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INTRODUCTION

Since 1972, when the resolution calling for a 10 year moratorium on the catching of whales for commercial purposes was adopted by the Stockholm Conference on the Human Environment,¹ the protection of whales has been pressed by environmental organizations as though it were a single, self-contained issue and the moratorium an end in itself that could be divorced from the wider considerations that were leading to changes in the law of the sea generally, and to the development of international environmental law in particular. But in fact, as experience has shown, there are many legal problems that have arisen and have had to be solved in order to secure the protection of whales. Legal problems have proved hydra-headed in interpretation of the 1946 International Convention for the Regulation of Whaling (ICRW), welcomed at the time as an innovative instrument that would for the first time enable the great whales at least to be conserved.

Before we can examine the problems to which the ICRW has given rise, however, it is necessary to briefly outline the situation and models preceding its conclusion which explain why it was initially thought to provide an effective mechanism for conservation of these species. It is also necessary to have an understanding of the unique characteristics of these species and of the scientific aspects of the management problem. Understanding the management problem means that any regulatory measures must take cognizance of these unique characteristics, as well as of the interrelationships of cetaceans with other species, of their food chains, and their special vulnerability to pollution, disturbance, and harassment. Furthermore, regulatory measures must differentiate between requirements for conservation and management of whales and marine mammals and requirements for fisheries.²

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ISSUES ARISING BEFORE THE CONCLUSION OF THE ICRW IN 1946

The 12 great whales were exploited for thousands of years for their main products—food and oil—and for side products that were developed over the years from their teeth, whalebone, skin, and hair. Industrial whaling took place for many years without any regulation whatsoever under the doctrine of the freedom of the seas, which included freedom to fish, whales being regarded as fish. The Basques exhausted the stocks of right whales in the Bay of Biscay from the eleventh century onwards, initially by hunting coastal stocks from land stations and then, as those stocks declined and techniques improved, by moving into pelagic whaling to meet industrial demands. Other states that joined in such activities could not be controlled without their consent. Improved equipment allowed an ever increasing take, and by the end of the nineteenth century, Greenland bowhead and Biscayan right whale had become rare.

History repeated itself elsewhere. Off the west coast of America, American Indians and Greenland Eskimos were the main hunters, while off the east coast, settlers took up the chase. Once coastal stocks were exhausted, the whalers moved farther afield to other stocks. They pursued sperm whales to Australia and New Zealand, the southern right whale in Africa, and whales in the Indian, Pacific and Atlantic Oceans where they were joined by other states. The American industry collapsed, its end accelerated by the discovery on the American continent of petroleum and gold. Other industries sprang up to the west to pursue the Bering Sea bowheads (also taken by the Eskimos) and the Californian gray whales, which were virtually exterminated once their breeding ground was discovered. During this period, more land stations were opened in other parts of the world—for example, Japan, Korea, Australia, Canada, and South Africa. Eventually, as pelagic whaling led to gross depletion of many species, even the small take from land stations posed a threat to the remaining whales.

An even more devastating period for the whales, however, emerged with the development of steam ships, followed by the invention of the harpoon gun by a Norwegian. This led to great development of Norwegian whaling, now including fin whales (blue, fin and sei). Other states followed suit all over the world, and factory ships were introduced. The


4. The name “whale” is not the scientific description of these species which are of the order of Cetacea, but rather the term used by the whalers to describe those large numbers of this order that they actually hunted. They are: Greenland right whale or bowhead, North Atlantic right whale, North Pacific right whale, Southern right whale, gray whale, blue whale, fin whale, sei whale, Bryde’s whale, minke whale, humpback whale, and sperm whale. For brief details of these, see 2 P. Birnie, supra note 3, at 671–72 (The Lives of Whales) (available from the IWC).
demand for products grew from increasing populations. Norway intensified its efforts on the Antarctic whale stocks, particularly after World War I, and once again other states followed suit. Soon catches in this area also started to decline. However, at that time few perceived the need to regulate catching in order to conserve the stocks on which the industry was based. Furthermore, the doctrine of freedom of fishing on the high seas, confirmed in the Bering Fur Seal Case in 1893, made regulation difficult, particularly in the absence of the sort of scientific information that is now available.

Scientists originally took no interest in cetacean biology, and even when they did, the whalers used it to help them exploit the whales on feeding or breeding grounds, or on their migratory routes. Whales were regarded as a resource to be economically exploited or "mined" like any other resource, and because this occurred mainly on the high seas, they were legally regarded as "common property resources" from which no state could be excluded access.

When overexploitation reached such a level of overproduction of whale oil that markets for it could not be found, the major whaling companies entered into intercompany agreements to regulate production, allocating a unit value (the "Blue Whale Unit" (BWU)) to the three major whales taken (blue, humpback, sei). The companies were allocated quotas on the basis of an oil ratio, but as not all the companies participated in the agreement, it was only partially successful, though it had some effect in reducing the number of whales killed.

Meanwhile, other approaches that were adopted similarly failed to solve the problem of overexploitation and decline. Some states attempted to unilaterally regulate whaling off their coasts, but because whaling took place mostly on the high seas due to the highly migratory character of the whales, such laws could be neither applied nor enforced outside their territorial seas and were not co-ordinated with other states, and thus were not effective in controlling pelagic whaling.

The International Council for the Exploration of the Sea (ICES), established in 1902 to promote international cooperation in scientific research, began to press for an international solution that would take account of scientific information and principles, with regulations adopted at the

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5. These included UK, South Africa, Japan, Panama, Germany, Chile, and the USA.
8. For an understanding of this concept, its limitations and devastating effect on the whales, inter alia, see F. Christy & A. Scott, The Common Wealth in Ocean Fisheries (1965) (see especially Chapter 2); I P. Birnie, supra note 3, at 78–81.
9. For a good account, see W. Vamplew, Salvesen of Leith 198 (1975).
10. Id. at 147; I P. Birnie, supra note 3, at 103–4
international level, based on continuing scientific investigation. After World War I, ICES encouraged the League of Nations to include this issue, \textit{inter alia}, on the agenda of its 1930 Conference promoting the rational exploitation of the sea's resources. ICES set out the measures required, emphasizing the need for uniformity in the national laws applied, and for the establishment of a central bureau to collect statistics from the whaling industry. The league did adopt a convention in 1931, though without incorporating any of the "new jurisprudence" advocated by its enlightened rapporteur who recognized that, "the riches of the sea, and especially the immense wealth of the Antarctic region, are the patrimony of the whole human race," and that the obsolete rules should be replaced by ones "based on scientific and economic considerations which alone would see justice done." The \textit{res communis} approach was rejected in favor of the free seas principle as the conceptual basis of the 1931 Convention for the Regulation of Whaling, but only 27 States ratified it. Some non-participants developed their industries, which did not encourage all whaling states to strictly adhere to the convention.

Though it was deficient in many respects, the convention did follow much of ICES' advice. It applied regulations "to all the waters of the world." All parties involved agreed to license their vessels, to take the necessary measures in their national jurisdictions, and to prohibit the taking of right whales and of lactating or undersized whales. However, the convention did not specifically protect any species other than the right whale, nor did it lay down enforcement measures or specify penalties. It did provide for methods of collecting statistical information, however, which in time—as it accumulated—highlighted the need for further and better measures. The introduction of these measures, however, required the convening of \textit{ad hoc} conferences to negotiate protocols. Each of these Conferences had different parties, and a confused legal situation resulted.

The regime laid down in these protocols—though a vast improvement on no regime at all—remained inadequate for the purpose of preventing the decline of stocks. The regulations stipulated in the protocols were inadequate, and as there was no permanent commission, they could only be amended by convening a special conference. The scientific database


14. For a brief outline and analysis of these, see 1 P. Birnie, \textit{supra} note 3, at 125-41.
remained imperfect, as not all states participated in supplying data, and there was no international supervision of enforcement, which was thus weak. Furthermore, there was no uniformity of penalties, and no ban on transfer of whaling vessels to non-parties although this was recommended. Absolute protection was accorded to only two species of gray and right whales. Protocols did include, however, a variety of now familiar regulations. Nevertheless, while an overall catch limit of 16,000 BWUs was set, governments could still issue permits to take and treat any species of whale—even those protected—for scientific purposes. Catch statistics, biological, and other information were to be collected, however.

All whaling vessels of parties were to be licensed by their flag state, but coastal states could license whaling vessels operating in their territorial seas. Enforcement was left to the individual states, but national inspectors were required to be carried on board, and the infraction of regulations to be penalized. Coastal aborigines using canoes or small craft, and operating only for their own consumption and use, were exempted from all restrictions under the regime. The most unusual provision—in the context of the few other fisheries conventions in existence at that time—was that the convention and protocols applied in "all waters of the world" (that is, the high seas, territorial waters, and any other claimed national zones), thus taking full cognizance of the highly migratory characteristics of whales, as advised by the scientists.

