

**THE IWC MORATORIUM IN QUAGMIRE:
THE LOOPHOLE OF SCIENTIFIC WHALING**

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INTRODUCTION

Before 1982, hundreds of thousands of whales were killed annually in a slaughter that was then, as is now, unconscionable.¹ In 1982, the International Whaling Commission (IWC)—the international entity in-charged of setting annual harvest quotas, regulating whaling practices, conducting whale research, and monitoring the compliance of member nations—enacted a five-year moratorium on all commercial whaling to begin in the 1985-1986 season and to last until 1990.² The concept of the moratorium came about from the complexities associated with the over-exploitation of whales, the dwindling whale population numbers, and in addition, complexities associated with a dying industry. By coming into effect, the moratorium was expected to allow for a phase-out period for the whaling industries, and at the same time, a comprehensive review of the whale species stocks by 1990.³

The few nations which still continue to hunt whales, and are therefore against the ban of commercial whaling—Japan, Iceland, and South Korea—have found a loophole in the schedule (the IWC operating document) that allows a member country to, in effect, issue itself a permit to capture whales for scientific purposes. The non-whaling conservationists countries in the IWC, and other groups seeking to preserve the integrity of the commercial moratorium, have contended that this loophole is a thinly disguised attempt to keep whale fleets viable during the moratorium in the name of science.⁴

STRUCTURE OF THE INTERNATIONAL WHALING COMMISSION

In 1946 the International Convention for the Regulation of Whaling (ICRW)⁵ was opened to signing in Washington, DC. The convention, to enter into force in 1948, created the IWC.⁶ It is clear from the preamble of the ICRW that its purpose was an economic one. As the name implies, it was designed to protect the industry, and not the animal. Although initially it recognized the interest of the nations of the world in sustaining, for future generations, the great natural resources represented in its whale stocks,⁷ its focus has changed since the early 1970s towards a preservation outlook, this mainly due to the prevailing conservationist nations in its memberships.⁸

The ICRW and IWC has since gone through numerous changes in its structure and purposes. In 1972, recognizing the need to distinguish among stocks, the IWC began to use species quotas, rather than the old "blue whale units" (the schedule of the ICRW calculated a blue whale unit as, 1 blue whale, *Balaenoptera musculus*; 2 fin whales, *Balaenoptera physalus*; 2.5 humpback whales, *Megaptera novaeangliae*; and 6 sei whales,

¹Anonymous. 1987. Whale News, 34.

²International Whaling Commission. 1986. 33 IWC Annual Report, 21.

³Palacio, F. 1983. The cessation of commercial whaling. *Oceanus*, 24(4).

⁴Anonymous. 1987. Whale News, 33.

⁵International Convention for the Regulation of Whaling. 62 Stat. 1716.

⁶Smith. 1984. the International Whaling Commission: An analysis of the past and reflections on the future. *Nat. Res. Law*, 16.

⁷ICRW, *supra* note 5.

⁸Hanskell, R. J. 1987. Abandoning whale conservation initiatives in Japan Whaling Association v. American Cetacean Society. *Harvard Environmental Law Review*, 11: 557.

Balaenoptera borealis).⁹ During the same year, at the United Nations Conference on the Human Environment, a proposal was unanimously adopted which would impose a ten year moratorium on commercial whaling. The Japanese argued that this was scientifically unjustified, and were quite concerned with the fact that the moratorium would limit whale research. Such research, the argument stated, was normally carried out by whaling vessels.¹⁰ A ten year blanket moratorium was then decided to be scientifically unjustified by the Scientific Committee during the 23rd IWC Annual Meeting. A blanket moratorium relies on the same principle as the blue whale unit, while the Committee found that prudent management requires regulation of the stocks individually.¹¹ Although a ten year moratorium was voted down three times during the 1970s,¹² a five year species-specific moratorium was finally voted into effect in 1982.¹³

Five nations, Japan, Norway, Chile, Peru and the Soviet Union, opposed the ban,¹⁴ and thus not becoming bounded by it. Peru and Chile have since agreed to end commercial whaling,¹⁵ as have Norway since the 1987 season, and the Soviet Union since April of 1988. Through an executive agreement, the United States government compromised with Japan, allowing that nation to gradually phase out whaling by 1988.¹⁶

