

Critical analysis of the Concerns, Conventions & Controversies of Deep Sea Whaling

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Abstract

Whaling and specifically deep sea whaling is an international concern especially in the context of the commercial significance it attracts as an international trade proposition.

The international laws and conventions on whaling in international waters is a subject of great concern and controversy for the operational feasibility and the international environmental laws designed in juxtaposition with the international trade laws.

The controversy on international whaling is a textbook case on environment-commerce conflict and exemplifies the national amendments for strategizing on the commercial edge viability.

The paper is a brief overview on the laws of whaling in the perspective of the concerns and challenges of the present international laws on whaling and the conventions and highlights on some suggestions for a review on the existing legislations, rules and regulations.

Introduction:

Man has been whaling since 800 A.D though it was only in the mid-19th century that whaling grew into commercial enterprise. Thousands of whales were killed to provide cheap meat, oil and other raw materials for products including dog food, margarine, polish and even strings for tennis racket. Indiscriminate whaling led to a steep decline in population of whales almost leading to extinction of few species pushing many species to the brink of extinction. The population of some species dipped to less than 1% of the original.

First attempts at regulating whaling were made in 1918 but failed miserably. It was only on 2nd December 1946, the International Whaling Commission was set up under the International Convention for the Regulation of Whaling which was signed by 15 nations¹ in Washington DC.² Initially the convention issued a detailed list of whaling regulations and quotas, called a schedule, placing restrictions and limits on whales killed. It soon became obvious that quotas didn't work, for the simple reason that in high seas monitoring the number of whales killed was impossible and national governments looked the other way, if not actively assisted, in excessive whaling. Based on the Stockholm Conference³, the CITES regulations and UNCLOS IWC in 1986 decided to institute a 10-year ban on commercial whaling, to give itself time to properly

¹ They were: Argentina, Australia, Brazil, Canada, Chile, Denmark, France, the Netherlands, New Zealand, Norway, Peru, The Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, the United States of America, and the Union of South Africa. ICRW, *supra* note 10, art. XI.

² Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849, *pmbi*.

³ Stockholm Declaration on the Human Environment, U.N. Doc A/ Conf.49/14/Rev.1, 11 I.L.M. 1416 (1972)

See also D'Amato & Chopra, *supra* note 38, at 36

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determine the whale populations and give their population time to recover. Nations like Japan, Russia & Norway⁴, were granted a three-year grace period to gradually bring their whaling to an end. This 10 yr ban has since become an indefinite ban.⁵

Conventions & International Laws

a) International Convention for the regulation of whaling (Washington, 2nd December 1946)

The International Convention for the regulation of Whaling in Washington resolved to set up the International Whaling Commission to:

- i) Fix quotas for whaling by individual nations,
- ii) Conduct scientific studies and tests to determine whale population, species, other data and into humanness of killing of whales from time to time
- iii) Setting from time to time:
 - (1) Species open or closed for whaling
 - (2) Open or closed waters
 - (3) Method and timing of whaling
 - (4) Types of gears and equipment used for whaling.
 - (5) Make recommendations from time to time to signing nations on matters pertaining to whales.
 - (6) Monitor actions taken by various governments on ships violating the convention.

There are three committees to assist ICW: (1) Scientific Committee which analyzes data on whales and makes its recommendations (2) Technical Committee which reviews the data and suggests amendments & further actions and the (3) Finance and Administration Committee.

There are various loopholes in the convention which makes are exploited by nations interested in whaling:

- a. Provisions for sustenance whaling and scientific whaling give nations a number of loopholes (see Controversies section below)
- b. The “opt-out” clause provides that a member nation in opposition to any amendment instituted by the IWC need only file a timely objection to be considered exempt from that regulation. Japan lodged a timely objection to the moratorium and continued to engage in the practice of commercial whaling
- c. The ICRW's only enforcement mechanism for addressing violations of IWC regulations is squarely based on the concept of self-policing. Specifically, Article IX of the Convention stipulates that each member nation shall punish violations of any regulation carried out by persons under their jurisdiction.
- d. The IWC has no ability to monitor whaling activities in waters under its auspices. Fishing and whaling fleets, such as those sent out by Japan in August 2000, often operate unnoticed and unobserved in international waters.

Scientific uncertainty is deeply imbedded in international environmental law.⁶ This is especially true in the instant case, given the migration patterns of whales throughout the world's oceans, low rates of reproduction, late onset of sexual maturity and small populations.

⁴ D'Amato & Chopra, *supra* note 38, at 38

⁵ Chairman's Report of the Thirty-Fourth Meeting of the International Commission on Whaling, IWC Doc. No.21 (1982).

⁶ Brown Weiss, *supra* note 11, at 688.

