

CHAPTER NINE: INTERNATIONAL ENVIRONMENTAL LAW

Pages 201-215

Introduction. When we think of the "international legal system," we call to mind *endogenous* cases and conflicts--that is, conflicts arising from inter-state interactions. But as we turn to the topic of the global environment, we find problems that appear to be to a large extent *exogenous* to the legal system. Enormous problems such as overpopulation, pollution, ozone depletion, and desertification do not necessarily arise from one nation competing with another; rather, they derive from the limitation of vital ecosystem resources. As a result, they are problems that nations share in common. The kind of "law" that is needed, accordingly, is one based on cooperation and not on conflict. To be sure, conflicts arise when one nation acts in an ecologically irresponsible manner and other nations react to that irresponsibility. But these conflicts are not basic; they result from a breakdown of international cooperation.

A huge "Earth Summit" was held in Rio de Janeiro during the first two weeks of June 1992. More nations of the world were in official attendance than at any other meeting in history. In addition, hundreds of non-governmental organizations from around the world sent their representatives. The idea was to examine global environmental problems as a matter of common concern. There were thousands of meetings, seminars, and speeches; delegates from the meetings reported to other groups, and finally a statement of principles emerged. Here is the complete text of the final "Rio Declaration":

A. The Earth Summit

The Rio Declaration on Environment and Development
Rio de Janeiro, 3-14 June 1992
A/CONF.151/5/Rev.1

Preamble

The United Nations Conference on Environment and Development,

Having met at Rio de Janeiro from 3 to 14 June 1992,

Reaffirming the Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm on 16 June 1972, and seeking to build upon it,

With the goal of establishing a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people,

Working towards international agreements which respect the interests of all and protect the integrity of the global environmental and developmental system,

Recognizing the integral and interdependent nature of the Earth, our home,

Proclaims that:

Principle 1

Human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.

Principle 2

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Principle 3

The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

Principle 4

In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

Principle 5

All States and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world.

Principle 6

The special situation and needs of developing countries, particularly the least developed and those most

environmentally vulnerable, shall be given special priority. International actions in the field of environment and development should also address the interests and needs of all countries.

Principle 7

States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

Principle 8

To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies.

Principle 9

States should cooperate to strengthen endogenous capacity-building for sustainable development by improving scientific understanding through exchanges of scientific and technological knowledge, and by enhancing the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies.

Principle 10

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

Principle 11

States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.

Principle 12

States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.

Principle 13

States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.

Principle 14

States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health.

Principle 15

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

Principle 16

National authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

Principle 17

Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.

Principle 18

States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Every effort shall be made by the international community to help States so afflicted.

Principle 19

States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.

Principle 20

Women have a vital role in environmental management and development. Their full participation is therefore essential to achieve sustainable development.

Principle 21

The creativity, ideals and courage of the youth of the world should be mobilized to forge a global partnership order to achieve sustainable development and ensure a better future for all.

Principle 22

Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

Principle 23

The environment and natural resources of people under oppression, domination and occupation shall be protected.

Principle 24

Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.

Principle 25

Peace, development and environmental protection are interdependent and indivisible.

Principle 26

States shall resolve all their environmental disputes peacefully and by appropriate means in accordance with the Charter of the United Nations.

Principle 27

States and people shall cooperate in good faith and in a spirit of partnership in the fulfillment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development.

NOTES AND QUESTIONS
FOR CLASSROOM DISCUSSION

1. Obviously the key concept in the Rio Declaration is "sustainable development." Huge battles lay behind the decision to use this phrase. The developing countries of the world, containing most of the world's population, expressed a fear that the word "environment" was a code word for inhibiting their development. They argued at Rio that the developed nations, once having achieved their high standard of living at a cost of polluting and destroying the environment, now want to keep other nations from catching up. They argued further that, in order to suppress third-world growth, the developed nations are now saying that growth has to be inhibited lest the fragile ecosystem be destroyed. At numerous meetings in Rio, spokespersons for the developed nations replied that pollution, overpopulation, oxygen and ozone depletion, and the possibility of permanent loss of now endangered species, is simply a fact of the state of the world in 1992. How we got here may be a cause for regret, but the fact is that we are here and unless we begin to restrain ourselves by inhibiting development-at-all-costs, our children may have no future.

These competing viewpoints coalesced in the term "sustainable development." In whose favor do you think that term "tilts"? Does Principle 7 help you decide? Principle 11?

2. Principle 16 is colloquially known as the "polluter pays" principle. It is easy to apply in what might be called "positive" pollution: the emitting of hydrocarbons and fluorocarbons into the atmosphere, the dumping of chemicals into rivers and oceans. But how would it apply to "negative" pollution: the destruction of restorative systems so that the atmosphere becomes more polluted? A tree is a restorative system; its leaves take in carbon dioxide and emit oxygen, and some trees also remove polluting chemicals from the air. But as forests are

increasingly cut down to make way for "development," the capacity of the earth's forests to change carbon dioxide into oxygen is increasingly diminished. An atmosphere largely depleted of oxygen cannot support animal life (including human life). Can you argue, on the basis of Principle 16, that clear-cutting of forests is a form of pollution, and hence the clear-cutter should bear the costs of its pollution?

