



Legal Analysis of IWC Competence to Manage Small Cetaceans

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I International Convention for the Regulation of Whaling, 1946

1. The International Convention for the Regulation of Whaling ("ICRW"), dated December 2, 1946, creates the International Whaling Commission ("IWC") and grants it competence to manage whales and whaling. The Commission can regulate whaling activities and make recommendations on matters relating to whales or whaling (ICRW Article VI).

2. According to Article V.1. of the ICRW, amended on November 19, 1956, the Commission is entitled to define species of whales both protected and not protected. Based on our systematic interpretation of the ICRW it is clear that all species of whales are subject to management under the Convention. The Commission however has the right to restrict the scope of application of the ICRW. The ICRW itself does not, however, indicate that the Convention is restricted in its application of small cetaceans.

II Annex of Nomenclature

3. As an appendix of ICRW, the Annex of Nomenclature was established to give definition to species of whales, e.g. the killer whale (*Orcinus orca*) and the northern and southern species of beaked whales, the northern bottlenose whale (*Hyperoodon ampullatus*), etc. The mentioned species are of the toothed small cetacean family. However, the term "whale" has not been defined, neither in the first appendix dated 1946, nor in the later amendments of 1977 or 1996.

4. The Annex of Nomenclature contains a list of translations of the common names used for the species regulated as they were the most threatened by commercial whaling at the time. The Nomenclature does not explicitly exclude any specific group or family of cetacean not listed in the Annex from the application of the IWC, based on Article V.1. of the Convention.

III Vienna Convention on Treaties

5. The Vienna Convention on the Law of Treaties of 1969 relates to the interpretation of treaties between states, of any treaty which is the constituent instrument of an international organization, and of any treaty adopted within an international organization without prejudice to relevant rules of the organization (Articles 1 und 5). Although the Vienna Convention is not a treaty with retroactive powers (Article 4), it confirms and asserts general rules of interpretation that are vital to treaties entered into force before 1969 (Yasseen, 1978, 27; Köck, 1976, 46).

6. Article 31 (1) of the Convention states the general rule of interpreting a treaty as follows: *„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 light of its object and purpose“*. The true meaning of a text is to be understood and arrived at by taking into account all consequences which normally and reasonably flow from a text (Sinclair, 1984, 121). In concreto the ICRW creates the International Whaling Commission ("IWC") and grants it competence to manage whales and whaling, and no distinction has been made between large and small whales. The ordinary meaning of the term „whale“ is therefore legally extended to any kind of whale without any restriction due to size or classification in the whale family.

7. Paragraph 3 of Article 31 of the Vienna Convention requires that the following should be taken into account along with the context of a treaty; *„any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions and any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.“* The value and significance of subsequent application will naturally depend on the extent to which it is concordant, common and consistent. (Sinclair, 1984, 137). It is our opinion that the application of small cetaceans to the IWC has been concordant, common and consistent through the years. Paragraph 2 of Article 31 defines the entire scope of a treaty: *„in addition to the text, including its preamble and annexes any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty“*. (Sinclair, 1984, 127; Yasseen, 1978, 35).

8. The parties of the ICRW have adopted the Annex of Nomenclature, as well as several resolutions concerning small cetaceans. Accordingly, and by agreement, the Parties have confirmed IWC competence to manage large and small whales equally.

9. Finally, Articles 39-41 of the Vienna Convention concern the amendment and modification of treaties. A treaty may be amended by agreement between the parties (Article 39). Since commercial whaling is banned according to the Moratorium on Commercial Whaling (Article 10e of the ICRW) and if the Commission felt it needed to redirect itself accordingly, an amendment to the ICRW could for example read and be implemented as the "Cetacean Conservation Convention".

IV United Nations Convention on the Law of the Sea

10. The UN Convention on the Law of the Sea (UNCLOS III) has been signed by over 130 nations. It came into effect on November 16, 1994. The Convention intends to protect the marine environment and does not leave open the possibility of states making reservations to it (Article 309).

11. The Convention regulates the conservation and the utilization of the living marine resources (Articles 61 and 62) such as fish within Exclusive Economic Zone (EEZ), Part V of the UNCLOS III Convention. Article 65 focuses on marine mammals. Nothing in this Part of the treaty restricts the right of a coastal state, or the competence of an international organization, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for according to UNCLOS.

12. The UN Convention on the Law of the Sea does not make a distinction between large and small cetaceans, but rather seeks to treat and protect them equally.

V Case Study „Resolution concerning the extension of the International Whaling Commission’s responsibilities for small cetaceans”, 1980

13. During its 32nd Annual Meeting in 1980 the International Whaling Commission adopted the „Resolution concerning the extension of the International Whaling Commission’s responsibilities for small cetaceans”. This resolution establishes that the Commission does not have significant opposition to the fact that small cetaceans are within its legal remit and terms of reference of the „International Convention for the Regulation of Whaling”.

VI Case Study: „Resolution on Small Cetaceans”, 1990

14. In the „Resolution on Small Cetaceans” of 1990, and in subsequent numerous other resolutions addressing small cetaceans since then, the Commission expresses concern that certain stocks of small cetaceans are under severe pressure and recognizes that there is an urgent need for further international cooperation to ensure adequate conservation of small cetaceans. No dissent among parties which could have legal ramifications has been expressed in these resolutions, nor any doubt as to the Commission’s entitlement to take action on the behalf of small cetaceans.

15. In resolutions adopted concerning small cetaceans, the Commission has requested the Scientific Committee to commence a process of gathering all available information on the present status of stocks of small cetaceans (...), on incidental takes, on the impact of those takes on the stocks, and provide an assessment of the present threats to the stocks concerned.

16. Legally, there is treaty concordance, commonality, consistency, and precedence to IWC management of small cetaceans in that in the IWC has sought to study and assess small cetaceans in the same manner it has sought Scientific Committee as well as Commission guidance on large cetacean conservation issues.

VII Conclusions

17. According to results from our analysis of IWC competence to manage small cetaceans, we find that not only are there no legal obstacles to the implementation of IWC management measures to better conserve stocks of small cetaceans, it is also the Commission's obligation.

References

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The following organizations made this legal analysis possible:

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