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VIEWPOINT

Whaling and International Law and Order

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The United Nations Convention on the Law of the Sea (UNCLOS), a treaty to which no state may make any reservation – Parties accept it all or nothing – passes responsibility for the management of whaling and the conservation of whale resources to a much older instrument: the 1946 International Convention for the Regulation of Whaling (ICRW) under which the International Whaling Commission (IWC) was established. An interpretation of this designation of responsibility is contained in Chapter 17 of the *Agenda* 21 document that emerged by consensus from the UN Conference on Environment and Development held in Rio di Janeiro in 1992. This makes it explicit that the IWC is held to be *uniquely* responsible in this matter.

The United Nations first formally recognized the responsibility of the IWC on the occasion of the 1972 UN Conference on the Human Environment in Stockholm (effectively the precursor of the Rio Conference) when it declared – subsequently with the endorsement of the UN General Assembly – that a 10-year moratorium on commercial whaling was needed, and invited the IWC to act on that declaration. There was no dissent from this resolution in Stockholm: of the remaining actively whaling nations, Norway had voted in favour while Japan abstained. Subsequently it became obvious that these positions were tactical, because those nations knew that the IWC, being at that time virtually a ''club'' of whaling countries, would take no action.

A decade later many countries members of the IWC had ceased whaling, several other non-whaling countries had joined or re-joined the IWC, and a three-quarters majority vote was obtained for a proposal by the Republic of Seychelles (now a maritime country with a vast EEZ) for an *indefinite* moratorium, to come into effect in 1986 in order to give a few countries an opportunity to phase out their whaling without economic disruption. Notably Brazil, Spain and South Korea, which with Peru and Chile had been clients of Japanese whaling interests, accepted the moratorium and phased out their industries.

The ICRW (1946) allows ''objections'' by Parties to otherwise binding decisions. Norway and the USSR *did* object to the 1982 decision, as did Japan and Peru. Subsequently Peru withdrew its objection and also ceased whaling. Interestingly the Icelandic Government was forced not to object, by an extremely close vote on the matter in Iceland's Parliament. Japan objected, too, but was later induced to withdraw its objection by pressure from the United States which threatened to withhold licenses for Japanese fishing vessels to operate in US waters. Although they had formally objected in fact both Norway and USSR eventually suspended their commercial whaling operations.

Because of the agreed delayed implementation of the moratorium decision Iceland and Japan, whose whaling industries did not intend to give up easily, had a few years to think of a way out. This way was suggested to them by a practice in which the US had engaged when it, too, was a whaling nation. That is by using a provision in the ICRW which mandates any nation, unilaterally and without restraint on numbers or species taken, to award itself ''permits'' for the killing of whales as ''scientific specimens''. As the land based whaling industry in California had declined for want of sufficient whales, the US Government had ''topped up'' valid commercial quotas by a few quaintly termed ''scientific whales''.

As the 1986 deadline was reached the Government of Iceland awarded its whalers ''scientific'' quotas for the large fin and sei whales. These were caught from land bases in Southwest Iceland entirely for meat export to Japan. It is widely believed that the Icelandic venture was in fact conceived by Japanese interests. Interestingly, the hunters for the much smaller minke whale in Northern Iceland, who supplied the limited domestic market, were not permitted to go ''scientific whaling''.

After a few years the fin and sei catching ceased. It had been hoped originally that the United States Government would exert pressure on Iceland to cease this

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nonsense, but it turned out that the US had other overriding interests – principally in a continuing presence at the great US/NATO airbase at Keflavik, near the capital, Reykjavik. The successful "persuasion" was exerted by boycotts of Icelandic products and services organised by Non-Governmental Organisations, led by Greenpeace International.