3. How does Principle 2 weigh in on the problem of "negative" pollution in the previous question?

4. Is Principle 1 species-chauvinistic? (Cf. *Anthology*, p. 271).

5. Principle 5 speaks of "eradicating poverty" as an "indispensable requirement for sustainable development." What if in some cases eradicating poverty in fact *conflicts* with sustainable development? Should such a "fact" be ignored in light of the "principle" stated in Principle 5?

6. What are the *priorities* of the Rio Declaration? What things should be done before other things are done? Note the use of the terms "integral" (Principle 4), "indispensable" (Principle 5), and "special priority" (Principle 6). Do these help us prioritize the various concerns?

7. Consider the export of super-efficient whaling vessels. If a manufacturing nation places a restriction on the export of these vessels, so as to discourage excessive whaling, would the country that wants to buy the vessels find support for its position in Principle 12? Does this principle generally reflect the developing countries' concern that developed countries might cut back on trade for environmental purposes? If so, isn't trade one of the tools that we would expect to be used in order to inhibit development so as to preserve basic environmental values?

8. Principle 20 salutes women, Principle 21 salutes youth, and Principle 22 salutes indigenous people. Why is there no principle saluting the non-human animal kingdom?

9. The editor of this Coursebook came back depressed from Rio. He acknowledged the importance of the Earth Summit in terms of heightened perceptions about the common problem of environmental degradation. But he was depressed about the total failure of the entire conference to prioritize anything. Not only did the entire conference fail, in his opinion, but each individual meeting he attended failed in its own small way to prioritize the items on its agenda. Instead, everyone participating in the Earth Summit seemed to be a spokesperson for a particular value or point of view. Each participant wanted to make sure that his or her value got reflected in the final documents. The result, in the author's estimation, was that nearly everyone's pet value did get reflected in the final documentation. No one was willing to say that someone else's value was more important than his own. This was particularly true of the scientists present at the conference. If a meeting contained a biologist, an engineer, a physicist, a medical doctor, and a chemist, each of these estimable scientists emphasized the critical importance of his or her own field of interest, but no one at any time ever conceded that a scientist in a different field might be addressing a more important concern.

Do you agree that prioritization is critical? Can we ever do anything in the environment without sacrificing something else? Is there such a thing as a free lunch? If everything we do in the ecosystem is at the cost of giving up something else that we might want to do, aren't we compelled to make priorities if we are going to do anything at all?

But if individuals make their own priorities, or if governments make their own priorities, and there is no central clearinghouse that organizes these priorities coherently, isn't the resulting practice unprioritized? How can a fragile ecosystem be saved if actions of individuals work at cross purposes?

Do you agree that the Rio Declaration itself is an "everything comes first" type of document? Or does it stake out some priorities?

What can international *law* do about all this? What can international *lawyers* do? Do you agree with the author of this Coursebook that, for all the lawyers that were present at the Rio Conference, there weren't enough lawyers? Are lawyers especially *trained* in prioritization? Are they sensitized by virtue of a law-school education to the importance of prioritizing arguments? Are they professionally impatient with people sitting around a table who want to do everything at once and all of whom agree with each other about everything?

10. The most important international meeting on the environment prior to the Earth Summit took place twenty years earlier in Stockholm. Following are some excerpts from the Stockholm Declaration. What major changes do you see in the Rio Declaration compared to the Stockholm Declaration? Are these changes improvements or retrogressions?

Declaration of the United Nations Conference on the Human Environment (1972)

The United Nations Conference on the Human Environment,
Having met at Stockholm from 5 to 16 June 1972,
Having considered the need for a common outlook and for common principles

to inspire and guide the peoples of the world in the preservation and enhancement of the human environment,
Proclaims that:

1. Man is both creature and molder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights--even the right to life itself.

2. The protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world; it is the urgent desire of the peoples of the whole world and the duty of all Governments.

Principle 1

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.

Principle 2

The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.

Principle 3

The capacity of the earth to produce vital renewable resources must be maintained and, wherever practicable, restored or improved.

Principle 4

Man has a special responsibility to safeguard and wisely manage the heritage of wildlife and its habitat, which are now gravely imperilled by a combination of adverse factors. Nature conservation, including wildlife, must therefore receive importance in planning for economic development.

Principle 5

The non-renewable resources of the earth must be employed in such a way as to guard against the danger of their future exhaustion and to ensure that benefits from such employment are shared by all mankind.

Principle 6

The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems. The just struggle of the peoples of all countries against pollution should be supported.

Principle 7

States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea.

Principle 8

Economic and social development is essential for ensuring a favorable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life.

Principle 9

Environmental deficiencies generated by the conditions of under-development and natural disasters pose grave problems and can best be remedied by accelerated development through the transfer of substantial quantities of financial and technological assistance as a supplement to the domestic effort of the developing countries and such timely assistance as may be required.

Principle 10

For the developing countries, stability of prices and adequate earnings for primary commodities and raw materials are essential to environmental management since economic factors as well as ecological processes must be taken into account.

Principle 11

The environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries, nor should they hamper the attainment of better living conditions for all, and

appropriate steps should be taken by States and international organizations with a view to reaching agreement on meeting the possible national and international economic consequences resulting from the application of environmental measures.

Principle 12

Resources should be made available to preserve and improve the environment, taking into account the circumstances and particular requirements of developing countries and any costs which may emanate from their incorporating environmental safeguards into their development planning and the need for making available to them, upon their request, additional international technical and financial assistance for this purpose.