Many of the protocols and recommendations, however, never came into force. Those that did failed to bind all whaling states. Stocks of species continued sequentially to decline, exacerbated by poor enforcement. The lack of any institutional machinery meant that amendment of regulations did not keep pace with scientific information, and there was no means to collect and collate data or co-ordinate research. By 1939, when World War II broke out, it was already apparent that these issues needed to be addressed in order to save the whales. The war provided a respite for the whales while states attacked human rather than animal species. Its end in 1945 provided both the opportunity to address the outstanding issues and a more internationalist climate of world opinion.

ISSUES ARISING FROM THE INTERNATIONAL CONVENTION FOR REGULATION OF WHALING (ICRW) 1946

The ICRW was concluded in 1946, following two preliminary conferences at which the above issues were discussed. The questions we

need to address concerning the ICRW text following almost 40 years of its operation include: whether it addressed the right issues; whether it provided an effective regime for the issues it did address; whether its parties have interpreted it in good faith with the aim of successfully resolving these issues; and whether new issues have arisen during its life, and, if so, whether and how these have been successfully resolved.

The ICRW's draftsmen incorporated in it most of the provisions of the 1931 convention and protocols, but with some substantial changes remedying their defects, of which the most important were: (1) the institution of an International Whaling Commission (IWC) (article III); and (2) a separate schedule of regulations which was treated as an integral part of the convention, but which could be amended annually by the Commission on the basis of undefined scientific "findings" (article V).

The final draft of the ICRW was something of an amalgam of the existing fisheries treaties which emphasizes the point that the underlying assumption of the ICRW was still that whaling was a form of fishing—the preamble refers to "whale fisheries"—and that the doctrine of the freedom of the seas must, therefore, be applied to it. No state revived the proposal made by the League of Nations' rapporteur that a "new jurisprudence" should be adopted. Although the preamble to the ICRW does "recognize the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks," this is far from Sr. Suarez's "common patrimony" approach, and while Dean Acheson, when opening the 1946 Conference, referred to whales as "wards of the entire world," he made it clear that this was only in the sense that no nation or group could claim title to them.

The ICRW did not provide for mutual inspection of vessels or direct employment of scientific research staff, though some existing conventions did so, and the Convention on Nature Protection and Wild Life Preser-

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17. This term was not defined and remains obscure and a cause of controversy in the IWC since it has enabled some states to argue that the ICRW does not require that regulations closely or completely follow scientific advice. It can be asked whether a finding that "no finding can be made" is itself a "finding."

18. The draftsmen (ironically drawn from the U.S., later to become the convention's greatest critic) looked at such treaties as: the Bering Fur Seal Convention 1911; 64 British State Papers 175 and Ch. II at 99 (1911), and its successor, the Provisional Fur Seal Treaty of 1942, et seq.: the series of International Pacific Halibut Conventions of 1923, 1930, 1937 and 1943; the International Pacific Salmon Fisheries Convention 1930; and drafts for the North East Atlantic Permanent Commission 1946. All of these treaties are discussed in D. Johnston, The International Law of Fisheries (1963) and A. Koers, The International Regulation of Fisheries (1973).

19. The 1945 Truman Proclamation of the United States' sovereign rights to exploit its Continental Shelf (59 Stat. 885–86) was careful to preserve the status of the waters above it as high seas, and the accompanying proclamation concerning fishery conservation zones merely noted the "pressing need for conservation and protection of fishing resources in certain areas" (emphasis added).

20. See League, supra note 12.

vation in the Western Hemisphere had been adopted in 1940 with exclusively conservatory aims, introducing the idea of creating national sanctuaries for fauna to prevent their extinction by man. The ICRW did establish sanctuaries initially, but in areas where there was no whaling, and later opened even these.

The Conferences perceived the main issue as establishing machinery to avoid the difficulties created in the past when every future amendment required conclusion of a new treaty. The ICRW preamble makes it clear that it was preservation and expansion of the whaling industry by means of conserving stocks by regulating catching that was the chief objective, although its phraseology has given rise to much argument concerning whether conservation or preservation of the industry is to be given the prior consideration. The parties stated that they desired "to establish a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks . . . and thus make possible the orderly development of the whaling industry." Other preambular statements have also proved challengeable in light of the growing scientific knowledge of whale biology and social habits, for example: that whale stocks are capable of natural increases if whaling is properly regulated and that such increases permit an increase in the number of whales taken without endangerment; that it is "in the common interest to achieve the optimum population level of whales stocks as rapidly as possible"; that this should be carried out "without causing widespread economic or nutritional distress," a qualification which, coupled with the substantive provision in article V of the convention that the interests of the consumers of whale products and the whaling industry must be taken into account, was used by the whaling industry until the mid 1970s to delay conservation measures advocated by scientists in favor of the industry's needs for a high whale catch.

Almost all of the substantive articles of the convention have been an issue at one time or another since the convention entered into force in 1949. Briefly, the articles provided for:

(i) the convention's application not only to factory ships, land stations, and whale catchers (all defined in the convention), but to "all waters in which whaling is prosecuted by them." Since exploitable whales were found in almost all the world's waters, it had

22. 161 U.N.T.S. 485, 193; it was eventually ratified by 17 Latin American states and the U.S.A.
23. ICRW, supra note 15 (preamble). Its aim was "to protect and preserve in their natural habitat representatives of all species of the native fauna in sufficient numbers and over areas extensive enough to assure them from becoming extinct through any agency within man's control." Id.
24. Id. (emphasis added).
25. Id. at art. 2.
26. Id. at art. 1.
global application—a vital provision because of whales' migrations.

(ii) A commission composed of one member with one vote from each contracting government which could amend the regulatory schedule by a three-quarters majority of members voting, but could adopt rules of procedure or make recommendations by a simple majority. These recommendations could relate to initiation of studies and investigations concerning whales and whaling and any matter whatsoever pertaining thereto.

(iii) A Secretariat which could potentially play an important role in the facilitation of the required studies, collection, and dissemination of information, and the publication of the Commission's reports, as well as servicing its bureaucratic needs.

(iv) The granting by any contracting government to any of its nationals of a special permit to kill, take, and treat whales for purposes of scientific research "notwithstanding anything contained in the [c]onvention." Whales so taken have to be, as far as practicable, processed, the proceeds being dealt with by the relevant government, with each government being required to transmit to some body designated by the Commission its available scientific information on whales and whaling in addition to the statistical information required by article VII to be transmitted to the then existing International Bureau of Whaling Statistics in Norway (now the IWC itself).

(v) Enforcement by national means only (the convention, however, was extended by protocol in 1956 to include provisions on methods of inspection among those schedule provisions which may be amended by the Commission under article V) but it was many years before the necessary majority could be obtained to introduce even an international observer scheme.

(vi) Withdrawal on 6 months notice to the depository government, this to be communicated to other governments, who could within a month of receipt likewise withdraw.

States could and did threaten to withdraw as a means of securing quotas higher than those advocated by most scientists; some did withdraw for this and other reasons. Since the ICRW defined "contracting government"

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27. Id. at art. III(1)(a) and (2).
28. Id. at para. 2.
29. Id. at art. IV(1)(a).
30. Id. at art. IV.
31. Id. at art. V(3).
32. Id. at art. VIII(1).
33. Id. at art. VIII(2).
34. Id. at art. VIII(3).
35. Id. at art. V.
37. ICRW, supra note 15, at art. X.
to include any government ratifying or adhering to the convention, it was and remains open to any government—a provision that proved crucial to changing the policies of the IWC in recent years.

Disputes have been generated not only concerning the interpretation of all these provisions, but also concerning the Annex of Nomenclature of Whales that was attached to the final act of the 1946 Conference.\(^3\)

The annex gives the scientific, English, French, Dutch, Russian, Scandinavian, and Spanish names for 12 species, including two ziphiidae (Hyperoodon ampullatus/bottlenose (Arctic) and Hyperoodon planifrons/bottlenose (Antarctic)). The final act states that the Conference recommends: that the chart of [n]omenclature of whales annexed to this [f]inal [a]ct be accepted as a guide by the governments represented at the Conference.\(^3\)\(^9\) However, the final act, unlike the schedule, is not an integral part of the convention but rather a document of the Conference\(^4\) and it is, therefore, unclear whether the rules of treaty interpretation apply to it.\(^4\) If the ordinary and contextual meaning of these words is considered, it would seem to be impossible to contend that this chart limits the application of the ICRW to the species listed on it, that is that only those nominated in it, which were those species commercially hunted at the time of the ICRW’s adoption can ever be brought within the convention’s regime. Nevertheless, this has subsequently been argued in order to resist its application to orca, pilot whales, and the North Atlantic bottlenose whale in particular and to small cetaceans generally, despite the fact that the minke whale, the application of the convention to which has subsequently been accepted by its parties, was not included in the chart, and that article V allows the Commission to “amend from time to time the provisions of the [s]chedule by adopting regulations with respect to the conservation and utilisation of whale resources”\(^4\)\(^2\) without defining the terms “whale,” “resources,” or “whale resources” or referring to the chart.

