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# Has the Law of the Sea Convention Strengthened the Conservation Ability of the International Whaling Commission?

Jared Zemantauski

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# Has the Law of the Sea Convention Strengthened the Conservation Ability of the International Whaling Commission?

Jared Zemantauski\*

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## 1. INTRODUCTION

Current International law governing marine mammals, including cetaceans (whales), consists of customary principles and provisions of relevant international agreements, including the International Convention for the Regulation of Whaling (ICRW) and the 1982 United Nations Convention on the Law of the Sea (UNCLOS).<sup>1</sup> Article III of the ICRW allowed for the establishment of an International Whaling Commission (IWC or Commission) to regulate global whale stocks and the commercial whaling industry.<sup>2</sup> This article discusses the history of the three structural weaknesses of the ICRW (as well as the regulatory power of the

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1. William T. Burke, *A New Whaling Agreement and International Law*, in TOWARD A SUSTAINABLE WHALING REGIME 52 (Robert L. Friedheim ed., 2001).

2. International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. No. 1849, 161 U.N.T.S. 74 [hereinafter ICRW].

IWC): the objections clause; the scientific permits provision; and its failure to create an enforcement mechanism. It also outlines the effects of UNCLOS on the IWC's authority to regulate whaling throughout the world. Indeed, by interpreting articles 65 and 120 of UNCLOS, which obligate member states to cooperate with appropriate international organizations for the conservation of marine mammals within national EEZ's<sup>3</sup> and the high seas<sup>4</sup> respectively, this article will show that member states are obligated to follow the decisions and regulations of the IWC governing whaling activities. It will further explore the concept of utilizing the dispute settlement provisions of UNCLOS to enforce IWC regulations.<sup>5</sup>

## 2. WEAKNESSES OF THE IWC

Three provisions of the IWC's charter disable the Commission's ability to regulate whaling: the objections clause (article V, para. 3), the scientific permit provision (article VIII, para. 1), and the enforcement provision (article IX).<sup>6</sup> Although the Commission has been able to bring the world's attention to the plight of the whale, creating some protections through the utilization of a commercial whaling moratorium, the above referenced provisions of the ICRW have left the Commission unable to enforce its own regulations for three major reasons.<sup>7</sup> First, a member state that disagrees with an IWC regulation may file an objection, opting-out of the regulation and exempting itself from the rule.<sup>8</sup> Second, the scientific permit provision allows a member state to conduct scientific research during the commercial moratorium including lethal research on endangered whale stocks.<sup>9</sup> And third, the Commission has no inherent authority to enforce punishment of infractions, as its power is vested in the member state having jurisdiction over the violator.<sup>10</sup> Accordingly, the Commission has no capability to ensure member state compliance with its regula-

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3. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOS Convention].

4. *Id.* Art. 120.

5. *Id.* Part XV.

6. Elizabeth A. Wehrmeister, *Giving the Cat Claws: Proposed Amendments to the International Whaling Convention*, 11 LOY. L.A. INT'L & COMP. L.J. 417, 418 (1989).

7. Adrienne M. Ruffle, *Resurrecting the International Whaling Commission: Suggestions to Strengthen the Conservation Effort*, 27 BROOK. J. INT'L L. 639, 652 (2001).

8. ICRW, *supra* note 2, Art. V, para. 3.

9. *Id.* at Art. VIII, para. 1.

10. *Id.* at Art. IX, para. 3.

tions, including the commercial whaling moratorium, on an international level.<sup>11</sup>

### 2.1 *The Objections Clause*

The objections clause is found in article V, paragraph 3 of the Convention and the process can be summarized as follows:

Amendments . . . do not become effective:

- (i) until 90 days after their notification by the Commission to the Contracting Governments;
- (ii) if any Government delivers an objection before the end of this period, such objection delays the entry into force for all governments for a further 90 days;
- (iii) during this second 90 day period any government can still object;
- (iv) if any objection is received during this second 90 day period any Government can object within a period of 30 days from the date upon which the last objection of the second 90 day period was received, whichever of (iii) or (iv) is the later;
- (v) at the end of this period (which could be as long as 210 days, i.e. seven months) the amendment comes into force only for the governments that have not objected.<sup>12</sup>

This provision “has often been criticized for ‘taking the teeth’ out of the Commission” by allowing a country “to delay the implementation of a regulation in all other member states” while completely exempting itself from the regulation by simply “lodging a timely objection.”<sup>13</sup> “This procedure has been used to avoid otherwise applicable quotas, reject classification of stocks where it would reduce whaling activities, and even to ignore IWC decisions on standards of humane killing.”<sup>14</sup>

In 1954, one of the Commission’s first conservation measures, for the prohibition on the taking of blue whales in the North Pacific, was defeated when Canada, Japan, the U.S. and the U.S.S.R. lodged formal objections.<sup>15</sup> Against the Commission’s

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11. Ruffle, *supra* note 7 at 653.

12. Wehrmeister, *supra* note 6, at 421.

13. Ruffle, *supra* note 7, at 653.

14. Dean M. Wilkinson, *The Use of Domestic Measures to Enforce International Whaling Agreements: A Critical Perspective*, 17 DENV. J. INT’L L. & POL’Y 271, 276 (1988).

