



**University of Akureyri
Faculty of law and social science
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Whaling and international law

Guðlaugur Hrafn Ólafsson

B.A Thesis in law at the Faculty of Law and Social Science



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Science**

Instructor: Pétur Dam Leifsson

Statements

I hereby declare that I am the only author of this project and that it is the result of my own research.

Ég lýsi því hér með yfir að ég einn er höfundur þessa verkefnis og að það er ágóði eigin rannsókna

Guðlaugur Hrafn Ólafsson

It is hereby confirmed that this thesis fulfils requirements for a BA-degree in the Faculty of Humanities and Social Science.

Það staðfestist hér með að lokaverkefni þetta fullnægir að mínum dómi kröfum til B.A. –prófs við Hug- og félagsvísindasvið.

Pétur Dam Leifsson

Útdráttur

Hvalveiðar fram á 20. öldina höfðu gengið alvarlega á stofna þess. Með vaxandi vitund í umhverfismálum, voru hvalir skilgreindir sem tæmandi auðlind, sem leiddi til hvalveiðibanns Alþjóðahvalveiðiráðsins 1982. Hvalveiðipjóðir hafa þó haldið áfram mjög umdeildum hvalveiðum og forsenda þessarar ritgerðar er að útlista skipulag hvalveiða í alþjóðlegu umhverfi, fara nánar út í alþjóðlegar stofnanir og lög sem snerta málefni hvala og hvalveiða.

Abstract

Whales had become severely depleted by pre-20th century whaling. With increasing awareness in environmental issues, whales were being identified as being a depleted resource, which led to the IWC 1982 Monatorium on whaling. Pro-whaling countries continue though controversial whaling and the rationale of this thesis is to outline the structure regarding whaling in the international scheme. This thesis will go into international organisation and law that contribute to the matters of whales and whaling.

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1. Introduction

Whales collectively inhabit all the world's oceans, these are the largest animals on earth with the blue whale the biggest creature to have ever lived on earth. These incredible cetaceans have been a source of human food, fuel and tools and for centuries whales had been treated as a nullius resource – considered to be freely available to anyone who could hunt and kill them. Records exist of whales being hunted in the Bay of Biscay during the 12th century, and the following centuries saw significant expansion of whaling activities by many states.¹ Whaling is one of the most controversial international problems, with emotional and hostile debates between pro-whaling and anti-whaling individuals and countries. Whales are thought to be over-exploited and being an endangered species and it has been a debate among different cultures if they should be harvested. Native peoples argue for struggling to maintain their traditional whaling customs and protect their cultural heritage as others claim their right to utilize marine resources with economic concerns, where the main exports are fish and by their claims the whales are eating and leading to depletion of their fish stocks, then there are those who see them as special or even sacred animals. Politics also play a huge role as usually in the developed western countries politicians feel important to consider environmental matters. A whaling conference was convened among whaling nations, which concluded the 1946 International convention for the regulation of whaling (ICWR) and whales were now to be viewed as a *res communis* resource – open to all - under which they would still be subject to some form of collective management.² As from 1986 there has been a zero catch limit on whales when the moratorium on whales was set, despite the moratorium whaling is still being conducted, commercially or through special permits. There are few kinds of whaling activities ongoing in the world, with commercial whaling being the most important and also there is so called „scientific“ whaling, which is when whaling is conducted to scientific purposes on stocks that are protected from whaling, besides there is also „aboriginal subsistence whaling“ which is conducted by very few indigenous native people only for non commercial purposes, i.e. their subsistence and cultural needs.

In this paper I will go into the legal framework of whaling in international law. In the first chapter I will though start to inform the readers about whales so they will get a better understanding of what whales are, and their status in oceans around the world, as well as the history of whaling. The second chapter and the main part of this essay will be structured to

¹ Frieland. Steven, 'Co-operation or chaos? – Article 65 of United Nations Convention on the Law of the Sea and the Future of the International Whaling Commission', (2005) 2 Macquarie J. Int'l & Comp. Env'tl. L. 1 p. 1

² Ibid p.2

explain the legal framework for whaling, i.e. organizations around management of whaling and international law concerning whaling. Chapter three will be a short chapter that will consider what the future may possibly be for whales and whaling activities in the world.