Article V is a key article of the ICRW and has given rise to more prolonged and bitter controversy than any other during the whole period of the IWC’s existence. It is, therefore, necessary to examine its provisions in more detail.

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40. See supra note 7 (Final Act).


42. ICRW, supra note 15, at art. V(1).
AMENDMENTS

Article V(1) permits the adoption of regulations fixing:

(a) protected and unprotected species;
(b) open and closed seasons;
(c) open and closed waters, including the designation of sanctuary areas;
(d) size limits for each species;
(e) time methods and intensity of whaling (including the maximum catch of whales to be taken in any one season);
(f) types and specification of gear and apparatus and appliances which may be used;
(g) methods of measurement; and
(h) catch returns and other statistical and biological methods.

There is no specific reference in the amendments to a power to permanently end whaling (which would seem to be contrary to the ICRW's aims), though there would seem equally to be no bar on preventing catching for a period for the conservatory purposes set out in the preamble. However, demands for a moratorium were pressed following the UNCHE resolution in 1972. Furthermore, there was no specific provision for species, vessel, or national quotas (only for an overall catch limit). Indeed, article V(2)(c) clearly stated that schedule amendments must not involve restrictions on the number or nationality of factory ships, but in time all these restrictions came to be demanded as stocks inexorably declined.

There were other qualifications imposed by article V(2). The amendments must: be only "[s]uch as are necessary to carry out the objectives and purposes of the Convention and to provide for the conservation, development and optimum utilization of the whale resources"; be based on scientific findings; and take into consideration the interests of the consumers regarding products and the whaling industry. The last two qualifications frequently gave rise to conflicting demands in relation to catch limits. Governments generally had representatives of the industry, rather than of consumers, among the experts and advisers permitted by article V(1) to accompany the Commissioner. Exceptions for aborigines allowing them to take whales otherwise protected or regulated as long as the meat and products were consumed wholly by them, were not included in the main convention, but from its conception were always included in the schedule as in the 1931 convention in relation to specific stocks such as Alaskan bowhead whales. The term "aborigine" was not defined, and the criteria for this have never been laid down despite the recent establishment of a working group to consider them. The imminent cessation of all commercial whaling for an interim period has made this issue urgent.

43. Id. at art. V (emphasis added).
Some of the whaling states that accepted this ban are beginning to argue that any coastal communities that have been dependent on whaling for their livelihood for a long time should qualify for such exceptions.

**OBJECTIONS PROCEDURES**

The most contentious issue of all concerns the objections procedure provided in article V(3). Even amendments obtaining the necessary three-quarters majority (generally achieved only after intensive lobbying by the more conservation minded states—those who either have never engaged in whaling or have given up doing so and thus have no industrial lobbies to offset their environmental ones) became effective only 90 days after their notification to contracting governments by the IWC. Even so, the amendments may still not enter into force for any government since, if any government lodges an objection before the expiration of this 90 day period, any other contracting government can also object during this period, or before 30 days after the receipt of the last objection received during that period. Only at the end of that period do the amendments become effective and then, of course, only for the governments that have not objected. The others are not bound unless and until they withdraw their objections. Resort to this procedure by whaling states has delayed many conservationist proposals during the past 30 years.

It is apparent that almost every phrase, if not every word, of every provision of the ICRW has been in issue during the 40 years that have passed since its entry into force. It is not possible to discuss all the legal arguments concerning the interpretations of the convention that have arisen. Rather, certain key issues will be considered. These are of three kinds: those that arose only in the earlier years; those that have arisen more recently; and those that have persisted throughout the IWC’s existence. It should be made clear from the outset that since its inception, when it had only 14 members, the IWC has included both developed and developing states. Even with its membership now expanded to 39, and with developing states now in the majority (unlike at the UN or the Third United Nations Conference on the Law of the Sea (UNCLOS)), the North/South divide as well as demands for a New International Economic Order have not been serious issues in the IWC, no doubt because developing as well as developed states have always been among the exploiters of whales and all the original parties to the ICRW were whaling states. From the late 1970s onwards, when non-whaling developing states were encouraged by conservationist Non-Governmental Organizations (NGOs) and some Inter-Governmental Organizations (IGOs) to join the IWC in 44. *Id.* at art. V(2). The original signatories of the IWC were Argentina, Australia, Brazil, Chile, Denmark, France, the Netherlands, New Zealand, Norway, Peru, South Africa, the U.S.S.R., the U.K., and the U.S.A.
order to augment the numbers voting for a cessation of commercial whaling, many developing states played a major part in securing this, but there were always a few developing states who wanted to continue whaling (Peru, Chile, Brazil, South Korea) or to resume whaling or begin whaling (the Philippines, the Solomon Islands, St. Vincent). Thus, the Group of 77 has been divided on whaling issues.\(^4\) Most of the current issues are not new. They derive from the ambiguous philosophies on which the ICRW was based, set out in its preamble—the conflict between conservation of whales purely for purposes of industrial sustenance and conservation of whales for their own sake as uniquely huge marine mammals with valuable and attractive characteristics about which and from which man has still much to learn to his own benefit.

Nevertheless, as the number of whales has continued to decline drastically, some legal issues hitherto in the background have increased in importance, such as: the possible extension of IWC regulations to small cetaceans, either in general or to specific species or stocks that are now threatened by overexploitation; the issue of scientific permits to take whales from stocks that are now all subject to zero quotas; the possibility of the IWC regulating or laying down guidelines for the nascent industry of whale-watching and other nonconsumptive uses (NCUs) of whales, such as their use for display in oceanaria; the effect of pollution and noise and other disturbances from, for example, offshore oil and gas and recreational activities on whales, especially on breeding and feeding grounds; inhumane methods of killing; the continued taking by aborigines of whales from otherwise protected stocks; the need for revision of the convention; its application within the newly extended jurisdiction of coastal states, which now exercise sovereign rights over fisheries in exclusive economic or fisheries zones up to 200 miles from their coastal baselines, not merely within a 3 mile territorial sea.

The annual reports of the IWC meetings establish that all these problems are now very much in issue and some have been for many years. The number of such published reports (now 37, with those of the 1986 and 1987 meetings forthcoming) is too large to permit all examples to be itemized or exemplified, and in any case, this has been done elsewhere.\(^4\) Instead, a brief outline of the major issues will be given, and only those


\(^4\) The most detailed account of the issues and events arising during the First to Thirty-Seventh International Whaling Commission meetings is contained in the International Whaling Commission’s own reports (obtainable from the International Whaling Commission). Verbatim records are also available for perusal at its Headquarters. See supra note 15. Detailed summaries of the issues and events at the First to Thirty-Seventh meetings are given and set in the context of developments in the Law of the Sea generally, and fisheries and conservatory conventions codes and principles in particular in P. Birnie, supra note 3; J. Tonnessen, supra note 3, gives a briefer account of International Whaling Commission meetings up to 1978, as does (up to 1976) Scarff, *The International Man-
issues debated at the most recent IWC meeting (the thirty-ninth, held in Bournemouth, UK, from June 22–26, 1987) will be elaborated on.

**IMPACT OF RELATED CONVENTIONS**

The IWC’s failure to effectively address many of these issues, as well as delays in dealing with such issues, has led conservationists to exploit the possibilities for protection provided under recent conventions, principles, and guidelines which, though not applying exclusively to whales, in fact do or could do so. Conventions include those on: International Trade in Endangered Species (CITES) 1973; Conservation of Antarctic Marine Living Resources 1979; Conservation of Migratory Species of Wild Animals 1979; the United Nations Convention on the Law of the Sea 1982; some regional conventions; European Community Regulations 1981/1982; guidelines and principles laid down by UNEP for Shared Natural Resources; IUCN in the World Conservation Strategy 1980; and the UN in the World Charter for Nature 1982. By far, the most useful of these conventions has been CITES, but all related treaties


49. XIX ILM 841 (1982).
55. IUCN-UNEP WWF publication 1980, obtainable from IUCN, Gland, Switzerland.
57. See Lyster, supra note 7, at 239–77, esp. 239 and 276–77.
enable a wider approach to whale protection than is enabled or pursued under the ICRW. Action can be taken under the above, *inter alia*, to: protect habitats; control trade in species threatened by it (all cetaceans are now listed on one or other of CITES Appendices); ensure that the necessary co-operative agreements are concluded between states across whose borders migratory species regularly range; and to preserve the Antarctic ecology that sustains the great whales. None of the conventions, including the World Conservation Strategy, rule out forever future exploitation of unendangered species. The IWC recognizes the existence of the relevant bodies established under these and other conventions, and now receives reports from some and sends representatives to attend their meetings. Other than this, there is little co-ordination of all these instruments in any general strategy to preserve the whales, nor is there an organization with overall responsibility for this, and this in itself is an issue.

