


Symposium on the State of Conservation of Whales in the 21st Century

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Developments in Ocean Law
1946-2006
Is the ICRW Outdated?

Duncan Currie
NGO Perspective

Where are we now?

.. and how did we get here?

Justification for Japanese Whaling Expedition: 1947

‘The United States government cannot agree that the Japanese should be penalized in future because of their past bad record in pelagic whaling’.

‘The protein food products and whale oil provided by the expedition will be a vitally necessary component of Japanese food and oil supplies during the calendar year 1948.’

-State Dept response to NZ, 1947

1946 ICRW Objectives

- *Considering* that the history of whaling has seen over-fishing of one area after another and of one species of whale after another to such a degree that it is essential to protect all species of whales from further over-fishing;
- *Recognizing* that it is in the common interest to achieve the **optimum level** of whale stocks as rapidly as possible **without causing widespread economic and nutritional distress.**
- Agree to conclude a convention to provide for the proper conservation of whale stocks **and thus make possible the orderly development of the whaling industry.**

Versus: 1982

UNCLOS Art 65

- States shall co-operate with a view to the **conservation** of marine mammals and
- For cetaceans in particular, shall work through the appropriate international organizations for their conservation, management and study.
- Can prohibit - as well as limit and regulate - the exploitation of marine mammals more strictly.

ICRW Schedule

- Amendments to the Schedule must be 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,
- shall take into consideration the interests of the consumers of whale products and the whaling industry.
- Art V.
- *Gabcikovo-Nagymaros* ICJ: new environmental norms should be taken into account in applying an older instrument. But: good governance is still crucial.

What does best practice now require?

Precautionary Approach

Ecosystem Approach

Protection of the Environment
Sustainability

Importance of Good Governance

- Stockholm Declaration, World Charter for Nature, Brundtland Report, UNCLOS, CBD: stress international co-operation.
- JPOI: good governance at international level is **fundamental** for achieving sustainable development.
- World Summit 2005: improve co-operation and co-ordination at all levels to address marine issues in an integrated manner, and promote integrated management and sustainable development of the oceans and seas.
- Transparency – esp Aarhus Convention and Almaty Guidelines

Elements of Good Governance

Procedural Elements

Requirements for international co-operation

- Robust decision-making procedures
- Constrain opt-out behaviour from undermining conservation
- Dispute resolution procedure
- Effective compliance and enforcement procedures.
- Amend constituent instrument
- Transparency: access to information, public participation

Importance of Co-operation

'Fundamental principle' – ITLOS/MOX

Rio: co-operate in a spirit of global partnership

Principle 7

to conserve, protect and restore the health and integrity of Earth's ecosystem.

UNCLOS: co-operate...

Art 65, 118

- with a view to the conservation of marine mammals
- work through the appropriate international organizations for their conservation, management and study.
- co-operate with each other in the conservation and management of living resources in the areas of the high seas.

CBD: co-operate...

Art 5

for conservation and sustainable use of biological diversity.

Ecosystem Approach

OSPAR/HELCOM (2003)

The comprehensive integrated management of human activities based on the best available scientific knowledge about the ecosystem and its dynamics...

...in order to identify and take action on influences which are critical to the health of marine ecosystems...

...thereby achieving sustainable use of ecosystem goods and services and maintenance of ecosystem integrity.

Ecosystem Approach: JPOI

endorsed the
ecosystem
approach for
fisheries,
biodiversity
protection
and
sustainable
development

...

and called for
its
implementation
by 2010.

Ecosystem Approach: 2006 Oceans Resolution

119 (c) Recalls that States should be guided in the application of ecosystem approaches by a number of existing instruments, in particular the Convention, which sets out the legal framework for all activities in the oceans and seas, and its implementing Agreements, as well as other commitments, such as those contained in the Convention on Biological Diversity and the World Summit on Sustainable Development call for the application of an ecosystem approach by 2010.

(d) Encourages States to cooperate and coordinate their efforts and take, individually or jointly, as appropriate, all measures, in conformity with international law, including the Convention and other applicable instruments, to address impacts on marine ecosystems in areas within and beyond national jurisdiction, taking into account the integrity of the ecosystems concerned.

Precautionary Approach

Rio
Declaration
1992

- **In order to protect the environment**, the precautionary approach shall be widely applied by States according to their capabilities.
- Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. – *Principle 15*

Fish Stocks
Agreement
1995

- States shall apply the precautionary approach widely to conservation, management and exploitation of [straddling fish stocks and highly migratory fish stocks] **in order to protect the living marine resources and preserve the marine environment** - *Art 6*

Sustainability: Brundtland Report

- =development which “meets the needs of the present without compromising the ability of future generations to meet their own needs.”
- Implies limits on the ability of the biosphere to absorb the effects of human activities. – para 27
- Nb: warned against using ‘scientific whaling’ exception undermining IWC credibility.

Need to add

- ecosystem approach, place of man in ecosystem,
- addressing existing environmental damage

Sustainability: Karl-Henrik Robért /Natural Step Framework

- In the sustainable society, nature is not subject to systematically increasing: (3) degradation by physical means.
- Objective: “Eliminate our contribution to the systematic physical degradation of nature through over-harvesting, introductions and other forms of modification.”

Does the IWC Measure Up?

Objectives out of date

Omits references to the precautionary principle, an ecosystem approach, integrated management and sustainability.

No amendment provisions

No effective compliance mechanism

Scope unclear

No dispute resolution mechanism

Unconstrained opt-out/objection mechanism

Transparency not guaranteed

Is the ICW the – or an - ‘appropriate organization?’

- work through the appropriate international organizations for their conservation, management and study (UNCLOS Art 65)
- Appropriateness defined by State practice
– CMS, CITES

What are the consequences if we remain on the present course?

- Further deadlock
- Conservation Committee deadlock
- Real management/study occurring outside IWC – CMS, ASCOBANS, ACCOBAMS, Pacific Cetacean MOU.

What Can be done?

- Amend Treaty – a Protocol
- **Vienna Convention Art. 40**
 - Notify contracting States
 - All can participate in negotiations, amendment
 - Not bound if don't join
 - New parties to new treaty bound (but to old treaty as to parties not bound by new treaty)

What Can be Done?

- Diplomatic Conference?
 - New Treaties: Vienna Art 30: Successive treaties.
 - If a State doesn't join – earlier treaty governs rights and obligations.
- UN General Assembly
- Part of discussion on Implementing Agreement?
- Global Commission

Some Major Commissions

- 1968—69 Commission on International Development (Pearson Commission) [World Bank]
- 1977—79 Independent Commission on International Development issues (Brandt Commission) [Aid/North-South]
- 1980—82 Independent Commission on Security and Disarmament Issues (Palme Commission) [disarmament]
- 1983—87 World Commission on Environment and Development (Brundtland Commission)
- 1987—90 South Commission [development/North-South relations]
- 1992—95 Commission on Global Governance [UN]
- 1995—98 World Commission on Forests and Sustainable Development [forestry]
- 1995—98 Independent World Commission on Oceans
- 2000 World Commission on water
- 1998- 2000 World Commission on Dams

Some Possible Outcomes

Objective: Co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the global whale populations as part of the ecosystem.

An ecosystem approach which is aimed at all aspects of sustainability including habitat and prey, a precautionary approach and prior environmental impact assessments. Address all environmental influences – climate change, pollution, ship strikes, etc.

Some Possible Outcomes

Good Governance:

- Robust decisionmaking, No or restrained opt-out
- Dispute resolution procedures
- Effective compliance and enforcement procedures.
- Amendment procedures
- Transparency