2. Introduction of whales and whaling

2.1 Characteristics of whales

Whales are the biggest creatures on earth, and are mammals like us human beings, which means that these marine mammals that live and spend all their time in the ocean have warm blood running through them, give birth to live young and nurse them, have traces of hair or fur, and must come to the surface to fill their lungs with air.³ There are 76 species of whales and they live in oceans all over the world, in southern warm waters to the cold northern regions. They are a part of the cetacean family alongside dolphins and porpoises and they have been divided into two subgroups, Odontoceti or the toothed whales (tannhvalir) and the Mysticeti or the baleen whales (skíðishvalir).⁴ Baleen whales have baleen in their mouth and they swallow their food with the sea water and strain food through the baleen. Those with teeth are under suborder Odontoceti, which includes toothed whales, dolphins and porpoises. Many odontocetes can navigate by echolocation, producing sound waves using a complex system of nasal sacs and passages, and using the echoes to navigate. While baleen whales are known for the strange and complex songs they produce, baleen whales do not use their songs for echolocation, and the purpose is still a mystery.⁵ The most common whales that have had commercial value are in the suborder of Baleen whales: *Gray whales*, *Right whales* which contains 4 species, Bowhead whales, North Atlantic, North Pacific and Southern Right whales. *Rorquals* which contains Blue whales, Bryde whales, Sei whales, Fin whales, Humpback whales, Common and Southern minke whales. Among the suborder of toothed whales: Sperm whales and Pilot whales.⁶ All the following whales are listed on CITES endangered species list appendix I, excluding the Pilot whale which is listed on appendix II ,

³Cetaceans: Whales, Dolphins, and Porpoise, (www.marinemammals.org) (link in bibliography)

⁴ Kalman, Bobbie, *What is a whale*, crabtree publishing (United Kingdom 2000) p. 5-6

⁵ Introduction to the Cetacea, (<http://www.ucmp.berkeley.edu>) (link in bibliography)

⁶ E. Scarff. James, 'The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment' (1976-1978) 6 Ecology L.Q. 323

meaning that international trade in them and products derived from them is very limited.⁷ Their status in oceans around the world will be explained further in the next subchapter

2.2 Commercial exploited whales and their status

Blue whales (Steypireyður) thought to be around 10 -25.000 in numbers are the largest animal ever known to have existed and has been protected worldwide since the 1960s. In spite of being located globally around the world they are one of the rarest of the whales, and are considered to be among the most endangered of the great whales.⁸ They remain at very low levels, but have been increasing slightly in numbers around Iceland being around 1000 animals, then they are around 3000 in the Gulf of California⁹ Fin whales (Langreyður) is the second largest animal after the Blue whale and are found in oceans all around the world. There were around 750,000 fin reportedly killed in the Southern Hemisphere between 1904 and 1979, nearly half of that was in a single decade in the 1950s.¹⁰ Data does not exist to allow a full assessment of present status, the North Atlantic shows a decent healthy state, probably exceeding 45.000. They are though rarely encountered in the southern hemisphere, however, partial estimates for the eastern North Pacific reveal around 10,000 animals.¹¹ They are protected in the Southern Ocean and North Pacific since the 1970s and in the North Atlantic by the moratorium from 1986.¹² Humpback whales (Hnúfubakur) were heavily exploited by commercial whaling from the 1920s-1950s, have been protected worldwide since the 1960s. They have shown evidence of strong recovery in the Southern Hemisphere, population is probably at least 60,000 and with annual increase rates of about 10% being recorded in a number of areas. In the central and western North Atlantic, have recovered to perhaps pre-exploitation levels and number over 12,000 animals. Less is known in the eastern North Atlantic but numbers are considerably less than in the western North Atlantic. Humpback whales in the North Pacific have shown positive increase rates in most areas. The present abundance in the total North Pacific is estimated at over 17,000, though western Pacific may only be about 1,000. This species has been very popular for whale watching, in recent years, many different Humpback whales that have never known whaling are becoming

⁷Appendix, I, II, III, (www.cites.org) (link in bibliography)

⁸ Whales and dolphins (cataceans), (wwf.panda.org) (link in bibliography)

⁹ Status of whales, (<http://iwcoffice.org>) (link in bibliography)