15. Ruffle, *supra* note 7, at 654.

decision to ban the use of the cold harpoon as an inhumane method of whaling in 1981, Brazil, Iceland, Japan, Norway, and the Soviet Union lodged objections.<sup>16</sup> Following this, four of the seven whaling states that voted against the commercial whaling moratorium (Japan, U.S.S.R., Norway, and Peru) filed timely objections, legally exempting themselves from the ban on commercial whaling.<sup>17</sup> Even a decision such as the IWC vote of 25-1 for a zero quota on male sperm whales in the North Pacific was ineffective when "the dissenting country, Japan, lodged an objection and continued whaling."<sup>18</sup>

Objections to such scenarios have been lodged at IWC meetings for many years, highlighting that they render provisions of the Convention ineffective.<sup>19</sup> The objections clause was arguably included in the Convention to reflect the traditional international legal theory that a sovereign state is only bound by that which it has expressly agreed.<sup>20</sup> Since its passage, countries have been able to invoke their power to object and thus not be in violation of the IWC's regulations "regardless of their whaling practices."<sup>21</sup> This compromise is common to many international agreements, but has left the IWC powerless to address the concerns of the conservation minded majority.<sup>22</sup>

## 2.2 *Scientific Permits Provision*

"Pursuant to Article VIII, paragraph 1 of the Convention, any country that wishes to conduct scientific research on whales may invoke the scientific research provision" and be exempted from IWC regulations.<sup>23</sup> The provision provides:

"Notwithstanding anything contained in this convention, and Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take, and treat whales for purposes of scientific research subject to such restrictions as the Contracting Government thinks fit, and the killing taking and treating of whales in accordance with the provisions of this Article shall be

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16. Wilkinson, *supra* note 14, at 276.

17. Wehrmeister, *supra* note 6, at 422.

18. Wilkinson, *supra* note 14, at 276.

19. Ruffle, *supra* note 7, at 654.

20. *Id.*

21. Wehrmeister, *supra* note 6, at 422.

22. Ruffle, *supra* note 7, at 654.

23. *Id.* at 655.

exempt from the operation of this Convention.”<sup>24</sup>

The use of scientific permits serves both a vital purpose in aiding the Commission to determine the size and viability of whale stocks in addition to creating a tool for countries to thwart the goals of the IWC (such as the commercial whaling moratorium).<sup>25</sup>

Prior to 1986, countries wishing to subvert IWC quotas modestly utilized the procedures in Article VIII. However, “[w]ith the imposition of the moratorium on commercial whaling, countries like Japan have systematically invoked the exception to effectively continue commercial whaling.”<sup>26</sup> For example, in 1976, Japan issued a whalers permit to kill 240 Bryde’s whales to circumvent a zero quota on the stock. Within a week of the much-publicized end to commercial whaling in the Antarctic in April of 1987, Japan submitted a research proposal for taking 825 minke whales and 50 sperm whales (to research stomach contents) annually over a ten-year period.<sup>27</sup> This announcement “generated a great deal of controversy because the scientific community has known for over a century that the sperm whales’ primary prey is squid.” In addition an exorbitant amount of data already existed in both Japan and the Soviet Union already answering the very question the killing of the whales was designed to reach.<sup>28</sup> When questioned about why the past data was not analyzed, a Japanese scientist participating in a meeting of the Scientific Committee (of the IWC) said that they were very curious about what the squid ate (there are easier ways of catching squid than by opening the stomachs of sperm whales); however, under further questioning, the scientist admitted to not having a specialist in squid biology on their team.<sup>29</sup> Pro-whaling nations also conducted “feasibility studies” to determine population levels via lethal samples of large numbers of individuals of endangered whale stocks, which they stated provides a more complete understanding of sustainable catch limits.<sup>30</sup> By allowing the killing of members of a species in order to determine its population, the pro-whaling states truly are “prostituting science to protect their commercial whaling

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24. Wehrmeister, *supra* note 6, at 424 (citing International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 74).

25. *Id.* at 423.

26. Ruffle, *supra* note 7, at 655.

27. Wilkinson, *supra* note 14, at 277.

28. Ruffle, *supra* note 7, at 656 – 57.

29. Wilkinson, *supra* note 14, at 278.

30. Ruffle, *supra* note 7, at 657.

interests.”<sup>31</sup>

Certainly in the case of Japan, the scientific research exception has become an exception that has overtaken the rule, undermining “IWC regulations and conservation decisions during the moratorium.”<sup>32</sup> Notably, the scientific research provision permits “researching” countries to use whale meat collected after experimentation in any manner they deem acceptable as long as the meat is not exported outside of the country.<sup>33</sup> Indeed, this scheme has allowed “research” proposals to become thinly-veiled attempts to skirt the moratorium, and that “as early as 1984, a Japanese official was quoted as saying that research whaling in the Antarctic was a possible way of continuing commercial operations during the moratorium.”<sup>34</sup> The Japanese research program “concerning marine mammals is carried out under the auspices of the government-linked Institute for Cetacean Research (Institute)” and is “expected to function as a center of research efforts made by independent researchers: such as national laboratories, universities, voluntary research institutions, and individual researchers.”<sup>35</sup> Yet, “the Institute is in charge of marketing whale meat and other research byproducts once the whales are processed and the data collected,” with “sales averaging between \$27 and \$36 million per year, with the proceeds supposedly used to fund additional research.”<sup>36</sup> Although conservationists claim that Japan’s “scientific whaling” program is solely a mechanism to bypass the moratorium, the state has a legal right under the ICRW to take whales for study (no matter how the IWC views the permit proposals) and to process and utilize the catch.<sup>37</sup>

Japan is not the only country to utilize scientific research as a means to continue commercial whaling. Iceland and South Korea issued scientific permits to their commercial fleets after the moratorium, including a 200 whale per year permit to the Icelandic Hvalur Whaling Company.<sup>38</sup> Using criteria enunciated in its 1986 resolution, the IWC came to the conclusion that both Iceland and South Korea were in violation of the Scientific Permit clause.<sup>39</sup>

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31. Wehrmeister, *supra* note 6, at 425.