THE RESEARCH PERMIT ARTICLE VIII

While theoretically protected by the commercial moratorium agreed in 1982, and finally in effect as of the 1987-1988 pelagic season, whales are still in jeopardy because of the only, recently fashionable, research permit article. In the ICRW charter, Article VIII allows member nations to issue themselves a special permit authorizing that nation to kill, take, and treat whales for the purpose of scientific research.¹⁷ This research permit also allows the country to process the animals and deal with any proceeds at their own discretion.

The overall purpose of the permit is to allow whaling and non-whaling nations to obtain a comprehensive assessment of the effect of the moratorium on whaling and the possible effects on conservation of the stocks, by gathering basic biological data on the whale species. The permit is submitted to the Scientific Committee of the IWC, which reviews it for its scientific content, purpose and merit. The Scientific Committee then may incorporate comments into the verbal and written reports it submits to the IWC. Although the issuing nation must submit the results of its scientific research to the Scientific Committee at least once a year, neither the Committee nor the full IWC has any authority to prevent such whaling from occurring under the permit. The sponsoring government is under no obligation to take into account the comments of the Scientific Committee, or any

⁹Smith, *supra* note 6.

¹⁰Smith, *supra* note 6.

¹¹International Whaling Commission. 1972. 23 IWC Annual Report.

¹²Smith, *supra* note 6.

¹³Birnie, P. 1986. The role of Law in protecting marine mammals. *Ambio*, 15(3): 139.

¹⁴*Id.*

¹⁵*Id.*

¹⁶Hanskell, *supra* note 8.

¹⁷International Convention for the Regulation of Whaling of 1946. 62 Stat. 1716, T. I. A. S. No. 1849, 161 U. N. T. S. 361.

resolution adopted by the IWC regarding its permit.¹⁸ In essence, the IWC lacks the power to otherwise control the taking of whales for scientific purposes.¹⁹

The little noticed research provision in the Convention began to gain importance in 1985 when, at the 38th Annual Meeting of the IWC, Iceland—soon to be followed by South Korea—distributed a document which became the framework for the permit it issued itself, effective as of the summer of 1986 whaling season, to kill a substantial number of whales, and to sell the meat and other products in international commerce, supposedly to support the research.²⁰ Their permit authorized the annual taking of 80 minke whales, *Balaenoptera acutorostrata*; 80 fin whales, and 40 sei whales.

At the next IWC meeting, opposition to the Icelandic proposal was forthcoming. A United States proposal severely attacked the killing of whales for "science," while making a healthy profit by selling the meat to Japan—always the purchaser of whale meat at high prices, whatever the source. The opposition had little effect at that time since the United States proposal was based on the attempt to restrict the international trade in whale meat caught under scientific permits. The use of the word "trade" led to resistance on the part of many normally supportive countries members of the European Economic Community—a free-trading bloc of 12 European countries.

PERMITS UNDER CONSIDERATION

Iceland's initiative to hunt whales under Article VIII led other whaling countries to use the same procedure to continue their whaling operations. At the 1986 39th Annual Meeting three research permits were under the consideration of the Scientific Committee. Japan submitted a proposal to take 825 minke whales and 50 sperm whales, *Physeter catodon*, annually from the Antarctic for a period of 12 years.²¹ This totals over 10,000 whales. Iceland's on-going permit allowed the taking of 80 fin whales and 40 sei whales per year, for the next 4 years.²² South Korea proposed a revised version of a previous year's submission—found to be scientifically meritless by the Scientific Committee in 1986—to take 80 minke whales from the depleted Sea of Japan, Yellow Sea and China Sea stocks.²³ In addition, Norway was planning to submit a research proposal, but foreseeing a controversial situation, did not. In contrast, the Soviet Union did not join the above whaling nations in using Article VIII for whaling. In the spring of 1987, they announced that it had halted commercial whaling as its fleet departed from the Southern Ocean grounds, and therefore, was in no position of planning to submit a proposal.²⁴

¹⁸Anonymous. 1985. Marine Mammal News, 11(7).