¹⁰ Supra, note 7

¹¹ Supra, note 8

¹² Supra, note 7

curious about boats and often approaches them for "friendly" encounters.¹³ The Sei whale (Sandreyður) is one of the fastest cetaceans, they inhabit all oceans and adjoining seas except in polar regions, feeding in cold water during the summer and migrating to warm waters during the winter.¹⁴ Sei whale populations in the Southern Ocean and North Atlantic and South Pacific were heavily exploited by industrial whaling after the decline in numbers of blue and fin whales, primarily from the mid-1960s to early 1970s. Today there are insufficient data to undertake an assessment of their status. A survey in part of their summer range revealed in 1989 a little sign of recovery in the northeastern Atlantic, but in the central North Atlantic showed around 10,500 animals, since then there have been no catches. In the North Pacific the recent abundance in 2006/7 estimate around 7,700 animals in 2006/7. They have been protected since mid-1970s apart from in the central North Atlantic which came with the moratorium in 1986.¹⁵ Bryde's whales (Brydehvalur) which have been protected since the moratorium prefer warmer waters, their history of whaling has been shorter and less intensive than the other baleen whales and not is considered endangered. The Minke Whales (Hrefna) are usually split into two species, Antarctic/Southern minke whale and the Common/Northern minke whale, though they are not more closely related to each other than to other balaenopterid species.¹⁶ The Antarctic species is found in the southern hemisphere and is the smallest of the large whales, commercial exploitation began in the early 1970s, much later than the other large whale species. There are several hundred thousand Antarctic minke whales and thus they are clearly not endangered but remain protected since the moratorium.¹⁷ The Common minke whale is found in the Northern Hemisphere, For the northeastern and central North Atlantic and off West Greenland it is estimated that there exists total over 180,000 animals. It is in a healthy state and has been protected since the moratorium.¹⁸ Gray whales (Sandlægja) have been protected since the 1930s with being severely depleted by pre-20th century whaling. They have recovered well and are in no danger of extinction with population around its pre-exploitation level of some 20,000 animals in the eastern Pacific. The western North Pacific population on the other hand is vulnerable with fewer than 130 animals.¹⁹ The Bowhead whales (Norðhvalur/Grænlandssléttbakur) an arctic species has been a victim of its long baleens and thick blubber, which have made them the most economically

¹³ Supra, note 8

¹⁴ Supra, note 7

¹⁵ Supra, note 8

¹⁶ *Balaenoptera bonaerensis*, (www.iucnredlist.org) (link in bibliography)

¹⁷ Ibid

¹⁸ Supra, note 8

¹⁹ Ibid

valuable of all cetaceans.²⁰ Heavily exploited by pre-20th century whaling, but today there exists at least two stocks in a healthy state, The Bering-Chukchi-Beaufort Seas stock numbered over 10,500 in 2001 and The eastern Arctic-West Greenland population numbers well over 3,500. The Bowhead whales have been protected since the early 1930s.²¹ The Right whales (Sléttbakur), which they got their name from being the “right whale” to hunt as they are slow swimmers and float after they have been killed²², are divided into The North Pacific species, the Southern species and the North Atlantic species (Íslandssléttbakur). The Right whale were severely depleted by pre-20th century whaling, very few abundance estimates exist with possibly only be few hundreds left, they are one of the most endangered species of large whale and have been protected since the 1930s. The Southern Right whale which had also been severely depleted have shown evidence of strong recovery, and may have now total of 16.000 animals.²³ The Sperm whales (Búrhvalur) have a huge geographic range, they can be found in almost all marine waters deeper than 1,000 m that are not covered by ice. In some areas, particularly in the western North Atlantic, sperm whales, especially males, can occur in shallower waters. Sperm Whale is not being heavily whaled at present and seems relatively secure from this threat with a global population size in the 100,000', although there is considerable uncertainty about sperm whale population. On the other hand there is a cause for concern as the Sperm Whale is not well adapted to recover from population depletion, with a maximum rate of increase of around 1% per year.²⁴ Pilot whales are actually two species, short-finned and long-finned (Grindhvalur). Short-finned Pilot whales are found in warm temperate to tropical waters of the world, generally in deep offshore areas, it is estimated that there are more than 600.000 animals. The long-finned whales are found in oceanic waters and some coastal waters of the North Atlantic Ocean, including the Mediterranean Sea and North Sea. The only current fishery for long-finned pilot whales is undertaken in the Faroe Islands and Greenland. Although this fishery has been actively pursued since the 9th century, catch levels have apparently not caused stock depletion with estimated of 1. Million animals.²⁵

²⁰ Supra, note 7

²¹ Supra, note 8

²² Tonnessen, Johan Nicolay, *The history of modern whaling*, University of California Press (Norway 1982) p.6

²³ Supra, note 8

²⁴ *Physeter macrocephalus*, (www.iucnredlist.org) (link in bibliography)

²⁵ *Globicephala melas*, *Globicephala macrorhynchus*, (www.iucnredlist.org) (link in bibliography)