32. Ruffle, *supra* note 7, at 655-6.

33. *Id.* at 656.

34. Wilkinson, *supra* note 14, at 278.

35. Ruffle, *supra* note 7, at 651.

36. *Id.* at 652.

37. Robert L. Friedheim, *The IWC as a Contested Regime*, in *TOWARD A SUSTAINABLE WHALING REGIME*, 11 (Robert L. Friedheim ed., 2001).

38. Wehrmeister, *supra* note 6, at 425.

39. *Id.*

The 1986 resolution recommends certain supplemental criteria (in addition to the “scientific purpose” criteria of article VIII, para. 1), and both the contracting government prior to issuing a permit and the Scientific Committee in reviewing the research results of prior permits should consider whether:

- (1) the objectives of the research are not practically and scientifically feasible through non-lethal research techniques;
- (2) the proposed research is intended and structured accordingly to contribute information essential for rational management of the stock;
- (3) the number, age and sex of whales to be taken are necessary to complete the research and will facilitate the conduct of the comprehensive assessment;
- (4) whales will be killed in a manner consistent with the provisions of Section III of the Schedule, due regard being had to whether there are compelling scientific reasons to the contrary.<sup>40</sup>

The IWC found the scientific permits of both Iceland and South Korea to be in violation of the Convention and recommended that the two member states revoke their respective permits. South Korea responded to the IWC recommendation by canceling all scientific whaling the same year while Iceland phased out their scientific whaling over a four year period. This left Japan as the only country circumventing the moratorium through the use of large-scale scientific research.<sup>41</sup>

### 2.3 *Enforcement Provision*

As a result of the IWC findings that the Icelandic and South Korean scientific permits were not truly for scientific purposes, neither country could rely on article VIII to exempt their whaling operations from the moratorium.<sup>42</sup> However, despite the Commission finding Iceland and South Korea in violation of the Convention, it lacked the authority to punish the countries and/or to end their illegal “research” practices.<sup>43</sup> The single greatest weakness of the IWC is the Commission’s lack of enforcement power.<sup>44</sup> Due to the United States insistence a provision for enforcement was

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40. *Id.* at 424.

41. International Whaling Commission website, *Special Permit Catches since 1985*, [http://www.iwcoffice.org/\\_documents/table\\_permit.htm](http://www.iwcoffice.org/_documents/table_permit.htm).

42. Wehrmeister, *supra* note 6, at 426-427.

43. *Id.* at 427.

44. *Id.*



removed from the Convention's final draft resulting in the article IX seen today.<sup>45</sup> Under such scheme, the Commission can only rely on the individual member states to prosecute infractions of the convention committed by its nationals and vessels in its jurisdiction.<sup>46</sup>

This lack of enforcement has haunted the Commission from its inception. Even with the objections clause and the scientific permit provisions; the Commission has no authority to punish states whose actions, which violate other parts of the Convention, have dire effects on the Commission's goals. Article IX, paragraph 4 states:

Each Contracting Government shall transmit to the Commission full details of each infraction of the provisions of this Convention by persons or vessels under the jurisdiction of that Government as reported by its inspectors. This information shall include a statement of measures taken for dealing with the infraction and of penalties imposed.<sup>47</sup>

Due to the Commission's inability to directly impose sanctions against violating countries, many violations go unnoticed within the pro-whaling nations or underreported and essentially unpunished on an international level.<sup>48</sup>

Each member state is also required to report to the Commission scientific data relating to the number of whales of each species captured, the number thereof lost at sea, each whale's sex and length, and whether any females contained a fetus.<sup>49</sup> These reports are designed to assist the Commission in deciding the various quotas of the associated whaling stocks. Unfortunately, the Commission also lacks any authority to punish pro-whaling nations for violating the reporting regulations.<sup>50</sup> The pro-whaling states are then prone to act in their own self-interests and under-report their statistics to the Commission, causing the calculations of the global whale populations to be horribly inaccurate.<sup>51</sup> The most stunning example of under-reporting was committed by the U.S.S.R. A former scientist in the Soviet Fisheries Ministry uncovered secret documents indicating that the Soviets had ordered the systematic slaughter of humpback whales over a

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45. Wilkinson, *supra* note 14, at 276.

46. ICRW, *supra* note 2, Art. IX, para. . 1.

47. *Id.* at Art. IX, para. . 4.