Principle 16

Demographic policies which are without prejudice to basic human rights and which are deemed appropriate by Governments concerned should be applied in those regions where the rate of population growth or excessive population concentrations are likely to have adverse effects on the environment of the human environment and impede development.

B. Bioethics and Biodiversity

Reading Assignment: *International Law Anthology*, pp. 269-80.

NOTES AND QUESTIONS FOR CLASSROOM DISCUSSION

1. What is Derek Parfit's paradox? On first reading, did it strike you as "silly"? How about on second reading?
2. Anthony D'Amato and Edith Brown Weiss differ in their conception of the rights and interests of future generations. Whose conception do you find more persuasive from a legal standpoint? From a moral standpoint?
3. Do you have a personal conception of bioethics? What is it?
4. Do the different perspectives of Edith Brown Weiss and Anthony D'Amato lead to substantively different environmental policies?
5. Do you think we can rely on humankind's morality, whether instinctual or not, to preserve the planet? Should human beings worry about other animals, or is "species chauvinism" acceptable?
6. According to Gunther Handl, what problems accompany conceptualizing environmental protection as a generic human right? What is the main benefit to such a conceptualization? Do you agree with Handl's ultimate conclusion? Why or why not?
7. What is "CITES"? How does it promote biodiversity? What are its limitations?
8. Should the international community lead the charge to protect biodiversity, or should it be left to individual states to protect their own wildlife? If the international community takes action, should the action simply be based on consent through treaties? What other options can you think of?
9. Is there always a difference between what is best for animals and what is best for humans? What does Tracy Dobson say? After reading her article on Biodiversity, do you think pure self-interest might motivate people to protect their environment? Is it sufficient to have concern for our living ascertainable children?
10. What is the international community doing to slow down desertification? Is it enough?
11. According to Bernard Oxman, is the common heritage principle inconsistent with high seas law? Why? Why not?
12. What does Frederic Kirgis mean by "soft law"? (If necessary, refer back to the discussion on "soft law" in the Anthology, pp. 148-54).
13. What is the difference in international law between "common concern" and "common heritage"?

C. Endangered Species

1. Elephants

Reading Assignment: *International Law Anthology*, pp. 280-85.

Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)
U.N.T.S., No. 14537 (1976)

Article 1

[Definitions.]

Article 2

1. Appendix I shall include all species threatened with extinction which are or may be affected by trade. Trade in specimens of these species must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances.

2. Appendix II shall include:

a) all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival; and

b) other species which must be subject to regulation in order that trade in specimens of certain species referred to in subparagraph (a) of this paragraph may be brought under effective control.

3. Appendix III shall include all species which any Party identifies as being subject to regulation within its jurisdiction for the purposes of preventing or restricting exploitation, and as needing the cooperation of other parties in the control of trade.

4. The Parties shall not allow trade in specimens of species included in Appendices I, II and III except in accordance with the provisions of the present Convention.

Article 3

1. All trade in specimens of species included in Appendix I shall be in accordance with the provisions of this Article.

2. The export of any specimen of a species included in Appendix I shall require the prior grant and presentation of an export permit. An export permit shall only be granted when the following conditions have been met:

a) a Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species;

b) a Management Authority of the State of export is satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora;

c) a Management Authority of the State of export is satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment; and

d) a Management Authority of the State of export is satisfied that an import permit has been granted for the specimen.

3. The import of any specimen of a species included in Appendix I shall require the prior grant and presentation of an import permit and either an export permit or a re-export certificate.

4. The re-export of any specimen of a species included in Appendix I shall require the prior grant and presentation of a re-export certificate.

Article 4

1. All trade in specimens of species included in Appendix II shall be in accordance with the provisions of this Article.

2. The export of any specimen of a species included in Appendix II shall require the prior grant and presentation of an export permit.

Article 8

1. The Parties shall take appropriate measures to enforce the provisions of the present Convention and to prohibit trade in specimens in violation thereof. These shall include measures:

a) to penalize trade in, or possession of, such specimens, or both; and

b) to provide for the confiscation or return to the State of export of such specimens.

2. In addition to the measures taken under paragraph 1 of this Article a Party may, when it deems it necessary, provide for any method of internal reimbursement for expenses incurred as a result of the confiscation of a specimen traded in violation of the measures taken in the application of the provisions of the present Convention.

Article 10

Where export or re-export is to, or import is from, a State not a Party to the present Convention, comparable documentation issued by the competent authorities in that State which substantially conforms with the requirements of the present Convention for permits and certificates may be accepted in lieu thereof by any Party.

NOTES AND QUESTIONS FOR CLASSROOM DISCUSSION

1. In the area of global environmental law, state sovereignty may be giving way to the interests of the international community in the same way as the area of human rights. Do you approve of this trend? Does it depend on how the interests of the international community are defined? Or on who does the defining?

2. What are global environmental resources? Is an elephant a global environmental resource?
3. Global environmental resources give rise to global environmental rights and obligations. What are these rights and obligations? How can the international community improve the handling of their global obligations?
4. According to Michael Glennon, what should be done to protect the elephants?
5. Why did the CITES Secretary-General oppose the effort to move the elephant to Appendix I (the highest level of protection of endangered species) of CITES? (See Appendix, p. 284 n.83 & n.84.) What is Glennon's position on this issue? What is yours?