Having seen that the Icelandic "experiment" had been successful in that demonstrably no Governments were prepared to exert real pressure, and with an economy so large and diversified that it was effectively immune to consumer boycotts, Japan began "scientific" catching of minke whales on a large scale in the Antarctic latitudes of the southern Ocean. At this time Norway also, after a brief pause, tentatively dipped its toes in the scientific pond, catching also minke whales, in the Northeast Atlantic which had become its "traditional" whaling area after it had ceased large-scale whaling in the Antarctic in the 1970s. However, it was not long before Norway resumed *commercial* catching of minke whales in earnest, which it could legally do by virtue of its objections both to the 1982 moratorium decision and to a subsequent IWC decision to classify the depleted Northeast Atlantic minke Whales as a "Protection Stock", with immediate zero quota. Norway of course was not, and still is not, bound by any internationally declared quotas, but the Government did impose a ban on export of whale meat. Norway does have a domestic market for whale meat which has until recently been able to absorb the main product from the several hundred minke whales caught each year.

Even when the IWC, in 1994, declared the entire Southern Ocean to be a whale "sanctuary" the Japanese Government – which "objected" to that decision, too – not only continued to authorise (and, indeed, subsidise) scientific minke whaling there but also increased the numbers killed. It then authorised scientific killing of minke whales also in the North Pacific; this helps make such operations by a single pelagic fleet more profitable, less dependent on continuing government subsidy.

Japan is now planning extending the North Pacific operations to the Bryde's Whale, a species about the same size and in fact very similar to the sei whales that used to be caught off Iceland and, until the 1970s in the Antarctic. Meanwhile Norway has increased its minke whale catch each year and is now allowing more minke whales to be caught each year (more than 600 last year) than were permitted under international quota before the moratorium theoretically came into effect. Norway's declared intention is to increase its unilaterally awarded catches towards 2000 annually. (Norwegian technicians can justify this by fiddling the IWC's own agreed, very conservative – precautionary – procedure for calculating international catch quotas, which is inoperative until other necessary measures have also been agreed, notably an international inspection scheme.) There is no market for such quantities within Norway. The unilaterally enforced export ban will be lifted as soon as Japan and Norway succeed in getting the minke whale re-classified from Appendix I to Appendix II of the Convention on International Trade in Endangered Species (CITES) which would allow Japan to import the meat of North Atlantic origin. This is attractive to Norwegian Whalers not only because it would open a virtually unlimited market but also because prices in Japan are several times higher than in Norway itself. The two countries failed to persuade CITES last year to make a downlisting (It requires a two-thirds majority vote of CITES Parties), but they will be trying again at the next Conference of Parties, probably in the year 2000. Near success resulted from deals made whereby a few southern African countries with no interest in whaling would vote for minke whale downlisting in return for votes (in favour of votes by the whaling countries and their allies (primarily a group of Caribbean states heavily dependent on financial aid from Japan) in favour of a resumption of elephant ivory trade). Such a deal can in practice only succeed if voting is secret and the countries interested in it succeeded in their secret voting strategy at the last CITES meeting. Japan and Norway tried this tactic also in the IWC at its annual meeting in Oman last year, but failed. On that occasion also the IWC reinforced its policy of urging CITES to retain always a ban on trade in all whale meat while the commercial moratorium remains in place. Whether CITES will do so remains to be seen; certainly Japan and Norway will seek to ensure that CITES Parties ignore the IWC's request.

The IWC has, over the years, again and again passed non-binding Resolutions calling on Norway and Japan to desist both from large-scale "scientific whaling" and commercial whaling under objection, to no avail. It is evident, too, that non-whaling states are not prepared to put effective diplomatic or economic pressure on these countries to stop bringing the IWC into disrepute. And, having seen this, Japan has begun to extend the "scientific sampling" tactic to fin fisheries where it wishes to take significantly more than internationally agreed quotas. In June this year Japan told the other Parties to the Commission for the Conservation of the Southern Bluefin Tuna (CCSBT) – Australia and New Zealand – that it intends to take 1400 tonnes of bluefin over and above the international quota of 6065 tonnes, in "experimental fishing". The present stock of the southern bluefin, which spawns south of Indonesia and migrates to feed in the Southern Ocean is estimated to be at only 8% of its 1960, essentially unexploited, level. The Australian Government has already said it can do nothing to stop the Japanese game. NGOs believe that both Australia and New Zealand will in any case be lenient with Japan in order not its jeopardise other trade links.