Let us look now at the experience of operating the ICRW itself since 1949 in relation to some of the major issues that have arisen.

**JURISDICTIONAL SCOPE OF THE CONVENTION**

**Geographical: EEZs and EFZs**

From 1947 onwards,58 some Latin American states adopted 200 mile maritime zones or territorial seas in which they asserted sovereignty over natural resources. Chile, Ecuador, and Peru in 1952 established a permanent commission to manage these resources within their zones,59 including the whales. Its regulations were generally much less stringent than those of the IWC, and their enforcement was and remains limited to national means. Even when whales were eventually protected by the IWC, they were often not protected when passing through these zones. Upon eventually becoming parties to the IWC in 1979, Chile and Peru entered reservations disclaiming any effect of the ICRW on their continuing “sovereignty” over the resources in their zones.60 In the IWC, they and other Latin American states with similar limits (Panama, Argentina, Mexico, Brazil), while parties to the ICRW, have always strongly resisted any attempt to argue that the ICRW’s scope extends to these areas. Applying the Vienna Convention’s rules on treaty interpretation, however, it seems clear that the ordinary meaning of article 1 of the ICRW is that

58. Following Chile’s declaration of jurisdiction over a 200 mile maritime zone in 1947, Chile, Ecuador, and Peru joined in the Declaration of the Maritime Zone, Santiago, Aug. 18, 1952. 1 New Directions in the Law of the Sea 231–33 (R. Churchill, M. Norquist & S. Lay eds.).


60. For details, see 2 P. Birnie, *supra* note 3, at 766–71 (*Status of the International Convention for Regulation of Whaling*), including the Peruvian and Chilean statements and reservations on ratification, and the Federal Republic of Germany’s objection to Peru’s statement.
it "applies . . . to all waters" in which whaling takes place. Most members of the IWC support this interpretation and dispute the legality of the Latin American interpretation. Since the 1982 Law of the Sea Convention (LOSC) approved, in article 56, the adoption by coastal states of 200 mile exclusive economic zones in which they have "sovereign rights [not sovereignty as in their territorial sea] for the purpose of exploring and exploiting, conserving and managing" the living natural resources, inter alia, many more states have adopted such zones\(^6\) and many developing states are sympathetic to the Latin American interpretation. Recent IWC meetings evidence their sensitivity to any further attempt to extend IWC regulations to other cetacean species within these zones, though they accept the regulations currently in force. The LOSC, however, provides in article 311 not only that it prevails for its parties over the 1958 Geneva Conventions on the Law of the Sea, but that it will not alter the rights and obligations of States parties arising from agreements compatible with the convention and which do not affect their rights or the performance of their obligations under it. Moreover, article 65 of the LOSC, though it states that nothing in the EEZ provisions restricts the rights of coastal states to regulate marine mammals more strictly than provided for in the EEZ articles, also makes the same provision for international organizations, adding that states must co-operate in conserving marine mammals and that "in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study." Such organizations would certainly include the IWC, which clearly plays the predominant role in the case of whales. All current ICRW parties except the United Kingdom and the United States (which do not support the restrictive interpretation) are signatories of the LOSC and, therefore, should do nothing to undermine its objectives.\(^6^2\)

**VESSELS**

**"Pirate" Whaling\(^6^3\)**

Article 1 applies the convention to "factory ships, land stations and whale catchers" (as defined in it) under the jurisdiction of the parties. Both the 1958 High Seas Convention (article 5) and the 1982 LOSC

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\(^{61}\) FAO, Legislation of Coastal State Requirements for Foreign Fishing, FAO Legislative Study No. 21 Rev. 2 (1985) (Food and Agriculture Organization, Rome).

\(^{62}\) Vienna Convention on the Law of Treaties, Art. 18: "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when (a) it has signed the treaty. . . ." U.N. Doc. A/CONF. 39/27.

\(^{63}\) For a full account of this example of "pirate" whaling and the measures taken by the IWC and various other actions taken, see P. Birnie, *supra* note 3 (Legal Measures for Conservation of Marine Mammals (IUCN)). Evidence of incidents of "pirate" whaling are also regularly reported in detail in the series of "Outlaw Whalers," reports published by C. Van Note, Monitor, USA; see also, People's Trust for Endangered Species, Pirate Whaling: A Report by the People's Trust for Endangered Species on Whaling under Flags of Convenience Outside the Jurisdiction of the International Whaling Commission (1979) (U.K.).
(article 11), while providing that ships shall be under the exclusive jurisdiction of their states of registration—whose flag they must fly—require only that there be an undefined "genuine link" between the state and the vessel it registers. Clearly, the ICRW cannot apply to vessels of non-party states. Some whaling states that are closely linked to their vessels did not join the ICRW for many years (e.g. Spain, Chile, Peru, Korea). Their activities were either unregulated (Spain, Korea) or regulated by the weaker South Pacific Commission. Some states or companies (both party and non-party to the ICRW) registered vessels with non-party states with which they had little or no link, using their flags as "flag[s] of convenience" for unregulated whaling. Both types of non-IWC whaling are generally referred to as "pirate" whaling since they have the effect of undermining the effectiveness of the IWC regulations though the term is more appropriate to the latter. The activities of Onassis' "Olympic Challenger" provided notorious examples of it in the early days of the IWC. Action to deal with such problems has had to be taken mainly outside the IWC: Peru arrested the "Olympic Challenger" in its 200 mile zone in 1955; South Africa successfully took measures against the M.V.s "Sierra" and "Tonna" in the 1970s, and recently the CITES has proved useful in preventing any meat or products from such operations being traded between its parties. The IWC, though it could not take direct action, has taken indirect action by adopting resolutions calling on CITES parties to take measures to support its ban on commercial whaling, and on IWC members to take measures to prevent import of whales or their products "processed at a land station or factory ship which is registered with, partially or wholly owned by, or under the jurisdiction of" any non-party state, and "to prevent the transfer of factory ships, whale catchers, or gear, apparatus or appliances used in the conduct of whaling operations, and to discourage the dissemination by its citizens of expertise and assistance necessary to the conduct of whaling operations in any form. . . ." Resolutions, however, while easier to adopt (requiring only a simple majority under article 1), do not have the binding force of the schedule amendments and are not included in it. The IWC also began in 1979 to compile a Register of Whaling Vessels subject to IWC quotas to enable the identification of "pirates," but discontinued it at the 1987 (Thirty-Ninth) meeting when Norway, which has formally objected to the zero

64. 1 P. Birnie, supra note 3, at 218–31.
65. 2 id. at 819–22 (Report by South African Commissioner on Steps Taken to Implement the 1977 IWC Resolution Concerning the Transfer of Whaling Equipment, etc. to Non-Member Nations).
66. 2 id. at 781 (DOCS) (IWC Resolution to CITES, Special Meeting).
67. Id. (IWC Resolution on Importation of Whale Products from Non-IWC Countries, Special Meeting 1978).
68. 2 id. at 782 (IWC Resolution on Transfer of Whaling Equipment and Expertise, etc., Special Meeting 1978).
69. 2 id. at 823 (Register of Whaling Vessels) (A.L. Carter, on behalf of the NGO, People's Trust for Endangered Species, was largely responsible for the compilation of this register until its discontinuance by the IWC at the 39th Meeting in 1987.).
quotas, announced that it would no longer co-operate in supplying the requisite information.