2. Whales

Japan Whaling Association v. American Cetacean Society
478 U.S. 221 (1986).

Justice WHITE delivered the opinion of the Court.

In these cases, we address the question whether, under what are referred to in these cases as the Pelly and Packwood Amendments,¹ the Secretary of Commerce is required to certify that Japan's whaling practices "diminish the effectiveness" of the International Convention for the Regulation of Whaling because that country's annual harvest exceeds quotas established under the Convention.

For centuries, men have hunted whales in order to obtain both food and oil, which, in turn, can be processed into a myriad of other products. Although at one time a harrowing and perilous profession, modern technological innovations have transformed whaling into a routine form of commercial fishing, and have allowed for a multifold increase in whale harvests worldwide.

Based on concern over the effects of excessive whaling, 15 nations formed the International Convention for the Regulation of Whaling (ICRW), Dec. 2, 1946.² The ICRW was designed to "provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry," and today serves as the principal international mechanism for promoting the conservation and development of whale populations. The United States was a founding member of the ICRW; Japan joined in 1951.

To achieve its purposes, the ICRW included a Schedule which, inter alia, regulates harvesting practices and sets harvest limits for various whale species. In addition, the ICRW established the International Whaling Commission (IWC), which implements portions of the Convention and is authorized to amend the Schedule and set new harvest quotas. The quotas are binding on IWC members if accepted by a three-fourths' majority vote. Under the terms of the Convention, however, the IWC has no power to impose sanctions for quota violations. Moreover, any member country may file a timely objection to an IWC amendment of the Schedule and thereby exempt itself from any obligation to comply with the limit unless and until the objection is withdrawn. All nonobjecting countries remain bound by the amendment.

Because of the IWC's inability to enforce its own quota and in an effort to promote enforcement of quotas set by other international fishery conservation programs, Congress passed the Pelly Amendment to the Fishermen's Protective Act of 1967. Principally intended to preserve and protect North American Atlantic salmon from depletion by Danish fishermen in violation of the ban imposed by the International Convention for the Northwest Atlantic Fisheries, the Amendment protected whales as well.³ The Amendment directs the Secretary of Commerce to certify to the President if "nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program." Upon certification, the President, in his discretion, may then direct the Secretary of the Treasury to prohibit the importation of fish products from the certified nation. The President may also decline to impose any sanctions or import prohibitions.

After enactment of the Pelly Amendment, the Secretary of Commerce five times certified different nations to the President as engaging in fishing operations which "diminish[ed] the effectiveness" of IWC quotas.⁴ None of the certifications resulted in the imposition of sanctions by the President. After each certification, however, the President was able to use the threat of discretionary sanctions to obtain commitments of future compliance from the offending nations. Although "the Pelly Amendment . . . served the useful function of quietly persuading nations to adhere to the decisions of international fishery conservation bodies,"⁵ Congress grew impatient with the Executive's delay in making certification decisions and refusal to impose sanctions.⁶ As a result, Congress passed the Packwood Amendment to the Magnuson Fishery Conservation and Management Act.⁷ This Amendment requires the Secretary of Commerce to "periodically monitor the activities of foreign nationals that may affect [international fishery conservation programs]. . .," "promptly investigate any activity by foreign nationals that, in the opinion of the Secretary, may be cause for certification . . .," and "promptly conclude; and reach a decision with respect to [that]

investigation."

To rectify the past failure of the President to impose the sanctions authorized--but not required--under the Pelly Amendment, the Packwood Amendment removes this element of discretion and mandates the imposition of economic sanctions against offending nations. Under the Amendment, if the Secretary of Commerce certifies that ``nationals of a foreign country, directly or indirectly, are conducting fishing operations or engaging in trade or taking which diminishes the effectiveness of the International Convention for the Regulation of Whaling," the Secretary of State must reduce, by at least 50%, the offending nation's fishery allocation within the United States' fishery conservation zone. Although the Amendment requires the imposition of sanctions when the Secretary of Commerce certifies a nation, it did not alter the initial certification process, except for requiring expedition. It was also provided that a certificate under the Packwood Amendment also serves as a certification for the purposes of the Pelly Amendment.

In 1981, the IWC established a zero quota for the Western Division stock of Northern Pacific sperm whales. The next year, the IWC ordered a 5-year moratorium on commercial whaling to begin with the 1985-1986 whaling season and last until 1990. In 1982, the IWC acted to grant Japan's request for a 2-year respite--for the 1982-1983 and 1983-1984 seasons--from the IWC's earlier decision banning sperm whaling.

Because Japan filed timely objections to both the IWC's 1981 zero quota for Northern Pacific sperm whales and 1982 commercial whaling moratorium, under the terms of the ICRW, it was not bound to comply with either limitation. Nonetheless, as the 1984-1985 whaling season grew near, it was apparently recognized that under either the Pelly or Packwood Amendment, the United States could impose economic sanctions if Japan continued to exceed these whaling quotas.