48. Ruffle, *supra* note 7, at 658.

49. *Id.*

50. *Id.*

51. *Id.*

twenty-year period.<sup>52</sup> The country officially reported to the IWC that only 2,710 humpbacks had been taken from 1948 to 1973, but the documents proved that the Soviet Union killed 48,477 humpback whales during that time period.<sup>53</sup> Data collected by the IWC during that time alerted the Commission to the possibility of deceptive reporting; but, lacking an effective enforcement mechanism, the Commission was forced to incorporate the Soviet Union's data into its own figures. Utilizing the false data destroyed any concept of reliability in the IWC's calculations.<sup>54</sup>

In addition to the reporting requirements, each member state is required to take "appropriate measures" to ensure the application of the provisions of the Convention.<sup>55</sup> Due in part to the deficiencies of self-monitoring and to the IWC's failure to compel performance of treaty obligations, pro-whaling nations found two additional routes around IWC regulations in the 1970s. These nations would either re-flag their whaling ships in nonmember countries, utilizing flags of convenience, or use their whaling ships in "joint ventures" with nations that are not members of the IWC.<sup>56</sup> With non-IWC member nations being exempt from the Commission's regulations, these ships could legally ignore all conservation guidelines. For example, in 1977 Japan actively supported the whaling industries of most non-member whaling nations, including Chile, Cyprus, North and South Korea, Peru, and Spain.<sup>57</sup> Thus these "pirate" whaling ships are often financed or completely owned by nationals of a member state of the IWC, all the while the member states ignore their responsibility to take "appropriate measures."<sup>58</sup> Luckily this practice all but subsided by the 1980's, but it left an avenue for countries such as Japan to further their commercial whaling agendas.

As a result of the deficiencies in the ICRW the only leverage available to the Commission is the power to "make recommendations to any or all contracting Governments on any matter that relates to whales or whaling and to the objectives and purposes of

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52. *Id.*

53. *Id.* at 659.

54. *Id.*

55. *Id.*

56. Gare Smith, *The International Whaling Commission: An Analysis of the Past and Reflections on the Future*, 16 Nat. Resources Law. 543, 560 (1983).

57. *Id.*

58. Joseph P. Rosati, *Enforcement Questions of the International Whaling Commission: Are Exclusive Economic Zones the Solution?*, 14 Cal. W. Int'l L.J. 114, 130 (1984).

this Convention.”<sup>59</sup> This wording grants the Commission the right to comment on almost any matter. The United States lead adjustment to article IX has thus removed the IWC from its intended position as an international governing body with the ability to make and enforce its will, and in put in its place a wizened advisor who speaks but is rarely heard.

### 3. STRENGTHENING THE IWC: THE IMPACTS OF UNCLOS

Indisputably, the IWC has done much to bring the plight of the whale to the world's attention. The Commission has exerted its best efforts in attempting to conserve and protect these leviathans, but at the same time it has also shown the world its weaknesses. The Commission has shown that no regulation, no matter how well written or scientifically supported, can succeed without effective enforcement against violators. Although untested, that enforcement power is available to the IWC, and the global community. The articles of UNCLOS provide the power to compel nations to work with the IWC using a dispute settlement procedure allowing nations to enforce IWC violations against one another.

#### 3.1 *Cooperation with the IWC*

In conducting this analysis on the UNCLOS articles, it must be stated that the Vienna Convention on the Law of Treaties (VCLT) is the tool used in treaty interpretation:

1. A Treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise in addition to the text, including its preamble and annexes:
  - a. Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty.
  - b. Any instrument which was made by one or more parties in connection with the conclusion of the treaty and *accepted* by the other parties as an instrument related to the treaty.
3. There shall also be taken into account, together with this context:

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59. Ruffle, *supra* note 7, at 659.

- a. Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provision;
- b. Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.<sup>60</sup>

The articles of UNCLOS should be reviewed in good faith and in accordance with the ordinary meaning of the incorporated terms. In order to fully understand the enforcement power available to the IWC, it is necessary to start this examination with the article of UNCLOS that was incorporated to protect the whales. Article 65 of UNCLOS states:

Nothing in this Part restricts the right of a coastal state or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management, and study.<sup>61</sup>

In order to lay out the foundation of the IWC's new strength, first the meaning of "appropriate international organizations" must be determined. While the term "international organizations" does indicate that the drafters of UNCLOS imagined the possibility of having more than one organization overseeing whale conservation, the IWC is currently the only whaling regime exercising any type of management authority over global whale stocks. During the drafting of UNCLOS it was generally assumed that Article 65 would consolidate the role of the IWC.<sup>62</sup> In addition, after the drafting of UNCLOS was completed, it was argued that Article 65 "deferred" to the IWC in all matters related to the management of whales as the IWC was the only international organization under the regime established in the article.<sup>63</sup> This view resulted in the contention that "all parties to UNCLOS, even those who were not also members of the IWC, would be bound by

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60. Alexander Gillespie, *Small Cetaceans, International Law and the International Whaling Commission*, 2 Melb. J. Int'l L. 257, 268 (2001).

61. LOS Convention, *supra* note 3, Art. 65.

62. Steven Freeland & Julie Drysdale, *Co-operation or Chaos? – Article 65 of United Nations Convention on the Law of the Sea and the Future of the International Whaling Commission*, 2 MACQUARIE J. INT'L & COMP. ENVTL. L. 1, 4 (2005).