2.3 The history of whaling

Humans have hunted whales for centuries, whale hunting as an industry began with the Basques in the thirteenth century where they sold whale meat to Europe. It was in the early 1600s, that when the whale got depleted that they moved in on other places around Europe with larger ships. Soon after, Denmark, Holland, England, France and Germany were all starting their own whale hunting.²⁶ The old and modern whaling differ as before the „right whale“ was mainly hunted and it got its name from being the right whale to kill, as they were slow swimmers and they could be caught from rowing boats with hand thrown harpoons. The right whale was very convenient to kill as it would float, most other whales will sink after being killed. After the right whale became decimated in latter half of the nineteenth century other methods were crucial for ongoing profitable whaling. To catch faster swimmers and whales that sink, steam, or diesel driven boats were introduced and a harpoon shot from a cannon that would explode inside the whale, then there was a line attached so they could haul the animal to the surface. These new methods would signal modern whaling.²⁷ What the whale has been bringing for harvesting is mainly food and oil, whale oil was used for all kind of things e.g soap and candles, but the importance of it was the greatest in the first world war, the glycerine in the whale oil was then a necessity in the production of the explosive nitro-glycerine²⁸ Today whale oil has been replaced and is not as usable as it was, so the main object of whaling today is for food.²⁹

3. Whaling and international law

3.1 International environmental principles

The United Nations Conference on Environment and Development (UNCED) was held at Rio de Janeiro, Brazil in June 1992. This global conference was a massive effort from representatives from 179 countries including host of other individuals and non governmental organization (NGO) to reconcile the impact of human socio-economic activities on the

²⁶ Siebert. Charles, *The secret world of whales*, Chronicle books (California 2010)p. 35-37

²⁷ Supra, note 22 p. 5-7

²⁸ Ibid p. 295

²⁹ T.Pees. Samuel, *Whale oil versus the others* (www.petroleumhistory.org) (link in bibliography)

environment and vice versa.³⁰ The goal of the Convention is to “establishing a new and equitable global partnership through the creation of new levels of cooperation among States..... working towards international agreements which respect the interests of all and protect the integrity of the global environmental and developmental system.”³¹ The Rio Conference addressed the precautionary approach and the concept of sustainable development.³² These are two principles that are consistent with the terms of the ICRW . The term 'sustainable development' was first used in the 1987 'Brundtland Report', which defined it as “development which meets the needs of the present without compromising the ability of future generations to meet their own needs”.³³ The acceptance of the principle is reflected in the Rio Declaration, which assumes that the principle exist in international law.³⁴ The principle of sustainability is also applied in UNCLOS as well as many other international treaties with relating to the management of species, it is regarded as an important element in the definition of 'conservation'.³⁵ The preamble of the ICRW states:

“.....Recognizing that the whale stocks are susceptible of natural increases if whaling is properly regulated, and that increases in the size of whale stocks will permit increases in the number of whales which may be captured without endangering these natural resources; 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; Recognizing that in the course of achieving these objectives, whaling operations should be confined to those species best able to sustain exploitation in order to give an interval for recovery to certain species of whales now depleted in numbers;..... to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry”³⁶

Article V in the Convention allows the Commission to make amendments to the provisions regarding conservation and utilization of whale resources to carry out the objectives and purposes of the Convention and to provide for the conservation, development, and optimum utilization of the whale resources.³⁷ There are clear concepts consistent with the principle of sustainable development and it should be therefore possible to make amendments and allow commercial whaling now if these natural resources are not endangered. The precautionary approach was set in principle 15 of the Rio Declaration, it states:

³⁰ United Nations Conference on Environment and Development (www.un.org) (link in bibliography)

³¹ Rio Declaration on Environment and Development (www.unep.org) (link in bibliography)

³² Ibid

³³ Framing Sustainable Development, (www.un.org) (link in bibliography)

³⁴ Supra, note 1 p. 31

³⁵ Ibid p. 32

³⁶ International Convention on the Regulation of Whaling (ICRW), preamble, (link in bibliography)

³⁷ Ibid

“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.”³⁸

To further understand this principle it has been applied to the management of straddling fish stocks and highly migratory fish stocks in article 6(2) of the Straddling Stocks Agreement, it states:

“ States should be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.”³⁹

This approach can also be applied to the management of whales under the ICRW as all amendments to the schedule of the ICRW management of whales are to be based on scientific findings, and the IWC claims that the end of the 1986 moratorium and the implementation of RMP⁴⁰ will occur when those who will utilize whales demonstrate that any resumption of whaling will not be harmful.⁴¹ The application of the precautionary principle has the effect of shifting the burden of proof, so that in management of natural resources, those proposing an activity must show that it does not cause environmental harm.⁴² Pro- whaling countries have numerous times sought to formally introduce the concept of sustainable use into the IWC resolution, they argue that to have serious scientific basis and comply with the principle of sustainable use.⁴³ Pro-whaling countries do not believe that the IWC is genuinely applying these principles, they are trying to show clear scientific evidence that indicate that some form of a controlled commercial whaling for certain whale species would not result in any threat to the sustainability of those species.⁴⁴ The failure of the IWC to apply these principles contributes to its declining credibility among states which encourages the development of other international organization.⁴⁵

³⁸ Rio Declaration, principle 15, UN Doc A/CONF. 151/26/Rev. 1, 31 ILM 874 (1992)

³⁹ United Nation Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, article 6(2) , UN Doc A/CONF.164/22

⁴⁰ The Revised Management Procedure or RMP was developed by the Scientific Committee by request of the IWC to provide advice on setting of catch limits for commercial whaling. The RMP would be a method of calculating sustainable removal levels which are consistent with the Commission’s objectives for commercial whaling.

⁴¹ Supra, note 1 p. 34

⁴² Ibid p. 34

⁴³ Ibid p. 32

⁴⁴ Ibid p. 34

⁴⁵ Ibid p. 35

3.2 Framework of the International Convention for the Regulation of Whaling

The International Convention for the Regulation of Whaling (ICRW) is the primary source in international law for whaling, it was signed in 1946, in order to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry and it is the International Whaling Commission's (IWC) founding document.⁴⁶ The convention states 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." For that, the purpose of the convention is to "provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry." The convention also recognizes that the "whale stocks are susceptible of natural increases if whaling is properly regulated, and that increases in the size of whale stocks will permit increases in the number of whales which may be captured without endangering these natural resources. "And that the goal of the convention "is to achieve the optimum level of whale stocks as rapidly as possible without causing widespread economic and nutritional distress."⁴⁷

Article III of the 1946 International Convention for the Regulation of Whaling (ICRW) establishes the International Whaling Commission (IWC). The main duty of the IWC is to review and monitor the standards established in the ICRW. These standards include complete protection of certain species, establishing whale sanctuaries, monitoring whale stocks, and compiling scientific and statistical reports. The IWC adopts regulations on catch limits, whaling methods and protected areas, on the basis of a three-quarters majority vote.⁴⁸ The IWC meets annually and is composed of one voting representative from each party who may be accompanied by experts and advisors. Non-parties and intergovernmental organizations are not allowed to attend the meetings and to be represented by observers, unless they have submitted a written request to the Secretary thirty days before the meeting or if they have attended previous meetings.⁴⁹ It is set up as the regulatory body with administrative powers to achieve the purpose of and goals set in the ICRW, it does not though hold the powers to enforce its regulatory policies, as it is with most international agreements that they lack enforcement clauses.⁵⁰ Membership in the IWC is open to any

⁴⁶ Key Documents, (iwcoffice.org) (Link in bibliography)

⁴⁷ Supra, note 36

⁴⁸ Spencer, Valeria Neale, 'Domestic Enforcement of International Law: The International Convention for the Regulation of Whaling' (1991) 2 Colo. J. Int'l Envtl. L. & Pol'y 109 p. 115

⁴⁹ Riffle, Adrienne M, 'Resurrecting the International Whaling Commission: Suggestions to Strengthen the Conservation Effort' (2001-2002) 27 Brook. J. Int'l L. 639 p. 647

⁵⁰ Supra, note 48 p. 115

country that agrees to the terms of the ICRW. The IWC currently has 82 member states.⁵¹ One of the functions of the IWC is to pass binding regulations, which form an integral part of the Convention. According to the agreement of ICRW states may object to these regulations and therefore opt out of the binding effect of an amendment by filing a timely objection." The amendment will not be enforced against any member that files a timely objection."⁵² In the IWC there are three committees set up under Article III(4) of the ICRW, the Scientific Committee that provides information and advice on the status, identification and classification of the whale stocks. The Technical Committee that prepares reports and makes recommendations on management principles and technical and practical options for implementation of conservation measures based on the Scientific Committee's advice. The Finance and Administration Committee that is made up of representatives of parties nominated by the Chairman of the IWC. It provides advice to the IWC on financial matters such as expenditure, budgets, members contribution scales, etc.⁵³