Following extensive negotiations, on November 13, 1984, Japan and the United States concluded an executive agreement through an exchange of letters between the Charge d'Affaires of Japan and the Secretary of Commerce. Subject to implementation requirements,⁸ Japan pledged to adhere to certain harvest limits and to cease commercial whaling by 1988. In return and after consulting with the United States Commissioner to the IWC, the Secretary determined that the short-term continuance of a specified level of limited whaling by Japan, coupled with its promise to discontinue all commercial whaling by 1988, ``would not diminish the effectiveness of the International Convention for the Regulation of Whaling, 1946, or its conservation program." Accordingly, the Secretary informed Japan that, so long as Japan complied with its pledges, the United States would not certify Japan under either Amendment.

Several days before consummation of the executive agreement, several wildlife conservation groups⁹ filed suit in District Court seeking a writ of mandamus compelling the Secretary of Commerce to certify Japan. Because in its view any taking of whales in excess of the IWC quotas diminishes the effectiveness of the ICRW, the District Court granted summary judgment for respondents and ordered the Secretary of Commerce immediately to certify to the President that Japan was in violation of the IWC sperm whale quota.¹⁰ Thereafter, Japan's Minister for Foreign Affairs informed the Secretary of Commerce that Japan would perform the second condition of the agreement-- withdrawal of its objection to the IWC moratorium-- provided that the United States obtained reversal of the District Court's order.

A divided Court of Appeals affirmed.¹¹ Recognizing that the Pelly and Packwood-Magnuson Amendments did not define the specific activities which would ``diminish the effectiveness" of the ICRW, the court looked to the Amendments' legislative history and concluded, as had the District Court, that the taking by Japanese nationals of whales in excess of quota automatically called for certification by the Secretary. We granted certiorari and now reverse.

We address first the Japanese petitioners' contention that the present actions are unsuitable for judicial review because they involve foreign relations and that a federal court, therefore, lacks the judicial power to command the Secretary of Commerce, an Executive Branch official, to dishonor and repudiate an international agreement. Relying on the political question doctrine, and quoting *Baker v. Carr*,¹² the Japanese petitioners argue that the danger of ``embarrassment from multifarious pronouncements by various departments on one question" bars any judicial resolution of the instant controversy.

We disagree. As *Baker* plainly held, the courts have the authority to construe treaties and executive agreements, and it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts. It is also evident that the challenge to the Secretary's decision not to certify Japan for harvesting whales in excess of IWC quotas presents a purely legal question of statutory interpretation. The Court must first determine the nature and scope of the duty imposed upon the Secretary by the Amendments, a decision which calls for applying no more than the traditional rules of statutory construction, and then applying this analysis to the particular set of facts presented below. We are cognizant of the interplay between these Amendments and the

conduct of this Nation's foreign relations, and we recognize the premier role which both Congress and the Executive play in this field. But under the Constitution, one of the Judiciary's characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones. We conclude, therefore, that the present cases present a justiciable controversy, and turn to the merits of petitioners' arguments.¹³

The issue before us is whether, in the circumstances of these cases, either the Pelly or Packwood Amendment required the Secretary to certify Japan for refusing to abide by the IWC whaling quotas. We have concluded that certification was not necessary and hence reject the Court of Appeals' holding and respondents' submission that certification is mandatory whenever a country exceeds its allowable take under the ICRW Schedule.

Under the Packwood Amendment, certification is neither permitted nor required until the Secretary makes a determination that nationals of a foreign country "are conducting fishing operations or engaging in trade or taking which diminishes the effectiveness" of the ICRW. It is clear that the Secretary must promptly make the certification decision, but the statute does not define the words "diminish the effectiveness of" or specify the factors that the Secretary should consider in making the decision entrusted to him alone. Specifically, it does not state that certification must be forthcoming whenever a country does not abide by IWC Schedules, and the Secretary did not understand or interpret the language of the Amendment to require him to do so. Had Congress intended otherwise, it would have been a simple matter to say that the Secretary must certify deliberate taking of whales in excess of IWC limits.

Here, as the Convention permitted it to do, Japan had filed its objection to the IWC harvest limits and to the moratorium to begin with the 1985-1986 season. It was accordingly not in breach of its obligations under the Convention in continuing to take whales, for it was part of the scheme of the Convention to permit nations to opt out of Schedules that were adopted over its objections. In these circumstances, the Secretary, after consultation with the United States Commissioner to the IWC and review of the IWC Scientific Committee opinions, determined that it would better serve the conservation ends of the Convention to accept Japan's pledge to limit its harvest of sperm whales for four years and to cease all commercial whaling in 1988, rather than to impose sanctions and risk continued whaling by the Japanese. In any event, the Secretary made the determination assigned to him by the Packwood Amendment and concluded that the limited taking of whales in the 1984 and 1985 coastal seasons would not diminish the effectiveness of the ICRW or its conservation program, and that he would not make the certification that he would otherwise be empowered to make.

The Secretary, of course, may not act contrary to the will of Congress when exercised within the bounds of the Constitution. If Congress has directly spoken to the precise issue in question, if the intent of Congress is clear, that is the end of the matter. But as the courts below and respondents concede, the statutory language itself contains no direction to the Secretary automatically and regardless of the circumstances to certify a nation that fails to conform to the IWC whaling Schedule. The language of the Pelly and Packwood Amendments might reasonably be construed in this manner, but the Secretary's construction that there are circumstances in which certification may be withheld, despite departures from the Schedules and without violating his duty, is also a reasonable construction of the language used in both Amendments. We do not understand the Secretary to be urging that he has carte blanche discretion to ignore and do nothing about whaling in excess of IWC Schedules. He does not argue, for example, that he could refuse to certify for any reason not connected with the aims and conservation goals of the Convention, or refuse to certify deliberate flouting of schedules by members who have failed to object to a particular schedule. But insofar as the plain language of the Amendments is concerned, the Secretary is not forbidden to refuse to certify for the reasons given in these cases.