**Substantive Scope: Small Cetaceans**

The Scientific Committee first examined the stocks of small whales in 1971. The arguments advanced by some states that the ICRW does not apply in EEZs and that its application is limited by the Chart on Nomenclature of Whales have made it impossible for the IWC to follow the advice of the majority of the Sub-Committee on Small Cetaceans established by its Scientific Committee that it should regulate some species or stocks of small cetaceans threatened by overexploitation. Instead, limited action was taken at the Twenty-Seventh IWC Meeting, and from 1976 onwards, the schedule was amended to require members to keep records giving particulars of whales taken in “small-type whaling operations.” These were defined as “catching operations using powered vessels with mounted harpoon guns hunting exclusively for minke, bottlenose, pilot or killer whales.” The term thus does not cover all operations or all small cetaceans. The Commission has approved (for administrative purposes only) a list of the world’s small cetaceans and encouraged members to increase research on those for which there is directed fishing. The Sub-Committee thought that an international body (which could be the IWC or a special body to be established) was needed to manage all stocks of cetaceans not on the IWC schedule. The issue was referred to a then impending conference as one which should be considered by it (to be held outside the IWC as the ICRW does not provide for revision) to revise the convention. In all, three conferences were held to consider revision of the ICRW, but all failed to reach agreement. The gap between the more conservationist states, who wanted to extend the scope of the convention to cover all cetaceans (a draft of an “International Convention for the Conservation of Cetaceans” was considered), and those that wanted to limit its scope to the ICRW model, was too great. Even the proposed title of the new convention was disputed. Not only did many states want to clearly exclude small cetaceans from the convention’s scope, but they also wanted to ensure that within their EEZs, any new convention would ensure that the coastal state would have the primary regulatory role and need only seek the advice of any commission or committees, except in

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71. In Copenhagen 1978; Estoril 1979; Reykjavik 1981, convened by Denmark, Portugal (a non-member) and Iceland, respectively. For an account of these meetings, see 1 P. Birnie, *supra* note 3, at 561–74; see 2 id. at 744–58 for the Report of the Preparatory Meeting to Improve and Update the International Convention for the Regulation of Whaling 1946, Reykjavik, 6–9 May 1981.
relation to the great and minke whales already regulated. Some preferred merely to amend article 1 of the ICRW to achieve recognition of the extension of coastal jurisdiction. Others, inspired by the 1972 Stockholm UNCHE Declaration, especially the United States which in 1972 had adopted a Marine Mammal Protection Act banning the taking of marine mammals in most circumstances, wanted a fresh start that would not only cover all cetaceans, but would take an ecological approach to their management, as had been done by 1980 in the Convention for the Conservation of Antarctic Marine Living Resources.

REVISION OF THE ICRW

At recent IWC meetings, the USSR revived the proposal for revision of the ICRW, following the entry into force of the zero quotas for all commercial whaling from 1985/86. It is, however, difficult to imagine that any new negotiation would not expose the same "can of worms" as did the earlier ones. Revision is not provided for in the ICRW and therefore requires unanimity among the existing parties. Meanwhile, the dispute continues in the IWC meetings. Though on an ad hoc basis, the North Atlantic bottlenose whale was given protected status, and, following a USSR move in 1979/80 to extend its pelagic catch to orca following the introduction of a moratorium on pelagic whaling at the Thirty-First Meeting in 1979, the schedule was amended to clearly extend this ban to the orca. An attempt by the Thirty-Fourth and Thirty-Fifth Meetings to follow the Scientific Committee's advice and regulate catches of Baird's Beaked whale failed, however. States entered into detailed legal argument in support of the rival views of the IWC's competence to regulate such catches, and as the convention does not define "whale," there seems

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72. Canada introduced this proposal, putting forward the recently established North-West Atlantic Fisheries Organization model. It failed to attract widespread support. Subsequently Canada, whose concerned internal departments were known to be divided on the issue of the commercial moratorium, withdrew from the ICRW. See Communiqué from Canadian Dept. of External Affairs (June 26, 1981); 2 P. Birnie, supra note 3, at 1021–22 (Canada withdraws from the International Whaling Convention and Commission). Canada therein stated that it continued to support an International Cetacean Convention to supercede the ICRW "taking into account recent developments on the law of the sea" and that cooperation to conserve whales, which it supported, did not require its IWC membership. At UNCLOS, Canada circulated an interpretation of Art. 65 of the draft LOSC which assumed that cooperation for conservation of cetaceans could take place through any appropriate organization. For small cetaceans, for example, the NAFO would be an appropriate organization. Under this arrangement, beluga and narwhal in the Canadian EEZ would be regulated by Canada, in consultation with NAFO.


74. See 2 P. Birnie, supra note 3 (Appendix 4 (ST/BB/2) to Report of the Steering Committee on Regulation of Baird's Beaked Whale to the Thirty-Fifth Meeting of the IWC, 1983 (IWC/35/ 15), for views of Japan, Denmark (opposing IWC competence), Australia, Netherlands, Oman, Seychelles, and UK (supporting IWC competence)).
little doubt that any species could legitimately be brought within the IWC's scope either *ad hoc* or as a group. The problem lies in securing the necessary three-quarters majority to operate article V and appropriately amend the schedule. Meanwhile, hunts such as that conducted by Faroese Islanders for pilot whales do not come within the IWC's scope despite public concern and discussion at recent IWC meetings, which Denmark tolerated without prejudice to its view that the issue was outside the IWC's competence.

**LIMITATION OF CATCHES**

*From an Overall Quota to New Management Procedures (NMP)*

Before intensive whaling began, it had been estimated that there were over 3,035,000 whales, but by 1977 there were only 1,953,000 and that figure was declining. The IWC first attempted to stem the tide by setting a single maximum catch limit in terms of the BWU, as permitted in article V(1)(e) of the ICRW. It started by setting the maximum catch limit at 16,000 BWU. That figure was reported caught in 1949/50, and when it was exceeded in 1951, declines in some species were noted by scientists who thought regional quotas should now be considered. Instead, factory ships increased in size and numbers. Fewer blue whales were caught, but the 16,000 BWU was retained. As early as 1952 (Fourth Meeting), some scientists recommended separate quotas for distinct populations of humpbacks and sanctuary areas based on scientific criteria. By 1953, only 14,853 BWU could be caught, as fins and blues were declining. Enforcement by some states was suspected to be poor and there was also "piratical" catching by non-members. This pattern continued. Drastic cuts in quota to 11,000 BWU and protection for individual populations or species proposed by scientists were resisted strenuously by certain states. The Scientific Committee, knowing the political difficulties, tempered its own advice. When some reductions were accepted in 1956–57, seven states lodged formal objections. Japan and the Netherlands rejected the view that stocks were declining. When the five Antarctic whaling states (Japan, Netherlands, Norway, the United Kingdom, and the USSR) failed to agree (in negotiations conducted outside the ICRW since it did not provide for this) on allocation of the Antarctic catch between them, Norway and the Netherlands withdrew in protest to what they regarded as an attempt to force an unfair share of the cuts onto them, and Japan threatened to do so as well. Several states were suspected of not fully reporting catches, but attempts to negotiate an International Observer Scheme, proposed by Norway in 1957, were slow and unsuccessful. In 1958, the first United

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Nations Convention on the Law of the Sea (UNCLOS I) adopted a Convention on Fishing and the Conservation of the Living Resources of the Sea that advocated conservation based on maintaining the optimum sustainable yield of these resources. It was proposed that the IWC should adopt this system. An independent committee of three scientists was called in when quotas were suspended entirely in 1960 at the Twelfth Meeting in an attempt to entice Norway and the Netherlands back. The Committee of Three drew attention to the decline and the lack of data on whales and whaling and called for drastic action. In 1961, however, self-imposed national quotas added up to 17,780 BWU, though only 15,252 BWU could be caught. Nevertheless, some states still gave preference to economic needs, and as quotas could not be allocated to vessels under the ICRW, these states increased the number of expeditions to try to meet these needs. This sorry story continued and the Fifteenth Meeting in 1963 was regarded as a last chance to halt overexploitation in time to restore stocks within a reasonable period. Dr. Holt, then one of the Committee of Three, attributed the IWC's failures to weaknesses in the ICRW and in the international legal status of the whales, which were not seen as belonging to everyone, including future generations. Scientific advice that the BWU be abolished and replaced with species quotas was not, however, followed until 1972. When the IWC did ban the taking of blue whales in the Antarctic in 1965, all five Antarctic whaling states lodged formal objections. By 1966, the quota was set at 4,000 BWU. However, this amount could not be caught. Even fins had so declined that the smaller sei whales began to be taken.

By 1970, the few non-governmental and international organizations that were allowed to attend IWC meetings as observers became increasingly critical. The UN decided in 1970 to convene the Third UNCLOS in 1973, and the UNCHE in 1972. The UNCHE adopted numerous relevant conservation principles in its declaration as well as an Action Plan that included many relevant recommendations. It also resolved to call for a ten-year moratorium on all commercial whaling, and established the United Nations Environment Programme, which also began to observe the IWC. The UNCLOS in due course adopted, and included in the LOSC (articles 136 and 137), the proposal that the resources of the deep seabed were "the common heritage of mankind," and vested them in mankind as a whole on whose behalf an International Seabed Authority would act to license and control their exploitation. These events encouraged de-

77. E.g. Principles 2, 4, 13, 20, 21, 22, 25; Recommendations 32, 33, 38, 46, 47, 49, 50, 99/3.
mands for a similar approach to whales and whaling since, by 1970, Antarctic whale stocks were so depleted that it was estimated it would take 50 years for some species to recover (only 2,470 BWU were caught, though Japan and the USSR actually increased their catch of sei and fin respectively). Although the IWC had by now adopted maximum sustainable yield as its management policy, many of its members did not undertake the research or provide the data necessary to achieve this and the Commission was in disarray and on point of collapse. The Food and Agriculture Organization (FAO) called the maximum sustainable yield (MSY) concept of management into question in 1971. It now regarded it as too simple for the increasingly complex situation of whales and suggested other approaches.