The IWC has adopted a New Management Procedure (NMP), designed to set quotas on the grounds of scientific assessments and sustainability. However, it depended on having much more information on whale stocks than was available and by the 1987 it concluded that it would not use the NMP if commercial whaling resumed. The IWC asked the scientific committee to research and promote alternative methods to ensure that future commercial whaling would not endanger whale stocks. In 1994 it was concluded that the Revised Management Procedure (RMP) was the optimal replacement. It establishes a framework to assess the viability of exploiting cetaceans of sustainable harvesting quotas. The procedure seeks to ensure that there are only catch quotas for populations of stocks that are determined to be above fifty-four percent of pre-exploitation population levels. These catch limits will be ascertained by applying the Catch Limit Algorithm model (CLA), the CLA uses data deemed relevant for population modeling by the IWC's Scientific Committee to establish sustainable quotas for discrete stocks of whales. The flaw of these methods are however the unreliability of scientists to ascertain the size of whale populations with any reasonable level of certainty.⁵⁴

The moratorium is a IWC regulation for a zero quota on commercial whaling, at an annual IWC meeting held in London in 1972, it was first brought up but failed to get the necessary

⁵¹ Membership and Contracting Governments, (iwcoffice.org) (link in bibliography)

⁵² International Convention on the Regulation of Whaling (ICRW), Article V paragraph 3

⁵³ Maffei. Maria Clara, 'The International Convention for the Regulation of Whaling' (1997) 12 Int'l J. Marine & Coastal L. 287 p. 292

⁵⁴ Burns. William C, 'The International Whaling Commission and the Future of Cetaceans: Problems and Prospects' (1997) 8 Colo. J. Int'l Envtl. L. & Pol'y 31 p. 55-60

recognition at the time with three-fourths majority vote against zero quota. The request for a moratorium on commercial whaling was presented throughout the 1970's, but with pro-whaling nations in large majority to block such amendments on whale hunting.⁵⁵ Late in the same decade profits for whaling had dropped significantly. Most whaling countries at the time were in for the whale oil, it had been in great demand up until the late 1960's, especially for military purposes, but non whale oil sources were replacing it, and petroleum products became a cheaper alternative. Whaling nations were closing down the industry as whaling became commercially impractical.⁵⁶ Anti-whaling groups had also been launching a massive propaganda campaign to promote to the public that killing whales is wrong as they were endangered mammals and it was immoral to eat them. It led to big recruitment by anti-whaling countries to the IWC, which meant that enough members were to shift the balance of the votes. The IWC then in 1982 set a resolution for a moratorium on commercial whaling which took full effect the season 1985/86.⁵⁷ The moratorium on commercial whaling was established together with the following details in the schedule to the ICRW.10 :

“(d) Notwithstanding the other provisions of paragraph 10 there shall be a moratorium on the taking, killing or treating of whales, except minke whales, by factory ships or whale catchers attached to factory ships. This moratorium applies to sperm whales, killer whales and baleen whales, except minke whales.

(e) 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 modification of this provision and the establishment of other catch limits.”

Despite the moratorium non-member states of the IWC can conduct whaling like Canada, as well as member-states like Japan, Norway and Iceland. They have been for a long time pro-whaling countries, and they have opted out from the moratorium with filing an objection. When the moratorium on commercial whaling was set initially, four whaling countries, Japan, Norway, Peru, and the former Soviet Union (later replaced by Russia), filed objections to it, though Peru soon withdrew its objection. These countries with their quick objections allowed

⁵⁵Kobayashi, Lisa, 'Lifting the international whaling commissions moratorium on commercial whaling as the most effective global regulation of whaling' (2005-2006) 29 *Environ. L. & Pol'y J.* 177 p. 179-180

⁵⁶*Ibid* p. 193-198

⁵⁷ *Ibid* p. 198

them to "opt out" of the moratorium.⁵⁸ With member-states that wish to resume commercial whaling at some point in the future but did not object to it initially when it was set may choose to exercise their right to withdraw from the ICRW under Article 11, as Iceland did in 1992. Then Under the IWC they could then rejoin and resume commercial whaling as Iceland did in 2006, when Iceland set a reservation to Paragraph 10 (e) of the Convention's schedule. In a controversial vote 2002 Iceland was allowed to vote even though it wasn't a member, The results were 19 for Iceland's readmission, 18 against. Thus Iceland, being allowed to vote for itself, gave itself membership in the IWC.⁵⁹ Another possibility is to invoke the doctrine of *clausula rebus sic stantibus*. Article 62 of the Vienna Convention on the Law of Treaties provides that a Party may invoke a fundamental change of circumstances as grounds for terminating or withdrawing from a treaty if:⁶⁰

“(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.”