63. *Id.* at 18-19.

the IWC regulations.”<sup>64</sup> Even Iceland, a pro-whaling nation, had formed the opinion that, in the absence of an alternate “appropriate international organization,” it was obligated to comply with IWC regulations pursuant to Article 65 (regardless of a nation’s status as a member of the IWC).<sup>65</sup>

The possible alternative to the IWC, the North Atlantic Marine Mammal Commission (NAMMCO), was established in 1992 and has yet to garner large multi-national support and in addition to only addressing marine mammal stocks in regional settings (the North Atlantic Ocean).<sup>66</sup> The IWC has been managing whales since 1946 (without any alternative regime usurping its authority), and was in effect during the Third United Nations Conference on the Law of the Sea in 1982, supporting the contention that the IWC is the central and uppermost international authority for cetaceans.<sup>67</sup> Additionally, the ICRW was recognized in 1992 by Agenda 21 as an “appropriate international organization” for cetaceans pursuant to the requirements contained in Article 64 of UNCLOS.<sup>68</sup> Being the uppermost international authority for cetaceans, and being formally recognized as an appropriate international organization for cetaceans by a United Nations program, certifies the IWC as the “appropriate” international organization as required in article 65.

An important note about article 65 is that although a member of UNLCOS must work through the IWC (as the appropriate international organization) in conserving, managing, and studying cetaceans, they are in no way required to become a member of the IWC. This is due to the fact that “working through” is also achieved by: collaboration in constructing acceptable conservation measures; timely submission of scientific information and data; recognition and acceptance of scientific findings; voluntary conservation measures; and coordination with enforcement schemes (to name a few action).<sup>69</sup> Other international organizations and treaties have non-members working with them in such a way, including the non-governmental organizations (NGOs) working with the IWC and the United States with respect to the UNCLOS. It is not

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64. *Id.* at 19.

65. *Id.* at 21.

66. Steinar Andresen, “Good” Institutions but “Bad” Politics?, in TOWARD A SUSTAINABLE WHALING REGIME 246 (Robert L. Friedheim ed., 2001).

67. Gillespie, *supra* note 60, at 284.

68. Rachelle Adam, *The Japanese Dolphin Hunts: In Quest of International Legal Protection for Small Cetaceans*, 14 ANIMAL L. 133, 171 (2007-2008).

69. Burke, *supra* note 1, at 55.

membership in the IWC that is critical to advancing cetacean management, but instead cooperation with its regulations.

### 3.2 *Jurisdiction of the IWC*

With UNCLOS compelling member states (and most importantly the pro-whaling states) to work through the IWC, the question remains: over what waters does the IWC have jurisdiction to regulate whaling? The two sections of article I of the ICRW state:

1. This Convention includes the Schedule attached thereto which forms an integral part thereof. All references to "Convention" shall be understood as including the said Schedule either in its present terms or as amended in accordance with the provisions of Article V.
2. This Convention applies to factory ships, land stations, and whale catchers under the jurisdiction of the Contracting Governments and to all waters in which whaling is prosecuted by such factory ships, land stations, and whale catchers.<sup>70</sup>

Paragraph two states that the IWC is granted jurisdiction in all waters of the globe in which whaling is prosecuted, including regulating whaling within a state's territorial sea and over any applicable land stations on its coast. The notion of the Commission's authority to regulate whaling within a state's Exclusive Economic Zone (EEZ), territorial sea, and sovereign soil (land stations) will be rejected by the pro-whaling states (and possibly other nations). While it is a natural reaction for the whaling states (whose objectives are the opposite of the Commission's view of cetacean protection) to reject the Commission's *carte blanche* authority over "all waters in which whaling is prosecuted" in light of the sovereign rights associated with these waters under UNCLOS, a careful reading of the UNCLOS articles actually provides the IWC with the legal authority to intrude upon the sovereigns rights of states within these same waters.

UNCLOS defines the boundaries of the EEZ in articles 55 and 57 as the area beyond and adjacent to the territorial sea<sup>71</sup> to a maximum distance of 200 nautical miles from the baseline used to measure the breadth of the territorial sea (the outermost limit of the territorial sea is 12 nautical miles from the baseline).<sup>72</sup> Pro-whaling states argue that their sovereign rights to exploit the liv-

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70. ICRW, *supra* note 2, Art. I.

71. LOS Convention, *supra* note 3, Art. 55.

72. LOS Convention, *supra* note 3, Art. 57.

ing resources (whales) in their EEZ's are preempted by article 65. The first sentence of article 65 asserting that "[n]othing in this Part restricts the right of a coastal state or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part," allows the appropriate international organization (the IWC as described above) to supersede a state's sovereign rights in the EEZ with respect to regulating marine mammals, especially cetaceans.<sup>73</sup> This revised text, approved with minor revisions, "makes clear that it permits either a complete prohibition or more restrictive limitations or regulations to protect marine mammals than the Convention [UNCLOS] would otherwise require."<sup>74</sup> Not only does article 65 recognize the IWC's power to set regulations (including the current moratorium) within state's EEZs, it also definitively overrules arguments made by some whaling nations that protective measures for marine mammals can do no more than ensure the maintenance of a maximum sustainable yield.<sup>75</sup> This shows that the changing trend within the IWC from management, to conservation, to protection of whale stocks is mirrored by the environmentalists and conservationists of many nations, and more importantly by the international document that recognizes the IWC's power to supersede sovereign rights within the EEZ for the betterment of cetaceans.

