

THE INTERNATIONAL WHALING COMMISSION: CHALLENGES FROM WITHIN AND WITHOUT

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I. INTRODUCTION

Despite the growing number of international organizations dedicated to the conservation and management of living marine resources, very few generate the controversy of the International Whaling Commission (IWC). The IWC remains an explosive point of friction between the deeply committed anti-whaling forces, on the one hand, and the handful of remaining stalwart whaling states and their supporters, on the other. As the organization approaches its sixtieth year of operation it is useful to review where it has come from to better understand where it may be going. Equally as important is a discussion of some of the key challenges, both internal and external, that the IWC presently faces.

This paper addresses these issues. While this work is neither a complete review of the history of the IWC nor a comprehensive survey of its institutional strengths and weaknesses, it will provide an overview and a context as to where the IWC sits as an international resource management organization. What will the IWC most likely have to reconcile in the early years of the 21st Century to remain a critical regulatory body and a legitimate forum in the future?

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II. A SHORT HISTORY OF THE IWC

The IWC was the product of the 1946 International Convention for the Regulation of Whaling (ICRW).¹ Before the ICRW, the dreadful mismanagement of cetaceans (whales, dolphins, and porpoises) by the nations of the world, and more specifically the whaling industry, resulted in the collapse of almost all commercially valuable whale stocks.² To be clear, the ICRW was an agreement among whaling states for whaling interests. Even though the convention purported to manage a marine resource, the ICRW could not be confused with what we would today call an environmental agreement. The last paragraph of the preamble leaves no mistake about its purpose: “[h]aving decided to conclude a convention to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry[.]”³

Despite this attempt to place some regulation and oversight around whaling practices, under the guiding hand of the IWC important whale populations continued to decline at alarming rates. For decades, the member states of the IWC met annually and set unsustainable quotas that did little more than guarantee short-term profits for whalers. Partly because of the abject failure of the IWC to achieve its objectives and partly because of the growing global environmental consciousness of the 1960s and 1970s, a movement took hold to end commercial whaling.

By 1982 the membership of the IWC had grown to thirty-seven members. Many of these newer members were not whaling states at all. Rather, they joined the IWC at the urging of save-the-whales activists simply to vote against the practice of commercial whaling. At the annual meeting in 1982 the IWC voted to impose a moratorium on commercial whaling that fully took effect in 1986. The moratorium was largely justified by its advocates on the scientific uncertainty surrounding the population assessments of key stocks. The moratorium remains in effect. As certain stocks have undoubtedly recovered, however, the pressure to lift the moratorium grows with each passing year. The moratorium on commercial whaling affects neither scientific research whaling⁴ nor aboriginal subsistence whaling⁵ both of which are provided for under

1. International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72 (entered into force Nov. 10, 1948), available at <http://www.iwcoffice.org> (last visited Mar. 17, 2004) [hereinafter ICRW]. Articles III through VII establish the IWC and confers upon it authority to manage and conserve cetacean resources.

2. For a more detailed discussion of the history of the IWC and whaling in general see Howard Scott Schiffman, *The Protection of Whales in International Law: A Perspective for the Next Century*, 22 BROOK. J. INT'L L. 303 (1996); Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L L. 21 (1991).

3. ICRW, *supra* note 1, at pmb1.

4. *Id.* at art. VIII.

5. *Id.* at sched., para. 13; Article 1(1) elevates the Schedule to an integral part of the ICRW. *Id.* at art. 1(1).

separate provisions of the ICRW. Both scientific research whaling and aboriginal whaling remain contentious issues in the IWC (discussed below).

The annual IWC meetings remain grinding plates of controversy as Japan, Norway, Iceland, and most recently some newer members (as of November 2003 the membership of the IWC had grown to fifty-one states) seek leverage to reverse the moratorium. The battles within the IWC do not occur in a vacuum. Rather, they must be understood against the backdrop of wider tensions between utilization and conservation of living marine resources. To add to the mix, concern for animal rights and welfare constitute an important part of the debate. The modern law of the sea is a good point of departure to understand these controversies.

III. WHALES, UNCLOS, AND INTERNATIONAL ENVIRONMENTAL LAW

The status of whales in international law took on a new and more thoughtful dimension with the conclusion of the 1982 United Nations Convention on the Law of the Sea (UNCLOS).⁶ UNCLOS is one of the most significant achievements of the United Nations. It provides a comprehensive framework for the modern law of the sea and mandates the proper conservation and management of marine resources. More importantly, with regard to the status of whales UNCLOS recognizes marine mammals as a special resource deserving of additional consideration. Specific provisions of UNCLOS are devoted to the conservation, as opposed to the utilization, of marine mammals in a state's waters. Article 65 of UNCLOS provides:

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 co-operate with a view to the 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.*⁷

The applicable provisions of UNCLOS may be viewed as the *lex specialis* most directly addressing the status of cetaceans under the law of the sea today. This contrasts with the treatment of other living marine resources, such as fish,

6. *United Nations Convention on the Law of the Sea*, Dec. 10, 1982, 21 I.L.M. 1261 (as of this writing UNCLOS is before the United States Senate for advice and consent in contemplation of ratification) [hereinafter UNCLOS].