We conclude that the Secretary's construction of the statutes neither contradicted the language of either Amendment, nor frustrated congressional intent. In enacting these Amendments, Congress' primary goal was to protect and conserve whales and other endangered species. The Secretary furthered this objective by entering into the agreement with Japan, calling for that nation's acceptance of the worldwide moratorium on commercial whaling and the withdrawal of its objection to the IWC zero sperm whale quota, in exchange for a transition period of limited additional whaling. Given the lack of any express direction to the Secretary that he must certify a nation whose whale harvest exceeds an IWC quota, the Secretary reasonably could conclude, as he has, that, "a cessation of all Japanese commercial whaling activities would contribute more to the effectiveness of the IWC and its conservation program than any other single development."

We conclude, therefore, that the Secretary's decision to secure the certainty of Japan's future compliance with the IWC's program through the 1984 executive agreement, rather than rely on the possibility that certification and imposition of economic sanctions would produce the same or better result, is a reasonable construction of the Pelly and Packwood Amendments. Congress granted the Secretary the authority to determine whether a foreign nation's whaling in excess of quotas diminishes the effectiveness of the IWC, and we find no reason to impose a mandatory

obligation upon the Secretary to certify that every quota violation necessarily fails that standard. Accordingly, the judgment of the Court of Appeals is

Reversed.

Justice MARSHALL, with whom Justice BRENNAN, Justice BLACKMUN, and Justice REHNQUIST join, dissenting:

Since 1971, Congress has sought to lead the world, through the repeated exercise of its power over foreign commerce, in preventing the extermination of whales and other threatened species of marine animals. I deeply regret that it will now have to act again before the Executive Branch will finally be compelled to obey the law. I believe that the Court has misunderstood the question posed by the case before us, and has reached an erroneous conclusion on a matter of intense worldwide concern. I therefore dissent.

Congress began its efforts with the Pelly Amendment, which directs that "[w]hen the Secretary of Commerce determines that 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." That Amendment, although apparently mandatory in its certification scheme, did not provide for a mandatory response from the President once the certification was made. Rather, the President was empowered, in his discretion, to impose sanctions on the certified nations or not to act at all.

This executive latitude in enforcement proved unsatisfactory. Between 1971 and 1978, every time that a nation exceeded international whaling quotas--on five occasions--the Secretary of Commerce duly certified to the President that the trespassing nation had exceeded whaling quotas set by the International Whaling Commission and had thus diminished the effectiveness of the conservation program. Although the offending nations had promised immediate compliance, the Secretary apparently believed that he was obliged to certify the past violations. Yet on the basis of those assurances, the President each time exercised his option under the Pelly Amendment to impose no sanctions on the violators.

Unhappy with the President's failure to sanction clear violations of international whaling agreements, Congress responded in 1979 with the Packwood Amendment. That Amendment provides that if the Secretary of Commerce certifies that a country is diminishing the effectiveness of the International Convention for the Regulation of Whaling, the Secretary of State must reduce the fishing allocation of the offending nation by at least 50 percent. It also provides certain time limits within which the Executive Branch must act in imposing the mandatory sanctions. The automatic imposition of sanctions, it seemed, would improve the effectiveness of the Pelly Amendment by providing a definite consequence for any nation disregarding whaling limits.

In 1984, the Secretary of Commerce for the first time declined to certify a case of intentional whaling in excess of established quotas. Rather than calling into play the Packwood Amendment's mandatory sanctions by certifying to the President Japan's persistence in conducting whaling operations, Secretary Baldrige set about to negotiate with Japan, using his power of certification under domestic law to obtain certain promises of reduced violations in future years. In the resulting compromise, the Secretary agreed not to certify Japan, provided that Japan would promise to reduce its whaling until 1988 and then withdraw its objection to the international whaling quotas. Arguing that the Secretary had no discretion to withhold certification, respondents sought review of the Secretary's action in federal court. Both the District Court and the Court of Appeals found that Congress had not empowered the Secretary to decline to certify a clear violation of International Whaling Commission (IWC) quotas, and ordered the Secretary to make the statutory certification. This Court now renders illusory the mandatory language of the statutory scheme, and finds permissible exactly the result that Congress sought to prevent in the Packwood Amendment: executive compromise of a national policy of whale conservation.

The Court devotes its opinion to the question whether the language of the Pelly or the Packwood Amendment leaves room for discretion in the Secretary to determine that a violation of the whaling quota need not be certified. Although framed in the same way by the Court of Appeals and by the parties before this Court, that issue is not the most direct approach to resolving the dispute before us. Indeed, by focusing entirely on this question, the Court fails to take into account the most significant aspect of these cases: that even the Secretary himself has not taken the position that Japan's past conduct is not the type of activity that diminishes the effectiveness of the whale conservation program, requiring his certification under the Pelly Amendment. In the face of an IWC determination that only a zero quota will protect the species, never has the Secretary concluded, nor could he conclude, that the intentional taking of large numbers of sperm whales does not diminish the effectiveness of the IWC program. Indeed, the Secretary has concluded just the opposite. Just four months before the execution of the bilateral agreement that spawned this litigation, Senator Packwood wrote to the Secretary as follows:

It has been assumed by everyone involved in this issue, including the whaling nations, that a nation which

continues commercial whaling after the IWC moratorium takes effect would definitely be certified. I share this assumption since I see no way around the logical conclusion that a nation which ignores the moratorium is diminishing the effectiveness of the IWC.

