaries to protect and preserve in their natural habitat representatives of all species of native fauna in numbers and areas sufficient to ensure that they do not become extinct through any means controlled by man. An Annex lists species now regarded by the states concerned as of special importance and urgency for preservation. Argentina and the USA early

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76. IWC Recommendations and Resolution *supra* note 75.

77. Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, 1940, T.I.A.S. No. 485, 161 U.N.T.S. 193.

listed the blue whale; and the USA, the right, bowhead and gray whales. Recent OAS-sponsored workshops have reactivated the Convention and further action may be forthcoming to update listings to correspond more closely with the IWC and CITES actions.

B. *The Permanent Commission of the Conference on the Use and Conservation of The Maritime Resources of the South Pacific (PCSP) 1952*<sup>78</sup>

This Commission was established following Chile, Ecuador and Peru's assertion of jurisdiction over a 200 nautical mile Maritime Zone. The PCSP's goals include conservation and protection of the marine fauna of these waters, including cetaceans. The Commission has met regularly to adopt regulations for whaling. Its main role is to coordinate the three states' laws for this purpose. A regulatory system similar to, but less stringent than the IWC's was initially adopted. Since Chile and Peru have now joined the IWC, however, IWC regulations must be applied.

Following the IWC zero quotas from 1985, the PCSP could provide a mechanism for coordinated study of whales in its area. It could also serve as a focal point for cooperation with relevant bodies through its Conference of the Representatives of the three Ministers of Foreign Affairs. The Conference meets biennially to set out its policies and is backed by a Secretariat and standing committees, including one for Coordination of Scientific Investigations and Work Methods.

C. *The African Convention on the Conservation of Nature and Natural Resources 1968*<sup>79</sup>

The Organization of African States (OAU) initiated this Convention, to protect water, flora and fauna resources threatened in various ways. The OAU provides the Secretariat. Species are listed on an Annex, but cetaceans are not listed. The Convention came into force on October 9, 1969 but remained dormant for many years. More interest has recently been evinced following the new international treaties. Some cetaceans may eventually be listed.

Article VII provides that for certain purposes parties shall "manage aquatic environments." Article X provides for establishment of conservation areas (as defined in Article III) to protect representative ecosystems and conserve species listed, or likely to be listed, in the Annex. Protective zones must be established around such areas within which activities detrimental to protected natural resources must be controlled. A variety of measures which must be taken for these purposes are pre-

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78. On this Permanent Commission, see: U.N. Leg. Ser. ST/LEG/SER.B/1 (1951), at 6; M. Savini, *supra* note 46, at 23-25.

79. African Convention on the Conservation of Nature and Natural Resources, 1968, Organization of African Unity, reprinted in INTERNATIONAL ENVIRONMENTAL LAW: MULTILATERAL AGREEMENTS, publication of the Commission for Environmental Policy, Law and Administration, Bonn, Federal Republic of Germany, BzUBz/IX/75.

scribed in Articles VII and VIII, including prohibition of some hunting methods, protection of habitats, and adoption of "adequate" legislation. Wildlife populations must be managed on the basis of scientific advice. The protective measures required for species threatened with extinction vary according to the degree of threat. Measures include control of trade, through permits, to prevent illegal takings.

Article XV requires that, if possible, a single national conservation agency be established to deal with all Convention matters. Parties are required to cooperate as necessary and to promote conservation education nationally.

D. *The Berne Convention on the Conservation of European of European Wildlife and Natural Habitats 1979*<sup>80</sup>

This Convention, negotiated through the Council of Europe, entered into force on June 1, 1982. Its object, under Article 1(1), is to conserve especially those species and habitats whose conservation requires the cooperation of several states. Endangered and vulnerable species, including migratory ones, are singled out in Article 2. Although the Convention was open initially only to member states of the Council of Europe, non-members participating in its development and other states invited by the Committee of Ministers of Council can accede. It applies in the territory, including the territorial sea, of state parties and can be extended to their dependencies.

Under Article 6, species are listed on three Appendices according to the degree of threat. The measures and also regulation of internal trade. The general objective under Article 2 is to maintain a population or to adapt it "to a level which corresponds in particular to ecological, scientific and cultural requirements," while taking into account economic and recreational requirements and the needs of subspecies, varieties, or forms at risk locally. This is a broad and open-ended goal. Article 4 requires parties to take measures to protect areas important to the listed migratory species and areas appropriately located for migratory routes, breeding, feeding, and other purposes, coordinating their efforts as appropriate. Article 10 elaborates special provision for this in relation to migratory species.

A Standing Committee of all parties, meeting at least biennially at the behest of the Council of Europe, is established by Article 13. Non-party states which are members of the Council of Europe can send observers. Specialist bodies may also attend ad hoc. The Standing Committee reviews the application of the Convention, recommends measures, reports to the Committee of Ministers, and can make any proposal for improving the effectiveness of the Convention.

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80. Berne Convention on the Conservation of European Wildlife and Natural Habitats, Sept. 19, 1979, Council of Europe European Treaty Series No. 104. See Convention, *supra* note 13.



Most articles of the Convention can be amended by following procedures in Article 15 with approval by a three-quarter majority of the parties. Amendment of appendices is subject to a simpler procedure and requires only a two-thirds majority.

E. *The European Economic Community (EEC)*<sup>81</sup>

By broad interpretation of the 1950 Treaty of Rome, the EEC has developed an Action Programme on the Environment,<sup>82</sup> which includes the marine environment. The Community can implement its goals by adopting regulations which bind member states and individuals as part of national law. The EEC's Commission can exercise its own initiative in proposing and drafting community measures to put before the EEC Council. The EEC can also become a party in its own right to conventions of an economic character. It may join economic bodies, such as fisheries commissions, in replacement of its individual member states, and may join bodies of an environmental character.