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Accordingly, current methods for ascertaining whale populations have proven dangerously inaccurate because the data is subject to individual biases and methodological flaws. Relying solely on information from member nations utilizing these potentially erroneous methods, the IWC has been unable to compile reliable records of whale stocks and catch statistics. Whaling nations have often capitalized on this dependence by refusing to supply the IWC with crucial data or by severely under-reporting catch statistics over the years.⁷

b) Convention on International trade in endangered species of wild fauna and flora

CITES is an international treaty that provides protection for wild animal and plant species in international trade. It is designed to promote the conservation of endangered species while allowing trade in certain wildlife. There are three categories of protection under the treaty. Species listed in Appendix I are threatened with extinction and are or may be affected by trade, therefore commercial trade is strictly prohibited. All of the great whales are listed on Appendix 1

c) United Nations Convention on the Law of the Sea (UNCLOS)⁸-

Also known as “The Constitution of the Oceans” UNCLOS came into being on 14 November 1994 and is presently binding for 154 Nation and the European Community. It represents an unprecedented and never replicated effort at codifying and progressive development of international law. There are more than 400 articles of the text and nine annexes in it.

UNCLOS however did not create any specific provisions for the regulation of whaling. Two sections of the new treaty, however, will impact the IWC-

1. Two hundred mile exclusive economic zone or EEZs, were recognized for each coastal country, which had the right to control the living resources within that zone. For marine species which were highly migratory it was mandatory for the coastal state to seek agreement with other users of the resource to ensure proper management of that resource. Many coastal countries also have national legislation for EEZs and thus anti-whaling states are able to ban whale hunting by others within their EEZs. Countries like United States, Australia, New Zealand, the United Kingdom, and Canada have prohibited whaling in their EEZs.
2. Article 65 places with various international institutions the responsibility for marine mammal management, and makes it compulsory for all UNCLOS signatories to conserve Marine Mammals. Coastal states still have the freedom to prohibit, limit and regulate the exploitation of whales more strictly than the Convention stipulates.

⁷ For a detailed explanation of current whale counting methods, see Burns, *supra* note 23, at 58. Present considerations regarding the viability of whales also fail to take into account the potentially disastrous effect of marine pollution, depletion of the ozone layer and climate change. *Id.*

⁸ *United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, 21 I.L.M. 1261 (entered into force Nov. 16, 1994)*

3. Article 120 applies Article 65 to the high seas as well as the coastal zone. Article 65 reads in full: “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, and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study.”

d) Marine mammal protection Act (US)

United States was the first nation in the world to pass a law protecting marine mammals. Passed in 1972 the Act makes it illegal for anyone in the US to trouble, injure or hunt any marine mammal species, regardless of their population. It also makes it illegal for anyone to import into US marine mammals or any product made from them.

Underwater noise has been attributed to whale beachings. This noise primarily results from military testing using sonar in the ocean. Noise pollution is regulated by the MMPA. Before tests may be conducted by the military, requests must be made under the MMPA

e) Endangered species Act (US) :

Passed in 1973, the Act protects both endangered species (defined as those in danger of extinction) and threatened species (those likely to become extinct in the foreseeable future). Whales are listed as endangered species under the ESA and thus it is illegal to kill, hunt, collect, injure or harass them, or to destruct their habitat in any way or to buy or sell them.

f) Pelly Amendment (US)

A strong but never used, legislation is US gives powers to US to apply sanctions against countries that violate international fisheries & environmental treaties. It applies to all species of fishes which are endangered or threatened. Only once, in 1974, did the US Congress approve sanctions against USSR & Japan for excessive whaling but it was vetoed by the then US President, Ford.

Despite continued defiance of the international ban on commercial whaling by a small group of countries, the United States has never issued trade sanctions for undermining the International Whaling Commission (IWC). HSI and The HSUS have called on the U.S. to invoke the Pelly Amendment to enact sanctions against whaling nations and although the United States claims to have a firm policy against all commercial and scientific whaling

g) Packwood-Magnuson Amendment (US)

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This amendment prohibits fishing in the U.S. 200-mile exclusive economic zone (EEZ) by vessels of a foreign State if the State or its nationals are considered to have diminished the effectiveness of the IWC conservation measures. Japan, which had fishing quotas in the U.S. EEZ, was most effected by it. However, since the current U.S. fishery policies preclude fishing by foreign vessels in its EEZ, this amendment has lost substantive meaning.

United States Supreme Court rulings on the amendment in *Japan Whaling Ass'n v. American Cetacean Society* are noteworthy.⁹ It ruled that the decision to implement sanctions was voluntary and that the Secretary of Commerce was not required to certify countries who captured whales in excess of IWC quotas under the Packwood-Magnuson Amendment. Negotiations between Japan & US ultimately resulted in Japan agreeing to abide by the quotas and the controversy ended.