What I am asking, Mac, is that you provide me with an assurance that it is the position of the Commerce Department that any nation which continues whaling after the moratorium takes effect will be certified under Packwood-Magnuson. (June 28, 1984).

The Secretary expressed his agreement:

You noted in your letter the widespread view that any continued commercial whaling after the International Whaling Commission (IWC) moratorium decision takes effect would be subject to certification. I agree, since any such whaling attributable to the policies of a foreign government would clearly diminish the effectiveness of the IWC. (July 24, 1984).

I cannot but conclude that the Secretary has determined in these cases, not that Japan's past violations are so negligible that they should not be understood to trigger the certification obligation, but that he would prefer to impose a penalty different from that which Congress prescribed in the Packwood Amendment. Significantly, the Secretary argues here that the agreement he negotiated with Japan will--in the future--protect the whaling ban more effectively than imposing sanctions now. But the regulation of future conduct is irrelevant to the certification scheme, which affects future violations only by punishing past ones. The Secretary's manipulation of the certification process to affect punishment is thus an attempt to evade the statutory sanctions rather than a genuine judgment that the effectiveness of the quota has not been diminished.

The Secretary would rewrite the law. Congress removed from the Executive Branch any power over penalties when it passed the Packwood Amendment. Indeed, the Secretary's compromise in these cases is precisely the type of action, previously taken by the President, that led Congress to enact the mandatory sanctions of the Packwood Amendment: in 1978, five nations had been found to have exceeded quotas, but the President had withheld sanctions upon the promise of future compliance with international norms. Here, the future "compliance" is even less satisfactory than that exacted in the past instances: instead of immediate compliance, the Secretary has settled for continued violations until 1988. And in 1988 all that Japan has promised is to withdraw its formal objection to the IWC moratorium.

The important question here, however, is not whether the Secretary's choice of sanctions was wise or effective, but whether it was authorized. The Court does not deny that Congress intended the consequences of actions diminishing the effectiveness of a whaling ban to be governed exclusively by the sanctions enumerated in the Packwood Amendment, with the optional addition of those provided in the Pelly Amendment. Thus, when the Secretary's action here, well intentioned or no, is seen for what it really is--a substitute of his judgment for Congress' on the issue of how best to respond to a foreign nation's intentional past violation of quotas--there can be no question but that the Secretary has flouted the express will of Congress and exceeded his own authority. On that basis alone, I would affirm the judgment of the Court of Appeals.

I would affirm the judgment below on the ground that the Secretary has exceeded his authority by using his power of certification, not as a means for identifying serious whaling violations, but as a means for evading the constraints of the Packwood Amendment. Even focusing, as the Court does, upon the distinct question whether the statute prevents the Secretary from determining that the effectiveness of a conservation program is not diminished by a substantial transgression of whaling quotas, I find the Court's conclusion utterly unsupported. I am troubled that this Court is empowering an officer of the Executive Branch, sworn to uphold and defend the laws of the United States, to ignore Congress' pointed response to a question long pondered:

whether Leviathan can long endure so wide a chase, and so remorseless a havoc;
whether he must not at last be exterminated from the waters,
and the last whale, like the last man, smoke his last pipe,
and then himself evaporate in the final puff."
H. Melville, *Moby Dick* 436 (Signet ed. 1961).

Reading Assignment: *International Law Anthology*, pp. 285-301.

NOTES AND QUESTIONS FOR CLASSROOM DISCUSSION

1. What was the "injury in fact" that gave the respondents standing to sue the Japan Whaling Association?

(See the Court's footnote, here numbered n.13. See also *Anthology*, pp. 296-97.) Do you agree with Anthony D'Amato and Sudhir Chopra that this particular "injury" may have not seemed sufficient to some of the justices?

2. The majority in the Japan Whaling Association Case admits that first the Pelly, and then the Packwood, Amendments were passed by a Congress that was frustrated with the Secretary's failure to impose economic sanctions upon countries violating the whaling guidelines of the International Whaling Commission. Why then doesn't the majority agree with the dissenters that "the Secretary has flouted the express will of Congress and exceeded his own authority"? Does the majority opinion strike you as politically motivated? Does it rest on a firm legal foundation?

3. Do all the justices of the Supreme Court really agree that whales need protection, and merely differ in their opinion of the best means to secure that goal?

4. What is the Cartesian thesis? Do you agree with it?

5. Are whales morally inferior to humans? In what sense? How do we know? Does it matter?

6. Is it fair to compare the treatment of whales today to the treatment of women and minorities in the past?

7. What is the philosophically intermediate position between according rights to whales and abusing whales?

8. Do you find convincing the authors' account of six discernible historical stages of international law's treatment of whales and whaling? What motivated the shift from each stage to the next? What role did the IWC play in the shifting? When did regulation become conservation? When did conservation become protection? Why? What role did President Truman play?