Article 65 recognizes the ability of the IWC to regulate or prohibit whaling within a nation's EEZ. The IWC is afforded the same rights over the high seas by article 120 of UNCLOS, which states that "Article 65 also applies to the conservation and management of marine mammals in the high seas."<sup>76</sup> The extension of article 65 into the high seas, by the text of article 120, allows the IWC to regulate and prohibit whaling on the high seas in order to avoid a tragedy of the commons. As such, the provisions of UNCLOS, especially the protection of Article 65, recognize the IWC's ability to intrude upon the sovereign rights of nations with regard to regulating and restricting whaling on the high seas and EEZ's of the world. UNCLOS therefore allows the IWC to apply the Convention in all waters of the globe in which whaling is prosecuted (save those of territorial seas and land stations). Although

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73. *Id.* at 423.

74. Bernard H. Oxman, *The Third United Nations Convention on the Law of the Sea*, 75 AM. J. INT'L L. 211, 233 (1981).

75. *Id.*

76. LOS Convention, *supra* note 3, at 442.

I believe the Commission is still able to apply the Convention to territorial seas and land stations, UNCLOS does nothing to limit the exploitation of marine mammals in these two areas.

#### 4. ENFORCING IWC REGULATIONS

The ICRW lacked the power to vest within the Commission the ability to enforce its regulations; and although there is now a way of legally binding a nation to the decisions of the Commission, that power still does not lie in the hands of the IWC. Nonetheless, there is now a vehicle to compel the pro-whaling states to comply with the decisions of the IWC. The articles of UNCLOS include a dispute settlement procedure that one nation may bring against another for disputes arising from interpretations of rights and responsibilities of member states under UNCLOS.

States party to both the ICRW and UNCLOS, or only the latter, have available and are subject to the dispute settlement provisions of UNCLOS.<sup>77</sup> Part XV of UNCLOS (Settlement of Disputes) is compulsory and binding when it applies, and including for disputes over an agreement (the ICRW Schedule) about taking whales on the high seas or about the legality of IWC regulations superseding a nation's sovereign rights under UNCLOS.<sup>78</sup> Article 286 of UNCLOS states that any dispute concerning the interpretation or application of the UNCLOS provisions shall, where no settlement is reached between the parties involved, be submitted at the request of any party to the court or tribunal having jurisdiction.<sup>79</sup> Violations of IWC regulations would be covered in the dispute settlement provisions of UNCLOS where state parties are unable to resolve a dispute "concerning the interpretation or application of an international agreement related to the purposes of UNCLOS."<sup>80</sup> More directly, Article 288 (paragraph 1) grants jurisdiction to a court or tribunal under the dispute settlement provisions of UNCLOS arising from any dispute concerning the interpretation or application of the Convention.<sup>81</sup> Thus, any disputes arising from the relationship between UNCLOS and the IWC, including: the IWC as the "appropriate" international organization to be "worked through" with regards to cetacean management, and the abilities granted to the IWC by article 65 and 120 of

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77. Burke, *supra* note 1, at 62.

78. *Id.*

79. LOS Convention, *supra* note 3, at 509.

80. *Id.* at 510.

81. *Id.* at 510.



UNCLOS to place stricter regulations (including a moratorium) in EEZ's and the high seas respectively, fall under the jurisdiction of Part XV of UNCLOS. As such, the effectiveness of the ICRW's objections clause as a means of bypassing IWC regulations (including the commercial whaling moratorium) could be rendered null and void by invoking the dispute settlement provisions of UNCLOS.

It is also reasonable to conclude that any state action diminishing the effectiveness of an IWC regulation (abuse of the scientific permit provision for example) will be subject to the dispute settlement provisions of UNCLOS.<sup>82</sup> States have the following means available to settle the dispute:

- a. the International Tribunal for the Law of the Sea established in accordance with Annex VI;
- b. the International Court of Justice;
- c. an arbitral tribunal constituted in accordance with Annex VII;
- d. a special arbitral tribunal constituted in accordance with Annex VIII<sup>83</sup>

The ability to bring a state before the International Court of Justice (ICJ), the International Tribunal for the Law of the Sea (ITLOS), or a special arbitral tribunal for diminishing the effectiveness of an IWC regulation, would alleviate various problems encountered by the IWC in the past. Member state actions such as using "flags of convenience" to re-flag whaling vessels to bypass IWC regulations, failing to actively enforce IWC regulations against their nationals and whaling vessels (in accordance with article IX of the ICRW), and reporting falsified information to the Scientific Committee of the IWC, can be brought before a court or tribunal.

Even though a state's failure to cooperate with, or diminish the effectiveness of, IWC regulations (by invoking the objections clause or misusing the scientific research provision for example) is under the jurisdiction of the dispute settlement provisions of UNCLOS, it must still be determined how the dispute will arrive before a court or tribunal. The UNCLOS dispute settlement provisions are read to allow one or more states to bring suit against another for "alleged" violations and misinterpretations of the UNCLOS articles. Under Annex VI, the tribunal is not only open to state parties but also to other entities when all parties of the

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82. Ruffle, *supra* note 7, at 670.