7. *Id.* at art. 65 (emphasis added). Article 120 extends this status to the high seas. *See id.* at art. 120.

where provisions favoring consumption and utilization balance more general obligations to conserve those resources.

Article 65 is relevant to the role of the IWC in that it mandates states to, "work through the appropriate international organizations for their conservation, management and study." While the IWC is not mentioned by name its long history allows one to conclude that the drafters of UNCLOS had it in mind. Significantly, however, the use of the plural "organizations" also indicates that additional organizations, present or future, may have been contemplated as well.

The favorable treatment of cetaceans in UNCLOS should also be understood in the context of the rise of international environmental law that largely began with the Stockholm Conference of 1972. Significantly, the commencement of the negotiation of UNCLOS was rather contemporaneous with Stockholm and its immediate aftermath. While UNCLOS is a comprehensive document addressing virtually all aspects of ocean usage it is also undeniably an environmental treaty with articles requiring the control of pollution, sustainable utilization of resources, and general obligations to protect and preserve the marine environment.

Whales are a vanguard species in the environmental movement because of their intelligence, beauty, and communal lifestyle. The fact that they are considered to be a consumable resource by some ignites passionate debate about ethics, animal rights, human rights, cultural preservation, cultural relativism, and resource utilization. Although discussion about these issues is not limited to cetaceans and arises elsewhere within the framework of international environmental law, it is hard to find another species where the volume of the debate is as loud.

Concern for the protection of whales is not limited to whaling. Whales, like all marine species, are susceptible to pollution.⁸ Recent scientific evidence suggests specific vulnerabilities of cetaceans to the effects of global warming.⁹ In addition, the collapse of key fish stocks upon which cetaceans feed complicates their management. The ability, not to mention the willingness, of the IWC to address these problems will be a significant challenge in the future.

IV. THE IWC TODAY: A HOUSE DIVIDED

At the present time the IWC is truly divided over the character and role of the organization. Norway, Iceland, and Japan clearly favor a resumption of consumptive use of cetaceans. On the other hand, many more members oppose

8. MARK P. SIMMONDS, *Evaluating the Threat from Pollution to Whales*, in THE FUTURE OF CETACEANS IN A CHANGING WORLD 317 (William C.G. Burns & Alexander Gillespie eds., Transnational Publishers, Inc. 2003).

9. WILLIAM C.G. BURNS, *Climate Change and the International Whaling Commission in the 21st Century* 339 (William C.G. Burns & Alexander Gillespie eds., Transnational Publishers, Inc. 2003).

whaling and the consumptive use of cetaceans in the first instance. These states, and the environmental non-governmental organizations supporting their efforts, proceed not only from a resource management prospective but also from an ethical standpoint. This perspective views whales and dolphins as special creatures deserving of special protection. Anti-whaling advocates often point to their sentience, intelligence, and communal lifestyles to justify a higher conservation status.

This battle between stalwart whalers and passionate conservationists is not new to the IWC. This was certainly present in the drive for the moratorium in the early 1980s and seems to be at play as the pendulum swings back in favor of some consumptive use. As one examines the dispositions of the IWC's newest members such as Mongolia and some small island states that have traditionally not expressed much interest in whaling issues, one is left to wonder if pro-whaling interests have not borrowed a page from the conservationists' playbook? Norway, Japan, and Iceland remain the whaling stalwarts but it does appear as if they have successfully recruited some allies into the IWC to shift debate in their favor.

With the new membership alignment in mind, it is helpful to review the most contentious issues on the IWC agenda. Although the overall strategic goal of the pro-whalers is the ultimate repeal of the moratorium on commercial whaling, the issues receiving the most attention continue to be: scientific research whaling, aboriginal whaling, and, in 2002, the re-entry of Iceland.

A. *Scientific Research Whaling*

As noted above, the ICRW allows member states to unilaterally grant their nationals permits to catch whales for the purpose of scientific research.¹⁰ The limits of this provision have been seriously tested in recent years by Japan. Japan maintains large-scale research of whaling programs in Antarctica and the North Pacific.¹¹ These programs remain controversial and have raised objections by the IWC. Over the years the IWC has issued over thirty resolutions suggesting limits on the use of scientific permits and, in many cases, expressed concern about the value and methods of Japan's programs in particular. Most recently, in Resolution 2003-3 the IWC called upon Japan to halt its research whaling activities in the Southern Hemisphere or replace it with non-lethal research methods.¹² This follows similar resolutions in previous

10. ICRW, *supra* note 1, at art. VIII.

11. See *Recent Japanese Scientific Permits*, IWC website, at <http://www.iwcoffice.org/sciperms.htm> (last visited Mar. 17, 2004).