Pursuant to these requirements and objectives, the EEC has become a party to the CCAMLR and is seeking to become a party to CITES. However, it has decided not to adhere to the ICRW, which preceded the EEC and does not provide for adherence by any organizations (a Protocol would be required to enable EEC membership). Moreover, EEC members' policies are not always harmonious in the IWC: Denmark (Greenland and the Faroe Islands) is still whaling; France, West Germany, the Netherlands, and the UK are not; the other EEC members are not parties to the ICRW. However, the EEC did agree in 1981 to protect cetaceans by banning the import of whales and whale products into the territories of Member States by means of a regulation<sup>83</sup> which became effective in January, 1982. An Annex to the Regulation lists a comprehensive number of banned products which includes main whale and other cetacean products. Once the EEC becomes a CITES party, it will probably adopt more general measures concerning suspension of trade in other species of wild flora and fauna. Until further Community action, member states will re-

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81. The EEC was established by the Treaty of Rome, 1950, 298 U.N.T.S. 11.

82. O.J. Eur. Comm. (No. C.112/3) Annex (1973); See also Declaration of the Council of the European Communities and of Representatives of the Governments of the Member States, Meeting in the Council of Nov. 22, 1973 on the Programme of Action of the European Communities on the Environment, O.J. EUR. COMM. (No. C112/1) SEC (74) 70014 (1973); Environment Programme 1977-81, Bull. E.C. Supp. 6/76.

83. See Regulation on Common Rules for Imports of Whales and other Cetacean Products, *supra* note 69. The Preamble to the Regulation also bases the Council's powers on those derived from the Treaty of Rome generally and from Article 235 in particular, which relates to powers implied by interpretation of the Treaty and its fundamental principles. The Council also stated that it took into account the Commission's proposals and the opinion expressed on the subject by the European Parliament, which had stated that it recognized that conservation of cetaceans calls for measures restricting international trade and that such measures should be taken at the Community level, in conformity with the Community's international obligations.

tain the right to limit nationally more products than those listed in this Annex.

The EEC has powers to enact binding measures. Its permanent institutions include a European Court of Justice and a democratically elected Parliament with advisory and supervisory powers. The EEC offers a model for future regional development of similar machinery to complete the protective circle of measures necessary to conserve cetaceans.

## XI. CONCLUSION

World attention has concentrated on the International Whaling Commission as the organization nominally concerned with conserving whales. But as this article has illustrated, the Whaling Commission is neither the only nor arguably the most important body which protects our marine resources.

The IWC was established in order to preserve no whales but whaling. It requires whales to be conserved so exploitation can continue. Pre-World War II over-catching was based on a patchwork of ad hoc regulations, unsupervised by any permanent body and not adhered to by all whaling states. This brought the industry near economic collapse.

The policies first adopted by the IWC regulated the industry but still permitted serious over-exploitation on ever declining stocks because they were based on industrial greed and widespread ignorance of cetacean ecology and behavior. Since 1972, when Stockholm UNCHE adopted fundamental principles and proposed a moratorium on commercial whaling, IWC policies, regulatory techniques and membership have greatly changed. This led to such annual decreases in remaining quotas that in 1982 the IWC achieved a sufficient majority of sympathetic whaling and non-whaling state members to procure cessation of commercial whaling by 1985, in the absence of objection or withdrawal.

These changes have been brought about by the activities of determinedly conservationist states and non-governmental organizations, by declining returns in commercial activities and by the tightening circle of international conventions. Global conventions, if widely ratified and applied, now offer virtually complete protection to at least the great whales. The CITES could control trade in products which has heretofore had damaging effects. The Bonn Convention affords the means for enabling the international cooperation necessary to protect species that migrate across frontiers. The CCAMLR can be used in conjunction with the ICRW to preserve the Antarctic ecology which governs a major habitat of great baleen whales.

This circle is reinforced by a band of regional conventions. The Berne Convention reveals a model for international action to protect habitats against newly perceived threats from pollution and various forms of human and industrial harassment. Other regions may apply and expand the international conventions by developing suitable local measures. Gaps remain, but an encouraging organizational start has been made, since all

these treaties establish or designate permanent bodies to supervise their operations.

There is, however, no cause for complacency. Some instruments are not in force, some are poorly ratified, some are ambiguous and require much interpretative practice, some are little used or ineffectively enforced. If commercial whaling ceases in 1985, this network of treaties will become vitally important in ensuring that illicit operations do not occur. Scientists have demonstrated that the continuing need for conservation of whales on an ecological and integrated basis. It must be asked whether the chronological pragmatic development that has occurred measures up to the strategic approach of the UNEP/FAO Draft Action Plan. A need surely exists for one or both of these organizations to use their powers to take the leading role to ensure that, whether regionally or globally, these new treaties and organizations work as part of a scientifically based strategy. Perhaps this can be done by convening periodic meetings of representatives of all bodies referred to in this article, serviced by a standing Plan Group.

Following the adoption of the moratorium at the 34th IWC Meeting, Dr. Gambell, the IWC Secretary, said that the moratorium tells us "not to forget about the whales but to think harder about them."<sup>84</sup> One problem to ponder is certainly how to weld this disparate series of treaties and organizations into a strategic plan of action to restore and maintain the whales and their environment.

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84. NEW SCIENTIST, July 29, 1982, at 282.