The ideology that emerged from the Third UN Conference on the Law of the Sea, which spawned UNCLOS, was that ocean fisheries should be managed through appropriate regional bodies (such as CCSBT and CCAMIR) or global specialised bodies (such as the IWC), in accord with general provisions for fisheries in

the UNCLOS. Subsequently a "Straddling stocks" convention has been negotiated to cover gaps in general provisions for "highly migratory species" (primarily whales and tunas) and for fish stocks that occupy or enter the waters under the jurisdictions of more than one state. However, the regional/specialised fisheries agreements nearly all contain loopholes such as those in the ICRW – possibility of unlimited "scientific" catches; objections and reservations regarding otherwise binding decisions (including breaking of consensuses where these are involved in the decision procedure) – so the old dream of achieving sustainability in international marine fisheries seems to be fading fast.

So what is to be done? Perhaps now that the UNCLOS is at last in force, and applies to most of the world's nations, it is time to reassess the global fisheries problem in the light of serious weaknesses in applicable international law. In the principle on "subsidiarity" adopted in UNCLOS, whereby responsibility is assigned to regional and specialised inter-governmental bodies, reference is made to the "appropriateness" of those bodies. Evidently the most basic criterion of appropriateness is the openness of such bodies to all interested states, including by definition all the states coastal to the area covered by each regional body. Even that elementary criterion was flouted a few years ago when Norway, Iceland, Greenland and Faroes Islands set up a body called the North Atlantic Marine Mammals Conservation Organisation. This is a new "club" of whalers and sealers. It is not open even to other North Atlantic coastal states except by agreement of the founding members. They have sought membership by Russia and Canada, as well as by Denmark itself, without success. It is most unlikely that any other states applying for membership would be accepted without declaring their readiness either to engage in commercial whaling and/or sealing, or at least to tolerate them. So far other states have resisted the temptation to try. Norway is evidently happy with the situation in the IWC wherein it is free of all international obligations for restraint or controls such as inspection and assignment of independent observers, so it does not agree to discuss seriously its minke whaling with NAMMCO – for the moment. And in July 1998 it was reported that a group of Caribbean governments, instigated by Japan, have begun the creation of a Caribbean Marine Mammals (exploitation) organisation.

But apart from the question of membership clearly, for ocean fisheries to be eventually sustainable, and productive, there will have to be limitations to the possibilities of states exempting themselves from the provisions of the relevant regional and specialised intergovernment bodies, whether by using objection provisions irresponsibly, or grossly abusing special provisions for the taking of specimens for *bona fide* scientific purposes, or even walking out of the organisation as both Norway and Japan have threatened to do in the IWC on numerous occasions.

The Independent World Commission on the Oceans (IWCO), under the leadership of the ex-President of Portugal, Dr Mario Soares, has been for two years preparing a report on all outstanding matters of relating to the sea and its resources, including the state of applicable international law. It will present its Report to a high level gathering in Lisbon in at the beginning of September, then to the Fall 1998 session of the UN General Assembly. It had a unique opportunity to make a vigorous call for action drastically to improve the governance of international fisheries, especially for the benefit of future human generations; unfortunately it has not risen to the occasion.

Some decades ago, when many scientists were getting worried about the likelihood and possible consequences of massive oil pollution resulting from accidents to larger and larger tankers, some of us close to this business said the political and commercial worlds would only pay attention after a serious accident had occurred. We were excessively optimistic: it took not merely the *Torrey Canyon* but also the *Amoco Cadiz* and a few others to bring about the necessary changes in practice. Ocean fisheries everywhere are collapsing. The rot started with the highly vulnerable whales; even so the idea that a moratorium was necessary and urgent found little support throughout the 1970s and even the 1980s. At that time it was unthinkable that similar drastic action might be needed for some fin fisheries: since which we have seen moratoria placed on cod fishing and others. I wonder how many ancient fisheries, and new ones, must collapse – with all the economic and social pains that entails – before the world will decide there really must be an assured future for sustainable supplies of food from the sea and that this requires a further donation of "sovereignty" by all states to effective international organisations for management, conservation and research.