9. What effect did Article 65 of the United Nations Convention on the Law of the Sea have on whales and whaling?

10. When can the entitlement stage become a reality? How is the entitlement stage different from the preservationist stage?

11. According to Christopher Stone, cited in the *Anthology* essay on whales, what differences will accrue if rights are ascribed to natural objects in the environment instead of making it a human obligation to treat the environment in a certain way? How do these changes affect whales and whalers?

12. What is the basis of Kazuo Sumi's counterclaim? What is the best case that can be made for Japan's position? Do you agree with the authors' critique?

13. Kazuo Sumi asserts that a cultural bias is working against Japanese whalers. Do you agree?

14. What counterclaim is Nancy Doubleday asserting on behalf of the Inuit? On what international covenant does she base the claim? Is it a persuasive argument? How does the Inuit claim differ from that of the Japanese whalers? Which is the more persuasive claim? In your opinion should either group have the right to kill whales?

15. How should the international community handle the plight of the Inuit? Do you agree in whole or in part with the approach suggested by D'Amato and Chopra? What other approaches should be tried?

FOOTNOTES Chapter 9

1 85 Stat. 786, as amended, 22 U.S.C. § 1978; 90 Stat. 337, as amended, 16 U.S.C. § 1821 (1982 ed. and Supp. III).

2 62 Stat. 1716, T.I.A.S. No. 1849 (entered into force Nov. 10, 1948).

3 See 117 Cong.Rec. 34752 (1971) (remarks of Rep. Pelly); H.R.Rep. No. 92-468, p. 6 (1971), U.S. CODE CONG. & ADMIN. NEWS 1971, p. 2409.

4 H.R.Rep. No. 95-1029, p. 9 (1978), U.S. CODE CONG. & ADMIN. NEWS 1978, p. 1768; 125 Cong.Rec. 22084 (1979) (remarks of Rep. Oberstar).

5 H.R.Rep. No. 95-1029, *supra*, at 9, U.S. CODE CONG. & ADMIN. NEWS 1978, pp. 1768, 1773.

6 See 125 Cong. Rec. 22083 (1979) (remarks of Rep. Murphy); *id.*, at 22084 (remarks of Rep. Oberstar).

7 16 U.S.C. § 1801 et seq. (1982 ed. and Supp. III).

8 The details of the Japanese commitments were explained in a summary accompanying the letter from the Charge d'Affaires to the Secretary. First, the countries agreed that if Japan would withdraw its objection to the IWC zero sperm whale quota, Japanese whalers could harvest up to 400 sperm whales in each of the 1984 and 1985

coastal seasons without triggering certification. Japan's irrevocable withdrawal of that objection was to take place on or before December 13, 1984, effective April 1, 1988. Japan fulfilled this portion of the agreement on December 11, 1984.

Second, the two nations agreed that if Japan would end all commercial whaling by April 1, 1988, Japanese whalers could take additional whales in the interim without triggering certification. Japan agreed to harvest no more than 200 sperm whales in each of the 1986 and 1987 coastal seasons. In addition, it would restrict its harvest of other whale species--under limits acceptable to the United States after consultation with Japan--through the end of the 1986-1987 pelagic season and the end of the 1987 coastal season. The agreement called for Japan to announce its commitment to terminate commercial whaling operations by withdrawing its objection to the 1982 IWC moratorium on or before April 1, 1985, effective April 1, 1988.

9 The original plaintiffs to this action are: American Cetacean Society, Animal Protection Institute of America, Animal Welfare Institute, Center for Environmental Education, The Fund for Animals, Greenpeace U.S.A., The Humane Society of the United States, International Fund for Animal Welfare, The Whale Center, Connecticut Cetacean Society, Defenders of Wildlife, Friends of the Earth, and Thomas Garrett, former United States Representative to the IWC.

10 604 F.Supp. 1398, 1411 (DC 1985).

11 247 U.S.App.D.C. 309, 768 F.2d 426 (1985).

12 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1969).

13 We also reject the Secretary's suggestion that no private cause of action is available to respondents. Respondents brought suit against the Secretary of Commerce, the head of a federal agency, and the suit, in essence, is one to "compel agency action unlawfully withheld." 5 U.S.C. § 706(1). . .The "right of action" in such cases is expressly created by the Administrative Procedure Act (APA).

It is clear that respondents may avail themselves of the right of action created by the APA. First, the Secretary's actions constitute the actions of an agency. In addition, there has been "final agency action," in that the Secretary formally has agreed with the Japanese that there will be no certification, and this appears to be an action "for which there is no other adequate remedy in a court," as the issue whether the Secretary's failure to certify was lawful will not otherwise arise in litigation. Next, it appears that respondents are sufficiently "aggrieved" by the agency's action: under our decisions in *Sierra Club v. Morton*, 405 U.S. 727 (1972), and *United States v. SCRAP*, 412 U.S. 669 (1973), they undoubtedly have alleged a sufficient "injury in fact" in that the whale watching and studying of their members will be adversely affected by continued whale harvesting, and this type of injury is within the "zone of interests" protected by the Pelly and Packwood Amendments. See *Association of Data Processing Service Organizations Inc. v. Camp*, 397 U.S. 150 (1970). Finally, the Secretary has failed to point to any expressed intention on the part of Congress to foreclose APA review of actions under either Amendment. We find, therefore, that respondents are entitled to pursue their claims under the right of action created by the APA.