Another option with conducting whaling despite the moratorium is under special permits and can be found in the aboriginal subsistence whaling exemption and scientific whaling permit.⁶¹ The IWC recognizes subsistence whaling by indigenous people for local consumption, where people naturally base their economies and diets heavily upon these large bodied marine resources and have done so for thousands of years. As why the ICRW incorporated an exemption for aboriginal subsistence whaling from whaling bans, an additional resolution preserving the rights and needs of aboriginal people who are dependant upon whales for nutritional, subsistence and cultural purposes.⁶² The IWC has recognised that aboriginal subsistence whaling is not in the same nature as commercial whaling for the different objectives it has. It is ensured that risks of extinction is not seriously increased when it comes to aboriginal subsistence whaling, maintain stocks at highest net recruitment level and enable harvest in perpetuity appropriate to cultural and nutritional requirements.⁶³ Current

⁵⁸ Schiffman. Howard Scott, 'The Protection of Whales in International Law: A Perspective for the Next Century' (1996-1997) 22 Brook. J. Int'l L. 303 p. 318

⁵⁹ Iceland and her re-adherence to the Convention after leaving in 1992, (www.iwcoffice.org) (link in bibliography)

⁶⁰ Supra, note 54 p. 87

⁶¹ Henderson. Ramsey, 'The Future of Whaling: Should the International Whaling Commission Create a Broadened Cultural Exemption to the Whaling Moratorium for Iceland?' (2004-2005) 33 Ga. J. Int'l & Comp. L. P. 668

⁶² Ibid p. 670

⁶³ Aboriginal Subsistence Whaling, (www.iwcoffice.org) (link in bibliography)

IWC regulations allows aboriginal subsistence whaling for Denmark (Greenland, fin, humpback and minke whales), the Russian Federation (Siberia, gray and bowhead whales), St Vincent and The Grenadines (Bequia, humpback whales) and the USA (Alaska, bowhead and gray whales).⁶⁴ Each one of these national governments have the responsibility to provide the commission with evidence of the cultural and subsistence needs of their people.⁶⁵ These are the the legal principles of aboriginal subsistence whaling. ICRW Schedule, Section, III, Paragraph 13:

1. "For stocks at or above MSY level, aboriginal subsistence catches shall be permitted so long as total removals do not exceed 90 per cent of MSY⁶⁶
2. For stocks below the MSY level but above a certain minimum level, aboriginal subsistence catches shall be permitted so long as they are set at levels which will allow whale stocks to move to the MSY level.
3. The above provisions 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 these provisions on whale stocks and consider modification.
4. For aboriginal whaling conducted under subparagraphs (b)(1), (b)(2), and (b)(3) of this paragraph, it is forbidden to strike, take or kill calves or any whale accompanied by a calf. For aboriginal whaling conducted under subparagraphs (b)(4) of this paragraph, it is forbidden to strike, take or kill suckling calves or female whales accompanied by calves.
5. All aboriginal whaling shall be conducted under national legislation that accords with this paragraph."

Aboriginal whaling has though a vague meaning, so to what extend can the meaning be stretched and who falls under it? The key distinction by the IWC between commercial whaling and subsistence whaling is that the former is conducted for profit, while the latter is conducted for survival and cultural purposes. This distinction creates difficulties in determining who qualifies for the subsistence exception since survival could incorporate both nutritional and economic needs. There may be need to continue whaling to ensure economic survival.⁶⁷ While the original purpose of the subsistence exemption from the whaling ban was recognizing the need to allow societies who depended on whales for food to continue whaling, the exemption now includes whaling for communities interested in reconnecting with their

⁶⁴ Ibid

⁶⁵ Ibid

⁶⁶ MSY stands for Maximum Sustainable Yield.