In other areas of international politics it has recently become the custom to refer to "rogue states", though somewhat vaguely defined. In fisheries too there are evidently "rogue states", and those close to the business know which they are, at present. But none are exempt from the temptation to cheat and fiddle the weak rules governing fishing and, for that matter, the trade in fish products. Hence although strengthened legal provisions are clearly needed they will be ineffective if weak monitoring, inspection and enforcement remain the norm.

Confrontation vs Negotiation

Earlier I argued that fatal loopholes in the constitutional provisions of regional and global specialised inter-governmental bodies supposed to regulate sea fisheries allow in practice the continued over-fishing of shared living marine resources (and hinder the recovery of those already depleted) despite the general principles of sustainability and precaution mandated by the UN Convention on the Law of the Sea and Agenda 21, Chapter

17, approved by the 1992 UN Conference on Environment and Development. I took the International Whaling Commission as the prime example of this problem. Here, I seek to describe the situation in IWC now, to explain its historical antecedents, analyse the options for action – or inaction – it faces and again make analogy with the situation of other regulatory instruments.

For many people, and some governments, the ethical questions involved in killing whales for profit differ from any that may be raised regarding fin-fish, molluscs and crustaceans. Nevertheless, the IWC is a particularly interesting subject because it is, I believe, more advanced than other bodies in seeking to apply rigorously the above principles of sustainability and precaution. In two periods in its 50-year history the IWC has sought to bring and hold commercial whaling at sustainable levels.

The first time, through the 1960s, on the initiative of the UK and USA, the IWC mandated that the level of catches of the large blue and fin whales in the Antarctic should be brought down to sustainable levels, on the basis of a commitment made in 1960 to act on the best available scientific advice. However, when the representatives of the then five Antarctic countries learned three years later how drastic would be the action they would thereby be required to take two of them – Japan and the USSR – said they could not be held to commitments previously made.

The second time, in 1974 the IWC, confronted by a suggestion by the United Nations that there should be a 10-year moratorium on commercial whaling, opted for a "modified moratorium" as proposed by Australia, then still a whaling country. Under this each population of each species of whale would be "classified" with respect to its estimated degree of depletion, if any. Any population that was assessed to be somewhat below its presumed level of optimal sustained productivity was to be declared a "Protection stock", with zero quota until it would be assessed to have recovered significantly under protection. For all others catch quotas would be calculated annually according to a supposedly scientific process called the New Management Procedure (NMP). The target was to be the notional "maximum sustainable yield" (MSY) of each "stock" but with a sliding scale of reduction below that figure intended to make allowance both for uncertainty in knowledge of just what was the MSY, and uncertainty as to the level of the stock in relation to its supposed "optimum" and "pristine" (pre-exploitation) levels. Thus an element of "precaution" was for the first time introduced into this or any other fisheries management regime.

Under the NMP regime for the first time catches of all "large" whale species in all ocean areas would be regulated. In the interval between 1960 and 1974 the blue whale had virtually disappeared everywhere, fin whales were much fewer, and the great "pelagic expeditions" had moved largely over to the next smaller species, the sei. The sperm whale was also included in the terms of the regime and, after some argument, the largest dolphin – orca, or the killer whale – was also included. However, in 1972, the year of the UN Resolution, the two remaining "pelagic" whaling powers, Japan and USSR, had switched largely to catching, in the Southern Ocean, the smallest baleen (whalebone) whale, the minke. Even less was known about the numbers, biology and behaviour of this species than of the more familiar larger ones.

By 1980 it was obvious to all that the NMP was not working.