¹⁹Hanskell, *supra* note 8.

²⁰Anonymous. 1986. Marine Mammal News, 12(5-6).

²¹Anonymous. 1987. CEE Report, 5(3).

²²Anonymous, *supra* note 21.

²³Anonymous, *supra* note 21.

²⁴Anonymous. 1986. Marine Mammal News, 13(6-7).

INTERNATIONAL RESPONSE AND THE UNITED STATES RESOLUTION

Response to violations of the IWC moratorium are generally in the form of trade sanctions against the offending nation. Although the United States was a founding party to the ICRW, as a whaling nation, its government has championed the Convention's conservationist focus within the organization, through domestic legislation and policy.²⁵ Attempting to place international restrictions on the trade of whale products, the United States hosted The Convention on International Trade of Endangered Species of Wild Fauna and Flora (CITES) in 1973. The Convention lists specific species which are protected, but it allows reservations to one or more species. Thus, despite its intention, trade is permitted.²⁶ In addition, the Pelly Amendment to the Fishermen's Protective Act (FPA)²⁷ has been an effective piece of domestic legislation in ensuring compliance with the IWC. Although by 1979, the United States Secretary of Commerce had certified five nations for diminishing the effectiveness of an international fisheries agreement, in each case, the President did not take action. Instead, he employed the threat of his discretionary sanction to ward off future violations. Congress however, grew impatient with the lack of sanctions and with the amount of time required for each decision. The result of this impatience was the Packwood Amendment to the Magnusen Fishery Conservation and Management Act of 1976.²⁸ Under the Packwood Amendment, when a nation is certified, the Secretary of Commerce must reduce the offending nation's fishing allocation in the United States Exclusive Economic Zone (EEZ) by 50 percent. If the infraction is not rectified in one year, 100 percent of the fishing rights are lost. The Packwood Amendment is linked to the Pelly Amendment because certification under the latter leads to sanctions under the former.

Even though these domestic legislations could serve as a tool for the United States to direct whaling nations toward honoring the moratorium, the 1986 hard lesson pushed the United States and other "like minded" countries to attempt a different approach in trying to close the loophole that Article VIII provided for. The new strategy was to address the issue through the quality of the science in the proposed permit, as well as its relevance to the comprehensive assessment of whale stocks,²⁹ which was mandated to be undertaken before 1990 under the terms of the 1982 moratorium.

At the 39th Annual Meeting, the new United States resolution was introduced, officially co-sponsored by Australia, the Netherlands, New Zealand and Sweden. Finland, West Germany and the United Kingdom also added strong support.³⁰ The resolution did not mention "trade," instead, focused on the science of the permit by including specific language in four new criteria:

- (1) That the research must address questions that should be answered in order to conduct the comprehensive assessment, which is essential to the rational management of whale stocks, or to meet other critically important research needs.

²⁵Hanskell, *supra* note 8.

²⁶Roanowicz, J. D. 1982. Ecology, economics, and law in the conservation of cetaceans. Unpubl. Major Paper, Dep. Marine Affairs, Univ. Rhode Island.

²⁷22 USC S. 1978.

²⁸Roanowicz, *supra* note 26.

²⁹Anonymous, *supra* note 1.

³⁰Anonymous, *supra* note 21.

- (2) That the research can be conducted without adversely affecting the overall status and trends of the stock in question or the success of the comprehensive assessment of such stock.
- (3) That the research address questions which can not be answered by analysis of existing data and/or use of non-lethal research techniques.
- (4) That the research is likely to yield results leading to reliable answers to the question put forth.³¹

In addition to providing for more clearly defined mechanisms in the Scientific Committee review process, the resolution also added a very important new provision; the review of the Committee's findings by the full Commission. Furthermore, in the event that the Committee finds that the four scientific criteria are not met, and the Commission concurs, the IWC Secretary has to notify the sponsoring government and request it to refrain from issuing the permit, or to revoke the existing one.³²