83. LOS Convention, *supra* note 3, at 509-10.

dispute acknowledge the jurisdiction of the tribunal.<sup>84</sup> In the whaling context, the IWC could become a signatory to UNCLOS and exercise its status as the principle organ of an international organization if the states party to the IWC voted accordingly.<sup>85</sup> International organizations which are signatories of UNCLOS may invoke the dispute settlement provisions concerning the application or interpretation of the Convention.<sup>86</sup> The notion that the “appropriate” international organization for the management of cetaceans may appear before a tribunal to enforce its regulations shows an enormous amount of international support for the protection of cetaceans, dwarfing that which is seen when single member states bring suit against one another.

##### 5. WEAKNESSES OF UNCLOS JURISDICTION

As the ideas laid out in this article form a solid foundation for the international enforcement of the IWC’s regulations, and more importantly the moratorium, the legal structure of the argument also leaves the foundation vulnerable to crumble. To this point, the discussion has focused on the anti-whaling nations finding a binding legal argument to enforce the IWC’s regulations, which was shown with the analysis of articles 65 and 120 of UNCLOS. However, the dispute settlement provisions of Part XV are a double-edged sword, allowing the pro-whaling nations to also bring suit against the IWC and the anti-whaling nations.

In accepting the UNCLOS treaty, “states have agreed to limit their taking of cetaceans by reference to obligations assumed under other relevant international agreements.”<sup>87</sup> Although article 65 allows the IWC to impose stricter regulations than otherwise necessary, restrictions that are inconsistent with the ICRW may actually violate UNCLOS itself.<sup>88</sup> The pro-whaling nations have always commented that the moratorium goes against the objectives and purposes of the ICRW, which are to insure a prosperous continuation of the commercial whaling industry.

Any possible violation of UNCLOS, through a violation of the ICRW, would allow a whaling state to bring the issue before a court or tribunal in the same ways the anti-whaling states may. A violation of the ICRW may occur if the Commission changes the

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84. Burke, *supra* note 1, at 64

85. *Id.*

86. LOS Convention, *supra* note 3, at 580.

87. Burke, *supra* note 1, at 64.

88. *Id.*

Schedule without taking into account the interests of consumers and the whaling industry, or could be based upon the current commercial whaling moratorium. These actions would be viewed by the whaling nations as unlawfully restricting their rights to take living resources on the high seas and within their EEZ's under UNCLOS. The whaling nations would bring the issue for clarification under Article 288 (paragraph 1) for disputes concerning the interpretation or application of the Convention (Articles 65 and 120).<sup>89</sup> Another avenue the whaling states could exploit to bring action before the tribunal is to make an argument about the validity of the whaling moratorium under the ICRW, creating a dispute over the interpretation or application of an international treaty related to the purposes of the Convention.<sup>90</sup>

There is no shortage of actions in the IWC's history that could be viewed as violating the purpose of the ICRW: the creation of the Southern Ocean sanctuary; the implementation of the moratorium; and statements from nations such as the United Kingdom that they will not support any future commercial whaling harvests, regardless of the best scientific data available.<sup>91</sup> The question of actions of the IWC violating the ICRW, and thus UNCLOS, can be countered in two ways. First, the interpretation of the IWC's actions and regulations, regarding whether they violate the ICRW, is not the proper subject matter of an action under Part XV; and second, the IWC has already determined any compliance issues internally under the ICRW in approving the regulations, forming no basis for proceeding under Part XV.<sup>92</sup> These counter arguments prohibit the whaling nations from exploiting Article 288 (paragraph 2) to elevate the IWC's regulations before a court or tribunal. As for utilizing Article 288 (paragraph 1) to clarify the IWC's ability to regulate (and prohibit) whaling in EEZ's and the high seas, the IWC's jurisdiction is clearly laid out as previously stated throughout this article. Yet, the interpretation and application of terms such as "appropriate international organization," "to prohibit, limit or regulate the exploitation of marine mammals more strictly," "co-operate with," and "conservation, management, and study" under Articles 65 and 120 may always be open to dispute from both sides of the whaling debate until an agreement is reached between the member states of UNCLOS or a

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89. LOS Convention, *supra* note 3, at 510.

90. *Id.*

91. Burke, *supra* note 1, at 68.

92. *Id.*

court/tribunal decision occurs.<sup>93</sup>

Under Part XV of UNCLOS, state parties may settle disputes arising from the interpretation or application of the Convention via the dispute settlement provisions as previously discussed.<sup>94</sup> Although Annex IX allows the IWC the opportunity to become a signatory to the Convention and to utilize the dispute settlement provisions, the ICRW itself appears to lack the authority to allow the Commission to make those decisions of its own accord.<sup>95</sup> Nothing may forbid the member states of the IWC from instructing the Commission to become a party to the Convention or to bring suit under the provisions of UNCLOS, but organized resistance from the pro-whaling nations could disrupt a vote to direct the Commission to activate the dispute settlement provisions.

In addition, only state parties to UNCLOS may take advantage of the dispute settlement provisions of the Convention.<sup>96</sup> For reasons which are already the basis of numerous scholastic endeavors, the United States has never become a party to UNCLOS even though it considers the Convention as customary international law. The United States lack of formal membership in UNCLOS prohibits it from elevating the whaling debate before a court or tribunal in accordance with Part XV.<sup>97</sup> As such, if the dispute settlement provisions are to be used to decide the future of whaling, another nation (and state party to UNCLOS) would need to take up the United States' historic mantle of marine mammal protector to bring suit under the Convention.