12. See *Resolution (2003-3) on Southern Hemisphere Minke Whales and Special Permit Whaling*, available at <http://www.iwcoffice.org/Resolutions2003/Resolution%202003.htm#Permits> (last visited Mar. 17, 2004).

years and feeds the concerns of those who see aggressive research whaling as an excuse to hold the place of the commercial whaling industry until the moratorium can be repealed.¹³

B. Aboriginal Whaling

Another major point of contention in recent years has been the issue of aboriginal whaling rights. Many opponents of whaling consider the issue of aboriginal whaling to be a proxy for the debate on commercial whaling while the moratorium is in effect. To be sure, a genuine and good faith debate is underway as to the extent of the rights of certain native tribes around the world to conduct sustainable subsistence whaling. The IWC presently recognizes several such claims.¹⁴

Perhaps the most controversial aboriginal claim is that of the Makah Tribe of Washington State. The United States government recognized the whaling rights of the Makah in the 1855 Treaty of Neah Bay. Although the Makah abstained from whaling activities for approximately 70 years, the tribe decided to revive its traditional whaling practices after the gray whale was removed from the endangered species list of the Endangered Species Act in 1994. Although the United States government has long since eschewed commercial whaling it was nevertheless sympathetic to the Makah's claim as it has been to those of other Native American tribes. In the mid-1990s the United States tried to secure a quota of gray whales for the Makah in the IWC.

Because other IWC members were fearful that additional aboriginal quotas would create a loophole for Japan and Norway to claim rights for "community based" whalers the United States was initially unsuccessful in its attempts to secure a gray whale quota for the Makah in the IWC. In 1997 the United States and Russia submitted a joint proposal for the aboriginal quota of pacific gray whales. Until this point only the Russian Chukotka tribe enjoyed an aboriginal quota for grays. This bilateral arrangement also included sharing the quota on bowhead whales enjoyed by Alaskan natives. Ultimately, because of the bilateral deal between the United States and Russia and how they presented the quota request, the IWC never formally recognized the Makah quota. The IWC effectively side-stepped this issue by simply specifying that the aboriginal quota for Eastern North Pacific Gray Whales may be "taken by those whose traditional, aboriginal, and subsistence needs have been recognized."¹⁵

13. For a discussion of the objections to scientific research whaling in its existing forms see Howard S. Schiffman, *Scientific Research Whaling in International Law: Objectives and Objections*, 8 *ILSA J. INT'L & COMP. L.* 473, 475 (2002).

14. See Catch Limits for Aboriginal Subsistence Whaling, at <http://www.iwcoffice.org/Catches.htm#Aboriginal> (last visited Mar. 17, 2004).

15. *Id.* (presently listed for the years 2003-2006).

Conspicuously, the Makah were never identified by name as a beneficiary of the quota. This created an uproar among anti-whaling advocates who claimed such specific recognition by the IWC was necessary for the quota to be consistent with the ICRW and international law in general. The better legal interpretation is probably contrary. The fundamental characteristic of international environmental law embodied in Principle 21 of the Stockholm Declaration recognizes the primary right of states to exploit their own resources pursuant to their own environmental policies.¹⁶ On the other hand, shifting the focus from international law to domestic, was the Makah hunt even consistent with United States law? At the present time, this is still rather unclear.

In 1999, the Makah resumed the hunt and succeeded in killing a young gray whale. This mobilized the anti-whaling forces to seek remedies in United States courts. In addition to questions raised under international law, United States law also presents obstacles to the Makah continuing the hunt. The Ninth Circuit has ruled that the government's Environmental Assessment for the Makah hunt does not satisfy the requirements of the National Environmental Policy Act (NEPA) and the Marine Mammal Protection Act (MMPA).¹⁷ At the present time the prospects for future Makah hunts remains uncertain.

The Scientific Committee of the IWC is currently in the process of developing new management regimes for aboriginal subsistence whaling. Aboriginal whaling, like scientific research whaling, is an ideological battleground during the time of the commercial moratorium. The volume of the debate over these issues has more to do with their ability to keep the IWC focused on the consumptive use of cetaceans than the relatively modest number of whales taken by these activities.

C. *The Re-entry of Iceland to the IWC*

In 1992 Iceland left the IWC exasperated by the fact that whaling interests were no longer adequately represented in the organization. Iceland decided to return in 2002 and was successful in doing so with a reservation to the moratorium.¹⁸ Iceland's re-entry was not only controversial but it represented something of a strategic shift in how pro-whaling states view the IWC and its potential to preside over a resumption of the consumptive use of cetaceans. Abandoning the IWC in favor of the establishment of some consumptive

16. *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF/48/14, 11 I.L.M. 1416 (1972), at Principle 21.