Notable changes were at last introduced at the Twenty-Fourth Meeting in 1972. The BWU was finally abandoned, and a limited International Observer Scheme was put into practice (see 3(1) below). The Stockholm moratorium proposal was presented by the USA. It was rejected by the IWC as having no scientific basis, but it did have some effect since the IWC now: established an International Decade of Cetacean Research (during which little was done in the event); established a proper Secretariat headed by a whale scientist; introduced species quotas in Antarctica (though agreeing on those continued to present problems); and began to collect data on small cetaceans. Stock by stock management was advocated by the Scientific Committee in 1973, as well as by the growing number of NGO observers, some of whom also demanded an ecosystem approach. Instead, the IWC accepted, at the Twenty-Sixth Meeting in 1974, an Australian compromise amendment introducing New Management Procedures (NMP). The NMP required classification, on the basis of Scientific Committee advice, of all stocks in the nine divisions now adopted by the IWC into one of three categories related to that stock’s status in relation to MSY or optimum levels (with a factor allowed for error due to environmental variables and uncertainties), viz: (i) Initial Management Stocks, which can be reduced in a controlled manner to achieve MSY; (ii) Sustained Management Stocks, which should be kept near MSY, whaling being permitted only on Scientific Committee advice; and (iii) Protection Stocks, below MSY level and thus requiring full protection, with no whaling on these therefore being permitted. The schedule was amended accordingly. To fund the necessary increase in administration, a novel method of funding was introduced based on a 50 percent flat rate contribution by all parties, with additional contributions of 25 percent each based on areas commercially operated between 1954–1973. Some of the newer members who joined in large numbers to bring about the commercial moratorium in recent years have apparently had difficulty in
paying their contributions. Their accumulating debts have serious implications for the IWC's future and have become an issue of increasing importance.

THE MORATORIA

Background

A World Consultation on Marine Mammals held at Bergen, Norway in 1976 highlighted the poor status of many stocks, and the complexity of whale biology and population dynamics given the ecological interrelationships of stocks within the marine environment as a whole. Although during the next decade the Scientific Committee endeavored to give the advice required to make the NMP work, it increasingly found that these uncertainties, coupled with the dearth of data, made it impossible for it to do so. Some members and the large numbers of NGOs who began to attend the IWC meetings still pressed, therefore, for a commercial moratorium. The Commission changed its Rules of Procedure in an attempt to reduce the numbers of NGOs attending by requiring that the NGOs concerned be "international," and defining this to include only "any organisation with officers in more than three nations." This proved an ineffective method of restricting their numbers as there was no limitation on the purposes of the organizations. Thus, the International Association of Rabbis has been accorded Observer status. The Commission then began to charge NGOs for its costly reports and recently also to levy an attendance fee.

The Thirty-First Meeting in 1979, which took place at a time when a growing number of ICRW revision meetings were being held and more international conservation conventions had been concluded, saw a considerable expansion in membership from 17 to 23 (four of the six new members being whaling states). Twenty observer states attended the meeting as well as seven IGOs and 34 NGOs. They comprised most of the last to lobby for a moratorium—two kinds of which were proposed: (a) A Ban on Pelagic Whaling, which was accepted; and (b) Preliminary Studies for a World-Wide Ban on Whaling, to include even aboriginal whaling, which was also put under way.

By 1980, the pressure on the IWC from developments under the international conservation treaties and bodies was increasing. The ICRW was no longer the sole relevant treaty for the protection of whales, though it was still the most important. Three kinds of moratoria were now in issue:

(a) The World Wide Moratoria, the studies for which had illuminated various problems;
(b) A Moratorium on Commercial Whaling proposed by the US, which failed to attract the required majority; and
(c) A Moratorium on Sperm Whaling, which, though largely ended by the Pelagic Moratorium, still took place in Division IX. This also failed.

At the Thirty-Third Meeting in 1981, the "step by step" approach proved attractive. No fewer than five types of moratoria were in issue: indefinite moratoria on (1) all whaling; (2) whaling in the North Atlantic; (3) pelagic whaling for minke; (4) sperm whaling; and (5) a world-wide phase-out of commercial whaling. All except the moratorium on sperm whaling were rejected. However, in 1982 at its Thirty-Fourth Meeting, the IWC, now with a membership of 39 (37 of whom, including eight non-whaling states, attended) did approve the "cessation" of all commercial whaling for an interim period. This was achieved on the initiative of the Seychelles by subtle manipulation of the NMP combined with avoidance of any suggestion that the cessation would be permanent or indefinite. A three-quarters majority was obtained to amend the schedule in the following terms:

Notwithstanding the other provisions of paragraph 10 catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero. This provision will be kept under review based upon the best scientific advice, and by 1990 at the latest, the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modifications of this provision and the establishment of other catch limits.

Thus, quotas were set, but for naught, with an opportunity provided for revision. Hence, the possibility of resuming whaling was left open. Four states abstained in the vote and seven voted against (Brazil, Iceland, Japan, Korea (PR), Norway, Peru, USSR). Four of the latter lodged formal objections (Japan, Norway, Peru, USSR). Peru withdrew its objections because the United States threatened to implement the unilateral economic sanctions provided by the Pelly amendments to the U.S. Fisherman's Protective Act,79 and the Packwood Magnuson amendments to

79. 22 U.S.C. § 1978 (Supp. V 1981). If the U.S. Secretary of Commerce certifies that foreign nationals "directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of any international program for endangered or threatened species, the US can prohibit import of fish products from that state. If the President does not then impose such a ban he must give his reasons." An "international fishing conservation program" is defined to include "any ban, restriction, regulation or any other measure in effect pursuant to a multilateral agreement which is in force in respect to the United States, the purpose of which is to conserve or protect the living resources of the sea." Id. § (g)(3). The ICRW is clearly included.
the Magnuson Fishery Conservation and Management Act. Under these amendments, the United States respectively must cut quotas for access to its EEZ, and can reduce the import of fish and fish products from states certified by the President as undermining a conservation convention to which the United States is party. Korea and Brazil did not, on reflection, formally object, nor did Iceland following a narrow vote in its Althing in favor of the cessation.

Japan had also formally objected to the sperm whaling ban, but in 1984 it entered into an agreement with the United States to suspend the application of sanctions for two years (permitting Japan to take sperm whales until 1988) in return for Japan notifying the IWC of the withdrawal of its objection, effective April 1, 1988. Japan duly sent such notification to the IWC, but the U.S. government’s decision was challenged by NGOs in a group action in the U.S. courts. They argued that once the Secretary of Commerce had received from the Marine Mammal Commission notification that a state was undermining the effectiveness of a relevant conservation convention, he was required by the amendments to make the necessary determination, that is he could not exercise any discretion not to certify. The lower courts found against the government, but the case eventually went to the U.S. Supreme Court, which found by a majority that such a determination was not mandatory in the circumstances of the case. However, the issue remains contentious within the United States, and the use of such unilateral sanctions is itself contentious within

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80. 16 U.S.C. § 1821(e) (Supp. 1981). If the U.S. Secretary of Commerce certifies that foreign nationals “directly or indirectly, are conducting fishing operations or engaging in trade or taking which diminishes the effectiveness of the Whaling Convention,” the State concerned’s quota permitting access to the US 200m. fishing conservation zone is automatically cut by 50% and if that state does not adjust its conduct within a year it loses its whole quota and access to the US zone, i.e. the sanction here is mandatory on the Secretary of Commerce’s certification (he acts on advice from the US Marine Mammal Commission in this respect).