The pro-whaling nations could also take the traditional position against any suit brought against them that states are not subject to the jurisdiction of an international tribunal absent their express consent.<sup>98</sup> This traditional position is formed around the notion that in any specific case, the risk of being sued without express consent is worse than the risk of being unable to sue without the express consent of the defendant.<sup>99</sup> Fortunately, the chance of a pro-whaling state withholding their consent is minimal at best. Many states regarded compulsory jurisdiction as "integral to the very idea of a new convention on the law of the

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93. LOS Convention, *supra* note 3, at 423, 442.

94. *Id.* at 509.

95. *Id.* at 578-81.

96. *Id.* at Part XV.

97. *Id.*

98. Oxman, *Complementary Agreements and Compulsory Jurisdiction*, 95 AM. J. Int'l L. 277, 284 (2001).

99. *Id.*

sea.”<sup>100</sup> With nations such as the United States and Japan (who are the largest activists on their respective sides of the whaling debate) rejecting the traditional freedom to consent to jurisdiction view in favor of compulsory jurisdiction, any parties sued under Part XV of UNCLOS will most likely grant their consent. As with any untested legal notion, no scholar can predict with assurance the judicial precedent that will be set, and both sides should be leery of rushing to implement the procedures of Part XV of UNCLOS.

## 6. CONCLUSION

The current state of the IWC is a precarious arrangement. Sixty-five years ago the ICRW created a Commission with the responsibility of managing whales in all waters of the globe, but it resembled the proverbial “swiss cheese” when it came to management loopholes and lack of enforcement power. After a disastrous beginning, including mismanagement by the Commission and member nations reporting falsified scientific catch data, it seemed as if things were changing for the better with the implementation of the moratorium.

It is obvious to the world that some pro-whaling nations, most notably Japan, had sidestepped the IWC’s decisions and continued to whale during the moratorium. Utilization of the objections clause, abuse of the scientific permit provision, and the exploitation of “flags of convenience” whaling vessels (pirate whalers) accounted for a large take of whales. The obvious abuse of scientific whaling permitted the Japanese to continue to harvest whales, but in the global spotlight. The world knows that Japan is violating the ICRW and the nation is publicly scrutinized and requested constantly to produce scientific data to show their “scientific” harvests are not endangering the species. The situation is reminiscent of a small child and a cookie jar. Every parent knows that children want a reason to eat cookies, and if not given permission to have one will then sneak cookies from the jar when the parent is not looking. As long as the cookie jar is not noticeably empty when the parent opens it next, the theft is normally forgiven. In this case everyone is watching the scientific harvests, and as long as the Japanese are not too greedy, there is no endangering of the stocks and the transgression goes unpunished.

Even with the support of governments such as the United

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100. *Id.* at 285.

States, United Kingdom, and Australia; pressure from NGO's such as the Sea Shepard Society; and a global outcry from scientists and environmentalists; there is still a small harvest of whales each year, but not one of such proportions that could harm the whale stocks. If the international community cannot live with these small infringements on their ideals, even though the pro-whaling countries are mostly in line with following the moratorium, then the time has come to show the interactions of the IWC and UNCLOS.

The UNCLOS treaty makes numerous references to other agreements, subjecting parties of UNCLOS to obligations derived from agreements to which they are not necessarily a party to but are now compelled to follow.<sup>101</sup> Article 65 of UNCLOS is one such reference. Through interpretation of the article, it obligates members of UNCLOS to "work through" the IWC in its capacity as the "appropriate" international organization to manage cetaceans. This includes the ability of the IWC to place stricter regulations or moratoriums on whaling on the high seas and in the EEZ's of member nations. Although these regulations limit the sovereign rights of nations in those areas, rights that are guaranteed by UNCLOS, the UNCLOS articles state that the IWC regulations may limit "exploitation of marine mammals more strictly than provided for" in UNCLOS.

Any dispute arising from a nation's violation of the IWC's new global authority dealing with the interpretation of a nation's obligations to the IWC under the UNCLOS articles, or state action diminishing the effectiveness of an IWC regulation, is under the jurisdiction of Part XV of UNCLOS. Nations can bring suit against one another, or another entity, before one of four groups: the International Tribunal for the Law of the Sea, the International Court of Justice, an arbitral tribunal in accordance with Annex VII, or a special arbitral tribunal in accordance with Annex VIII. The decisions of these tribunals are binding to the states involved and could create a new judicial precedent in the whaling controversy. With any dispute, there are arguments for both sides, creating the possibility that the plaintiff may be ruled against.

This article explored the effects of UNCLOS on the powers of the IWC and outlined a concept that legally binds members of UNCLOS to obey the regulations of the IWC. As an avid admirer

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101. Burke, *supra* note 1, at 63.

of cetaceans, a perfect world would be able to utilize the concepts laid out and permanently outlaw the harvesting of whales, save for truly scientific purposes. The ICRW is sixty years old and the current decisions of the IWC must be viewed in this light. While pro-whaling nations argue that the IWC has violated the purposes and objectives that it was created to protect, perhaps the current actions of the IWC show the evolution of the ICRW. The world as a whole has changed from exploitation of resources to conservation, and the IWC is no different. Even UNCLOS, through the highly supported and sought after article 65, shows the desire of nations to protect cetaceans. The adoption of UNCLOS roughly forty years after the inception of the ICRW shows the evolution of man's relationship with the whale.