17. See *Anderson v. Evans*, 314 F.3d 1006 (9th Cir. 2002), amended by 350 F.3d 815 (9th Cir. 2003); *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000).

18. For the text of Iceland's reservation see *Iceland and her re-adherence to the Convention after leaving in 1992*, available at <http://www.iwcoffice.org/Iceland.htm> (Mar. 17, 2004).

friendly organizations, was, and still is to a certain extent, a possible strategy for whaling states.

Should whaling states reject the IWC entirely to seek newer consumptive friendly organizations this would be viewed with great disfavor by states with which they share common interests in many other areas. It perhaps could be seen as derogation from the duty to cooperate in the conservation of cetaceans as required by UNCLOS.¹⁹ Although the North Atlantic Marine Mammal Commission (NAMMCO) is sometimes mentioned as a potential forum to put forward a consumptive regulatory framework in competition with the IWC, it is highly unlikely to do so.²⁰ First, it is most doubtful whether NAMMCO is organizationally empowered to enact any regulation at all.²¹ Second, its history indicates that, thus far anyway, it is content to concentrate on scientific research and not the direct management of marine mammal resources.

Iceland's return in 2002 suggests that, at least in the short term, the IWC will be the forum where the future battles between consumption and conservation of cetaceans will be waged. With the most recent additions to the membership of the IWC the odds are more even. With the undeniable increase in the populations of certain key species the arguments for sustainable whaling likewise improve. On the other hand, in the highly polarized arena that is the IWC nothing is so certain.

D. The Berlin Initiative

Despite the factors indicating apparent gains by pro-whaling interests, at the IWC's annual meeting in 2003 it adopted the so-called "Berlin Initiative" by a vote of twenty-five to twenty with one abstention.²² This resolution establishes a "Conservation Committee," which will be comprised of all IWC members. The Conservation Committee will prepare and implement the "Conservation Agenda" of the IWC. Environmental NGO's like Greenpeace are excited about the prospect of a "Conservation Agenda" within the IWC.²³ Pro-whaling states are naturally skeptical.²⁴

19. See Howard S. Schiffman, *The Competence of Pro-Consumptive International Organizations to Regulate Cetacean Resources*, in Burns & Gillespie, *supra* note 8, at 173-76.

20. See *id.* at 176-85.

21. See *id.* at 176-77.

22. See Final Press Release of the 55th Annual Meeting, available at <http://www.iwcoffice.org/FinalPressRelease2003.htm> (last visited Mar. 17, 2004).

23. See *Berlin Initiative Attracts Worldwide Support*, available at http://www.greenpeace.org/nz/news/news_main.asp?PRID=534 (last visited Mar. 17, 2004).

24. Press Release, Japanese Fisheries Agency, June 16, 2003, *Berlin Initiative Final Blow to IWC*, available at <http://www.jfa.maff.go.jp/whale/whatsnew/030616JapanBerlinBlow.pdf> (last visited Mar. 17, 2004).

For the time being the Berlin Initiative and the rather predictable controversy surrounding it simply serves to highlight the continued tensions within the IWC. It raises important questions about the future of the IWC as an inter-governmental organization and whether or not it will have the confidence of its members, including a measure of respect from pro-whaling states, going forward. Without this confidence, we will likely see issues of cetacean management devolve to other international organizations. Some of these organizations will have a conservation focus and some a consumptive-friendly focus. This decentralization of cetacean management will certainly not foster the international cooperation on this issue envisaged by UNCLOS.

V. CONCLUSION

Will the IWC permit some form of commercial whaling in the near future or have the status of whales as intelligent, sentient creatures overtaken by arguments for their consumptive use? The future of cetaceans is in many ways bound up with the future of the IWC itself. The IWC remains a house divided and there are no signs of genuine reconciliation anytime soon. The issues of scientific research whaling and aboriginal subsistence whaling are mere reflections of the deep ideological divisions between pro-whaling and anti-whaling advocates. Whether or not the IWC continues to function as a premier institution in international resource management remains to be seen.

UNCLOS provides the legal framework within which cetacean conservation and management needs to proceed. States on both sides of the ideological divide need to cooperate to fulfill these objectives. The alternative, that is, continued rancor, risks squandering what has already been achieved in the recovery of key species. Whatever challenges the IWC faces today are actually far less daunting than those it faced before the days of the moratorium.

Whales are a vanguard species among wildlife resources and the IWC is a vanguard organization in international resource management. From an institutional perspective, whether or not the IWC is successful will tell us a great deal about international environmental law and its institutions in the 21st Century. For the sake of present and future generations, one can only hope that all IWC member states understand their responsibilities to successfully meet these challenges.