81. Details of the agreement are given in Agreement to End Japanese Whaling Announced (U.S. Dept. of Commerce News Communique, Nov. 13, 1984 (Wash. D.C. 20230), which states that under it “Japan would withdraw its objections to the International Whaling Commission’s (IWC) current prohibition to sperm whaling and its future moratorium on commercial whaling by a specified date.” Id. In return, the U.S. would not invoke sanctions. Under international law Japan would continue to whale indefinitely under its objection. The agreement was in two stages: first Japan would withdraw its objection to sperm whaling prohibition by Dec. 13, 1984; secondly, to the commercial whaling moratorium by April 1, 1985, effective no later than 1988. If Japan did not act on these provisions, the U.S. would immediately initiate the 50% reduction in its fish catches in U.S. waters. Space does not permit an investigation regarding whether the legal status of this agreement is that of a treaty. It was concluded through an exchange of letters between the Japanese Ambassador to the U.S. dated Nov. 13, 1984 and the U.S. Secretary of Commerce, of the same date, attached to the above communiqué, or of the binding character of a postdated notice of withdrawal from the ICRW or of the data on which obligation to withdraw becomes effective, but clearly many such questions remain unanswered.

the IWC where some members regard such action as an invasion of their sovereignty and contrary to UN Charter requirements on the use of force against the sovereignty of states.

ENFORCEMENT

International Observer Scheme

That the mutual suspicion of poor national enforcement of catch quotas and other IWC regulations undermined the will of states to effectively enforce the ICRW has been made clear in the discussion above of the experience of catch quotas. It took 18 years, from 1955, when Norway first proposed such a scheme at the Seventh IWC Meeting, to 1972, when a partial ad hoc International Observer Scheme was finally inaugurated,\(^{83}\) for limited international enforcement to be introduced. Its adoption required conclusion outside the IWC of a protocol amending the ICRW to permit the IWC to regulate inspection. Although such a protocol was adopted in 1956, it did not become effective until 1959, since ratification by all the then 17 members was necessary. Nineteen fifty-nine was the very year in which Norway and the Netherlands withdrew. As their involvement was vital to the success of such a scheme, they expressed willingness to continue to participate, but discussions on the nature of a scheme were inhibited and proposals for it remained on the agenda of every meeting thereafter. A scheme was approved at the Fifteenth Meeting in 1963 that was a considerable advance on the few operated by other fisheries commissions, but it failed to attract the required ratification of all five Antarctic Pelagic Whaling States, and lapsed in 1965–1966 without ever having entered into force.\(^{84}\) A new scheme was adopted on a regional basis in 1967 and extended to land stations in 1968, but was not put into practical effect until 1977. It was not the fully international scheme proposed in the 1950s, but was based on mutual exchange of observers appointed by the IWC on the nomination of the whaling states between whom agreement had been concluded, and was paid for by them on the basis of their respective catches.

Within its limitations, the scheme has worked well. Reports are full and few infractions are reported.\(^{85}\) However, the schemes never covered

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84. For details of this scheme, see id. at 322–24.

85. In 1973 at the Twenty-Fifth Meeting, the following schemes existed and were reported on: (i) in Antarctica: Japan/USSR; (ii) Southern Hemisphere: Australia/South Africa; (iii) North Pacific (a) Pelagic: Japan/USSR for factory ships; (b) Land stations: USA; (iv) North Atlantic: Canada/Iceland/Iceland/Norway. International Whaling Commission 25th Report (1973), but N.B. detailed reports are not included in this though available in the IWC working papers.
the activities of all whaling states. Brazil, in particular, endlessly post-
poned the introduction of its promised scheme. With the end of com-
mercial whaling, the few remaining schemes will all lapse, the USSR/
Japanese one being the last to do so. It must be asked then, how under
these circumstances, can the moratorium itself be policed, with no com-
mercial vessels allegedly at sea or other forms of voyages of inspection
established. Reliance must be placed on the international legal require-
ment that parties fulfill their convention obligations in good faith.

Infractions Reports
Each state party to the ICRW is required by article IX, sections (1)
and (2) to put two inspectors on its factory ships and to inspect its land
stations and, by section (4), to submit reports to the IWC of infractions
by persons or vessels under its jurisdiction, including details of measures
taken and penalties imposed. After early suspicions of inadequate reports
and some failures to submit reports, all whaling members have generally
fulfilled these obligations in recent years. Penalties were not originally
expressed in any common currency, and thus could not be effectively
compared and evaluated, but since the 1970s, penalties have been reported
in U.S. dollars and thus have received more open criticism. Contracting
governments are also required by a long-standing schedule amendment
to send copies of all their relevant laws and regulations relating to whales
and whaling and changes therein to the IWC. However, several contract-
ning governments have failed to do this, particularly concerning updates.
The IWC has seldom commented on this, however, and has made little
use of this information.

National Laws
The advent of the 200 mile EEZ or EFZ, and the approval in article
65 of the 1982 LOSC of coastal states regulating marine mammals more
strictly than the relevant international organizations, has encouraged states
concerned totally with protecting whales from exploitation to do so through
comprehensive national laws.86 Notable examples of comprehensive new
acts are: the USA’s Marine Mammal Protection Act 1977;87 the Australian
Whale Protection Act of 1980;88 and the New Zealand Marine Mammal
Protection Act of 1978.89 Other states such as the U.K. and Canada have
banned the taking of all great whales merely by amending or augmenting

86. For examples of relevant legislation, see P. Birnie, supra note 3, at 88-141 (IUCN); S.
existing legislation. National sanctions also have been legislated for the United States in the Pelly and Packwood Magnuson amendments referred to previously. The United States and some other states also assert jurisdiction over whaling by their nationals on the high seas. New Zealand does so over whale catching by its nationals wherever they may be, even if within waters subject to the jurisdiction of another state.

National laws in the United States and Australia have been used to control harassment from whale watchers and the use for display of small cetaceans in the absence of relevant IWC regulations.

Aboriginal Whaling

As the commercial moratorium will, for a few years at least, remove the disputes concerning quotas and moratorium from the IWC agenda, the issue of whaling by native peoples on ICRW protected stocks has become more contentious. This exception is made by schedule amendment. It is not in the substantive convention. The schedule regularly provides that, notwithstanding any classification of stocks, including the zero quotas, catch limits can be set “for aboriginal subsistence whaling to satisfy aboriginal subsistence need” for the season concerned. Neither “aboriginal” nor “subsistence” is defined or listed in the “Interpretation” section of the schedule, but principles have been enunciated to ensure that the MSY of the stocks concerned is not endangered. They are to be reviewed on the basis of the best scientific advice, and by 1990 at the latest their effects on whale stocks will be reviewed.

Present aboriginal exceptions cover some East Greenland fin whales, gray whales from the Eastern North Pacific stock, minke and fin whales off West Greenland, bowhead whales from the Bering Sea stocks, and humpback whales off St. Vincent and the Grenadines. Numbers and conditions are set by the Commission: the first can be taken only by vessels under 50 grt., and the meat and products of the others must be used exclusively for local consumption by aborigines. These exceptions have been opposed by some states in recent years. The most contentious issue has been the bowheads taken by the Alaskan Eskimos against the Scientific Committee’s advice in 1977 under the NMP stating that the bowheads still remained so depleted following commercial exploitation that they should be totally protected. The growing prosperity of the Eskimos had enabled them to increase their catches using more sophisticated equipment. The IWC immediately removed the aboriginal excep-

90. For a more detailed account of the development of this issue at IWC meetings, see P. Birnie, supra note 3, at 485–86, 500–510, 604–5, 611, 619, 629.
tion on this stock, which caused severe embarrassment to the United States, which had led the fight for the moratorium and for more conservationist policies, but also had commitments to sustain the cultural rights and traditional subsistence needs of its Eskimos. It challenged the legality of this action on the grounds that the moratorium only applied to commercial whaling, but, of course, the substantive articles of the ICRW make no reference to aboriginal exceptions, and certainly do not guarantee them. A compromise was effected, and the United States encouraged intensive investigation of the stock by the Eskimos. Aided by the investigation, and following much lobbying by Eskimos at the subsequent IWC meetings, a small quota has regularly been allowed for 2-3 year block quotas expressed in terms of the number of whales both caught and struck. For several years, however, this problem curtailed the United States’ ability to secure drastic reduction of catches of other species since it had to win support for its own proposals for Eskimo quotas. Much hard bargaining took place on these issues. The problem continues as the Scientific Committee has now left the stocks unclassified, and Eskimos still seek higher quotas and are beginning to gain the support of some small developing state members sympathetic to the rights of native peoples. Moreover, some states, such as Norway and Japan, are now seeking a re-definition of “aboriginal,” or the substitution of some other term that would encompass “traditional” whaling by small and remote coastal communities and bring it within the scope of the exemptions. Japan would like to include commercial whaling by coastal communities with an alleged cultural history of whaling, whether or not products are consumed locally. The definition of “aborigine” has already been examined by an IWC Working Group, which found it impossible to produce an agreed single definition. At its Thirty-Ninth Meeting, however, the IWC agreed to set up another working group to reconsider this issue.