The limitations of the unilateral regulations –

It is literally impossible for any individual state to enforce an international regulation through domestic laws. In a few cases, threat of unilateral sanctions may result in a token effort toward correcting the offense.¹⁰ Threat of counter sanctions usually deters tougher action, especially if the two nations have deep economic ties.

More importantly, utilization of fishery import prohibitions under the Pelly and Packwood-Magnuson Amendments raises serious questions about the consistency of such action with United States obligations under GATT.¹¹ The question of whether the amendments will interfere with provisions of GATT is not entirely clear. The vagueness of these provisions and the lack of authoritative rulings make it nearly impossible to predict the outcome of future conflict.¹² Still, "a comprehensive treaty such as GATT that lowers trade barriers signals a move toward multilateralism that implies a disdain for unilateral measures to further environmental goals."¹³

h) Other regulations

i) International ban on driftnet fishing

The steam boats, floating factory ships, driftnets and gillnets kill thousands of whales each year. In 1931 alone, 43,129 whales were killed. In 1991, the United Nations passed a resolution establishing an international ban on driftnet fishing. As for gillnet regulations, in 1993, regulations went into effect in Hawaii, where the nets are predominantly used, that make it unlawful for any person fishing with a gill net to leave it unattended for more than two hours.

ii) Ship Collisions with Whales

⁹ *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986)

¹⁰ *Wilkinson*, *supra* note 72, at 286.

¹¹ See *General Agreement on Tariffs and Trade*, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 (*hereinafter* GATT).

¹² Steve Charnovitz, *Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment on Foreign Environmental Practices*, 9 *Am. U. J. Int'l L. & Pol.* 751, 775-90 (1994).

¹³ *Schiffman*, *supra* note 33, at 335-36

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Collisions with ships are a major source of injury and death for many whales. The United States Coast Guard has implemented mandatory ship reporting systems. When ships enter specific whale habitats, they must report to a shore-based station. The ships then receive a message about ship striking of whales, measures they can take to avoid ship strikes, and locations of recent sightings.

iii) Whale Watching

Local US laws may make it unlawful to approach a whale within a certain number of feet. The MMPA also regulates whale watching because watching can cause harassment to the whales.

3. Controversies

1. Opposition to ban on commercial banning

“As long as the anti-whaling countries cannot show us that we are mistaken, we will continue to follow this policy, We will keep going until the world understands this.”¹⁴

Iceland and Norway have flat out objected to the moratorium and now hunt whales in the North Atlantic. Japan, a country intent on exploiting the popularity of whale in the marketplace, has continued the practice of commercial whaling utilizing the scientific research exception.

One of Japan's more notorious arguments in support of its controversial whaling activity is that the IWC has acted on irrational emotions and inaccurate scientific data that seriously underestimates whale populations. Japan's argument fails to take into account the position of whales in the ocean's food chain. Whales play a crucial part in maintaining the equilibrium of the ecosystem. Thus, "the killing of one whale amounts to harvesting from three hundred to five hundred square kilometers of ocean area."¹⁵

The reasoning by Japan for whaling requirement are-

1. Japan's food self-sufficiency in contrast, is extremely low—just 40 percent, down from 73 percent in 1965.
2. Comparing itself with China, Japan says they take six million tons of fish a year, which is about five percent of the total global catch of 120 million tons. China alone takes 40 million tons, approaching half of the total. In the last decade the amount of fish China takes has exploded.
3. The FA says the minke (the smallest of the whales) and several other species have recovered and are gobbling fish at a rate five times faster than that of humans. Pro-whalers in Japan suggest the problem is a 'lack of balance' in the oceans. Whales eat a lot of fish so they have to return balance to the oceans by cutting down their numbers.
4. Whales are now among the most researched animals in the world, ironically making it easier for pro-whalers to argue that hunting can restart. And some conservationists support them.

¹⁴ Hamada Yasukazu, a leading member of the Parliamentary Whaling League

¹⁵ Dr. W. M. von Zharen, *Ocean Ecosystem Stewardship*, 23 *Wm. & Mary Env'tl. L. & Pol. Rev.* 1, 20 (1998)

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Japanese population point of view -

In Japan, two of our activists faced felony charges and long prison sentences for their role in exposing the black-market whale meat trade in Japan, creating a public discussion in the Japanese media about the future of whaling. In Japan, whaling is both uneconomical and unpopular. It's time they put away their harpoons for good.

“Japan, Iceland and Norway are taking whales outside of the IWC. It is lucky it is just these three. We have no guarantee that other countries will engage in self-controlled, self-restrained fishing. It should be about sustainable management rather than arguments about different philosophical views of whales.”