In the final run, the anti-whaling bloc held firm, while complex parliamentary maneuvering by the Japanese delegation was undertaken to bring motions to postpone everything until the following year. Votes on a revision of the United States resolution by Japan, the effect of which would have been to nullify all the language providing for the scientific permit review by the full Commission, were taken, and the Japan initiative was defeated.³³ Following, two votes were taken on the United States resolution itself, both receiving broad support.³⁴

Since the 39th summer meeting ended, high-level negotiations have taken place between Iceland and United States officials. The Icelanders were aware that their country could be certified under the Pelly Amendment, if it pursued its whaling under the scientific permit. A joint statement by the Reagan Administration set the stage for the second bilateral agreement on whaling—the first being the one signed with Japan in 1984.³⁵ There are three operative provisions to the agreement: (1) For 1988 and thereafter, Iceland would submit its research program for review by the IWC Scientific Committee, and abide by its recommendations; (2) the United States would not certify Iceland for the 80 fin whales taken in 1987 and the 20 sei whales (of the 40 proposed) taken the same year; and (3) the United States will work with Iceland and other IWC Commissioners to review the Scientific Committee's procedure in dealing with scientific permits.³⁶

OUTLOOK TO THE FUTURE

The ghost of the IWC's lack of power still hunts its recommendations on whale conservation and protection. The IWC lacks an inherent enforcement mechanism³⁷ and

³¹Anonymous, *supra* note 24.

³²Anonymous, *supra* note 24.

³³Anonymous, *supra* note 1.

³⁴Anonymous, *supra* note 21.

³⁵Hanskell, *supra* note 7.

³⁶Anonymous. 1987. Marine Mammal News, 13(8-9).

³⁷Roanowicz, *supra* note 26, p. 17.

must rely on its individual members to ensure compliance. Likewise, the ICRW also contains an opt-out clause which allows all IWC members to file objections within 90 days to any amendment. The amendment then does not become effective for another 90 days, in which other governments may also file objections. Any objecting government is not bound by the amendment. Since changes in the ICRW must be unanimous, and objecting nations are not bound by any resolution, some critics believe that there is no foreseeable change in the scientific loophole dilemma. On the other hand, changes are not likely to come from rewording of the Convention, but instead from unilateral agreements between governments. United States has been the spearhead in this movement.

Despite strong objections and arguments from conservation groups, and the conservation-minded majority in the IWC, commercial whaling continues under the false front of scientific research. United States reaction seems to be moderate, considering the lengths to which it could go to support conservation of the world's whale stocks. However, Japan imports between 50 to 60 percent of United States fish products, and it is feared that a strict trade sanction against Japan would result in a similar retaliatory measure against the United States. Similarly, Iceland is located in an extremely important military (choke point) position, through which Soviet submarines must pass to gain access to the oceans of the world. Iceland cooperates with the United States and other NATO allies in the placement of various listening devices on the sea floor, and it is feared that strict sanctions against Iceland could jeopardize this position.³⁸

The steps taken in the 1987 39th IWC Annual Meeting represent a considerable achievement and certainly an improvement over the previous efforts to enforce the so-long waited whaling moratorium. The effect of the last three meetings and of the United States negotiations may help to prevent whaling nations from flouting the world's whale protection sentiment, to keep these countries from whaling for profit without any oversight, and perhaps restore some credibility to the IWC as a force for whale management and protection. The IWC has been plunged into a new era of conservation. Its consciousness has been raised, and it may well survive the numerous assaults on it. As the only international body of its kind, and despite its many faults, it must.

We must ensure that those widely welcomed decisions are not allowed to become mere empty words. It would be a tragedy if, under the guise of scientific study or subsistence hunting, commercial whaling were reintroduced. It will be necessary to allow the taking of whales for scientific purposes, and aboriginal effort will remain. Yet if either exception is used as a cover for continued commercial exploitation, the credibility of the IWC will be undermined. The world will not forgive us if promises to protect the whales are betrayed by subterfuge.³⁹

³⁸Anonymous, *supra* note 36.

³⁹Welcoming remarks by England's Rt. Hon. John S. Gunner, Minister of State for Agriculture, Fisheries and Food, on the 39th Annual Meeting of the IWC. Anonymous, *supra* note 1.

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