Scientific Permits

As catch quotas declined and more stocks were classified PS under the NMP, more international interest began to be taken in the special permits issued by some states under article VIII, which allowed their issue for purposes of scientific research “notwithstanding anything contained in the Convention” (i.e. including fixing of stock status and commercial quotas), subject only to “such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit.” Whales so taken are to be processed as far as possible, and the proceeds dealt

93. The IWC sought a legal opinion on this interpretation from Dr. D. Bowett, Q.C. who rejected this argument and found the amendment to be within the scope of the ICRW’s Art. V; Opinion of 16th of Nov. 1977 (on file IWC).
94. For an account of this problem, see I P. Birnie, supra note 3, at 486–87.
with as the government concerned directs. The killing, taking, and treating of whales under this article is clearly exempt from regulation under the convention. Since it was suspected that some states were using, or might use this exemption to take more whales than needed for research, or for spurious "scientific" purposes,\textsuperscript{95} and the IWC could clearly not directly prohibit the issue of such permits, other ways of influencing their issue were sought within the ICRW framework. The Commission amended the Scientific Committee's Rules of Procedure and the schedule to require that proposed permits be submitted before issue to the Scientific Committee for prior review so that it could make recommendations upon them. Several members protested that this was illegal and an infringement of their national sovereignty since article VI gave them exclusive discretion to issue the permits. This argument was not sustainable since the IWC accepting that this was so, did not attempt to usurp the role of contracting governments, but merely provided an opportunity for scientific comment compatible with objects of the ICRW and the terms of reference of its Scientific Committee. However, the issuing state could still ignore these comments and issue the permit.\textsuperscript{96}

Following the adoption of the moratorium, some states that had lodged objections to it as well as some that had not began to issue more special permits.\textsuperscript{97} Fearing that this would become a form of disguised commercial whaling since the proceeds could be sold, and it was clear that this was the intention,\textsuperscript{98} the IWC at its Thirty-Eighth Meeting in 1986 adopted a

\begin{itemize}
\item[95.] Japan took 250 Byrde's whales under special permit in 1976; Friends of the Earth Manual '78, at 36 alleged little information was derived from these specimens.
\item[96.] The IWC again solicited an opinion from Dr. Bowett concerning its power to amend the schedule to enable prior review of scientific permits. Dr. Bowett considered that the view that the proposed amendment infringed upon the sovereignty of state parties was not well-founded since they had already accepted an obligation to submit scientific information (in Art. VIII(3)). It was only the extent of that obligation that was in issue because the amendment was compatible with the ICRW's objects. There was no doubt that prior review was a proper function of the Scientific Committee.
\item[DOC. IWC/39/9—Legal Opinion on Schedule Provisions for Prior Review of Scientific Permits etc.]
\item[97.] Iceland and Korea (1985) were followed by Japan, which in 1987 announced that it planned to take 825 minke whales and 50 sperm whales in the Antarctic as part of a 12 year "scientific whaling program" (IWC/39/36 Japanese Research Programme); Norwegian scientists proposed a 5 year whaling research program involving the taking of 200 protected minkes per annum (not yet formally adopted by the Norwegian Government); Korea revised its first proposal and now intended to take 80 protected minke whales; Iceland's proposal was still related to taking 200 whales. It is alleged that the information derived from those now taken by Iceland (77 fin, 40 sei) and Korea (69 minke) is no more than that required to be supplied under the schedule concerning commercial catches.
\item[98.] West German authorities seized 7 containers of Icelandic whale meat in the free port of Hamburg en route to Japan on March 20, 1987; they contained 140-75 tons of fin and sei whale meat derived from the 1986 Icelandic scientific program and were labeled only as "frozen seafood." West Germany has enacted the power to confiscate products of species listed on the endangered Annexes of CITES shipped through Hamburg without papers conforming to CITES requirements. It is sufficient for this purpose that West Germany is a party to CITES though Iceland is not. NGO Briefing for IWC Commissioners, Jun 1987, Temple House, 25/26 High St., Lewes, U.K., BN 72 LU.
\end{itemize}
resolution recommending certain criteria for the Scientific Committee to apply in evaluating the scientific value of proposed special permits, including that the proposed research should contribute information that should answer significant management questions and that the proposed take would materially facilitate the conduct of the comprehensive assessment of the moratorium. At the Thirty-Ninth Meeting, by a majority (six states voting against: Chile, Iceland, Japan, Korea, Norway, USSR; nine in favor), a further resolution was adopted which, inter alia, provided further criteria and guidelines for the Scientific Committee to follow in reviewing special permit proposals. In addition, it established a mechanism whereby the Commission can review the Scientific Committee’s report on proposed permits and recommend (but, of course, not require) that contracting governments, where it is deemed appropriate (if the permits do not meet the resolution’s criteria), in the exercise of their sovereign rights, refrain from issuing or revoke issued permits that the Commission, taking account of the Scientific Committee’s comments, considers do not satisfy each criterion or meet the IWC’s conservation policy. The Commission then proceeded to adopt resolutions recommending that the Governments of the Republic of Korea, Iceland, and Japan refrain from issuing or revoke (as appropriate) scientific permits in force or proposed. Iceland and others strongly opposed these resolutions. Iceland argued that to empower the Commission to evaluate the permits infringed upon the meaning of article VI and the exercise of the exclusive rights of the contracting governments permitted under it.

Governments would not be able to apply solely scientific considerations before issuing permits, but would be subject to political pressure since the United States was considering initiating the Pelling/Packwood Magnuson amendment procedures against states which issued permits against the Scientific Committee’s advice. A major legal argument ensued and the United States, which had undertaken an extended legal analysis of the interrelationship of the relevant provisions of articles VI and VIII before the meeting, contended that any state could disregard the views of the Commission expressed under article VI, but that before doing so it should have the benefit of the IWC’s views concerning the “scientific purposes” required by article VIII. This was consistent with the purposes of the ICRW of which article VIII was a part. Norway, the USSR, and Japan, inter alia, supported the Icelandic argument; Australia and the U.K. supported those of the United States. This has become the most crucial issue of all since abuse of scientific permits would enable any

100. IWC/39/39: Iceland: Legal Analysis.
state to avoid the commercial moratorium and keep its whaling fleets active pending the review of the zero quotas in 1990, in the expectation that commercial whaling might then be resumed.

CONCLUSION

Some of the legal issues raised earlier in the IWC's history may have disappeared, such as the BWU, or faded in importance, such as the setting of catch quotas and establishment of an International Observer Scheme, but new ones have arisen to take their places as stocks declined and the needs of conservation were perceived, in the light of growing scientific knowledge, to be far more complex than originally realized. Thus, such problems have arisen as: the interrelationship of whales with other species and their environment; prevention of disturbance from whale watching and other non-consumptive uses (NCUs); the use of scientific permits; the aboriginal catch; enforcing the commercial moratorium; and the ICRW's relation to other conventions and their impact on them.

The most remarkable aspect is the role fulfilled by the schedule which has proved a most useful and flexible instrument for reflecting changes in attitudes and practice, and thus for resolving issues. In establishing the Commission, the ICRW provided a forum for the discussion and bargaining necessary to achieve resolution of conflicts concerning interpretation of the ICRW. The pestle of politics ground down the contentious issues in the meetings and the resulting solutions are contained in the schedule. In the process, the convention has been widely interpreted and was once even amended. Continuing organs such as the IWC have considerable latitude in interpreting their constitutive instrument, as the achievement of the moratorium under a convention for regulation of whaling evidences. But there are still many issues to be addressed, including non-consumptive uses, which will become predominant if the ban on commercial whaling of large whales continues, such as small cetaceans, and revision of the convention or institution of any new regime that may yet be required to take account of the fact that rebus non sic stantibus.

But will it ever be possible to begin to attract the unanimity required to revise the ICRW? In 1987, the IWC agreed to try again. It established a working group charged with examining these questions and later with considering proposals for revision. The danger is that a new convention would not attract the membership of all the present parties to the ICRW. If it embraces all cetaceans and non-consumptive uses, allows no exceptions for aboriginal "small-type" or other localized forms of whaling, or restricts scientific permits and supports the other concerns of conservationist states, it will not be accepted by those that want to continue these
activities. However, if these activities are provided for, conservationist states would reject a revised or new convention. The result would be an emasculated ICRW, which would remain in force unless all its parties withdrew from it. In such circumstances, the vital remaining issue is whether—to paraphrase a much quoted sentence from Herman Melville’s *Moby Dick*—the whaling convention itself, not the whales, “can long endure so wide a chase and so remorseless a havoc: whether [it] must not at last be exterminated from the waters and the last [Commissioner], like the last man, smoke his last pipe and then himself evaporate in the final puff.” It appears that because of the flexibility of the ICRW and its schedule, which have been used to great advantage by its more conservationist members, whales will live. Will we now see campaigns to save the ICRW?