—Morishita Joji, Director for International Negotiations, Fisheries Agency.

2. Loopholes in International Convention on Whaling

While under a commercial moratorium, the Treaty still allows for subsistence and scientific whaling. The “ambiguity” of the subsistence whaling exception and “loophole” of the scientific whaling exception has numerous problems, which undermine IWC regulations. As a result, both of these exceptions have led to the ineffectiveness of the IWC.

a. Subsistence Whaling - The Controversy between the Makah Tribe and Norwegian Coastal Fisherman¹⁶

Subsistence whaling is the taking of a limited number of whales by certain indigenous peoples. Individuals who claim this exception must meet the following requirements:¹⁷

- (1) whaling for purposes of local aboriginal, indigenous or native people who share strong, community, family, social and cultural ties related to a continuing traditional dependence on whaling and on the use of whales;
- (2) traditional uses of whale product by local aboriginal, indigenous or native communities to meet their nutritional, subsistence and cultural requirements
- (3) Subsistence catches of whales made by aboriginal subsistence whaling operations.¹⁸

The Makah, a Native American tribe, petitioned IWC for right to whaling on the grounds of importance of whaling for their culture besides being of nutritional importance. They were granted the right to hunt five gray whales under the aboriginal subsistence exemption to the ICRW.

Fisherman from Norway were however denied similar exemption under the "aboriginal" requirement while Alaskan Inuit's and Makah have been allowed to sell

¹⁶ *The Makah Whale Hunt and Leviathan's Death: Reinventing Tradition and Disputing Authenticity in the Age of Modernity.*
Rob van Ginkel, University of Amsterdam

¹⁷ *International Whaling Commission and Aboriginal/Subsistence Whaling: April 1979 to July 1981, Special Issue 4 (1981).*

¹⁸ *The phrase "aboriginal subsistence" was not defined by the ICRW; rather, the phrase was left vague due in part to the extremely limited and specific nature of the exemption. This has led to problems*

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non-edible whale products, showing a recognition that mere nutritional subsistence alone does not meet their need, but that economic subsistence is also necessary.

b. **Scientific Whaling:**

Is controlled - killing of whales for the purpose of scientific studies.

“Notwithstanding anything contained in this Convention, any Contracting Government may grant to any of its nationals a special permit authorizing that nation to kill, take, and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fits and the kill, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of the Convention”¹⁹

Under the guise of “scientific whaling” Japan has been killing hundreds of whales, insisting that it needs the data to validate its claim that whales have regained their numbers and now no longer need to be protected. It labels the meat of whales as a “by product” of the scientific experiments and sells it in open market.

The IWC adopted a resolution to strongly urge Japan to reconsider these studies. Nevertheless, Japan has continued its "feasibility studies." This demonstrates one of the failures of the IWC, the inability to punish infractions

3. *Animal Protection Institute of America v. Mosbacher*

In US, in 1992 the Animal Protection Institute of America filed a case against Secretary of Commerce, challenging the permits given for importing false killer whales and belugas for public display. Zoo association and aquarium seeking the whales for similar display also intervened. The District Court & the whale watchers contended that the permits were not abuse of discretion.

The court held that the Secretary’s actions were in accordance with the law because the Secretary had authority to issue the permits under the MMPA and the Secretary’s actions were not arbitrary or capricious. With respect to the permit for one type of whale, only whales that were already in captivity would be imported; thus, their removal would not affect the wild population. Such whales were neither "threatened" nor "endangered" under the ESA nor had they been declared "depleted" under the MMPA. Similarly, the other type of whale was to be taken from water in which studies had revealed that there was an abundant supply.

Conclusion

Whaling is one of the most controversial International legal issue of our times, pitting the whaling nations against the issue of conservation, commerce against environment and morality against realism.

¹⁹ ICRW, *supra*, art. VII

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Is it moral to kill a mammal as, if not more, developed than human beings? Is it ethical to drive a species to extinction for commercial interests? Is it possible for international bodies to punish those nations who knowingly flout accepted international conventions and laws?

Each piece of legislation and each international declaration which is enacted to preserve whales through the punishment of those who unjustly hunt these creatures is a step in the right direction, to preserve the future for these incredible beings.²⁰

The IWC needs to be strengthened to ensure greater monitoring the international waters in real time and reliable scientific data and plug the loop holes which are exploited by whaling nations. Further, the efforts of non-governmental organizations to publicize Japanese whaling hunts should be applauded. The pressure of public opinion is important if whales are to be preserved for the future of mankind.

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²⁰ *Jonah Swallows the Whale*, 11 J. Envtl. L. & Litig. 413 (1996).

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