⁶⁷ Supra, note 61 p. 670

cultural heritage.⁶⁸ The Makah tribe who live in and around Washington US in a small fishing village along the Pacific Ocean have a long history of whaling. They were granted the exemption because they could show a nutritional dependence on whale meat, that the hunt for the whales ought to be rightly understood as an attempt to achieve and maintain a subsistence standard of living, and finally, that the whaling tradition was a significant component of the Makah culture.⁶⁹ Few years later or in 2002, the Makah council slashed funding for the hunts and dissolved their whaling commission. The only explanation given was that whaling itself was not currently a priority. The aboriginal subsistence exception has been very narrowly granted to people who could show both cultural and nutritional subsistence needs but the Makahs are citizens of a wealthy, food-exporting country, thus making whaling not a nutritional issue. Then the Makah applied to the IWC for whaling on aboriginal subsistence grounds and were granted the subsistence exemption based upon the persistent image of their tribe as whalers. In this situation, the Makahs successfully argued that subsistence meant more than the fulfillment of a basic nutritional or even solely economic need. In their case the subsistence exemption has been broadened to include sustaining people's culture.⁷⁰ A country's economic situation constitutes a large part of its culture and the International Covenant on Economic, Social, and Cultural Rights ensures every country's right to preserve their economic and cultural heritage, that could mean a country right for whaling as an economic and cultural means of survival.⁷¹ Iceland could use this as an argument to fit itself within a broadened cultural subsistence exemption of whaling, they could successfully argue that it needs whaling for economic reasons which constitute a large part of its cultural survival. However, a strong argument against this is that whale-watching is now a larger part of its modern culture than whaling with whale-watching providing far greater numbers of new jobs and revenue for local communities around the island and also for the economy of Iceland in general.

Another provision of the International Convention on the Regulation of Whaling allows whaling, under the "scientific permit" exception. Scientific Permits allows a country to hunt and kill whales for scientific purposes and research, Japan and Iceland are the two countries that have been using this provision. Japan has been engaged in scientific whaling since 1987, a year after the IWC moratorium on commercial whaling began. Iceland began scientific whaling in 2003 before resuming their commercial hunt in 2006. These permits to hunt and

⁶⁸ Ibid p. 669

⁶⁹ Ibid p. 672

⁷⁰ Ibid p. 673

⁷¹ Ibid p. 669

kill whales under this provision have been an area of discussion and debate, the Anti-whaling side see it as a loop hole get around the moratorium to conduct commercial whaling with sale of whale meat on an open market from scientific whaling. It creates a conflict of interest with biasing management advice provided by a member nation and its scientific institute. Scientific research and killing whales in the process are issued in Article VIII of the ICRW, which states:

1. “Notwithstanding anything contained in this Convention any 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 to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted.
2. Any whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted.
3. Each Contracting Government shall transmit to such body as may be designated by the Commission, in so far as practicable, and at intervals of not more than one year, scientific information available to that Government with respect to whales and whaling, including the results of research conducted pursuant to paragraph 1 of this Article and to Article IV.
4. Recognizing that continuous collection and analysis of biological data in connection with the operations of factory ships and land stations are indispensable to sound and constructive management of the whale fisheries, the Contracting Governments will take all practicable measures to obtain such data.”

The first paragraph of the regulation (1) is an exception from the moratorium and says that the killing of whales is allowed and legal if a permit has been granted for scientific purposes. Under this regulation (2) it states, whales caught shall be practically processed, the issuing governments, e.g. Japan which is by far the most extensive in scientific whaling see it as permit for commercial sale of the meat taken from scientific whaling.

3.3 Other international treaties and bodies

The North Atlantic Marine Mammal Commission or NAMMCO is another international body for cooperation for conservation, management and study of marine mammals, it is in the North Atlantic.⁷² This pro-whaling organisation was formed because of dissatisfaction with the IWC when they decided at its annual meeting in 1992 to continue the commercial ban on

⁷² Welcome to the North Atlantic Marine Mammal Commission, (www.nammco.no)

whaling.⁷³ The agreement was signed in Nuuk, Greenland on 9 April 1992 by Norway, Iceland, Greenland and the Faroe Islands, and entered into force 90 days later on 8 July 1992. The members of the NAMMCO aim to strengthen and further develop effective conservation and management measures for whales, based on the best available scientific evidence.⁷⁴ Just like for the IWC, within the NAMMCO there is a scientific committee that sets catch limits and advises on conservation based on scientific studies.⁷⁵ One of the things that divides NAMMCO from the IWC is that they acknowledge rights and needs of coastal communities to make a sustainable living from what the sea can provide. The reason e.g. for Iceland to walk out of the organization was the right to utilize their marine resources. The desire to resume whaling is motivated by economic concerns as a large part of Iceland exports are fish and by their claims the minke whales are eating and leading to depletion of their fish stocks.⁷⁶ Iceland was one of the member nations of the International Whaling Commission (IWC) that, in 2006, sponsored the research of St Kitts & Nevis Declaration, it was introduced by the pro-whaling countries and was voted in favour within the IWC, it provides the following:

“ACCEPTING that scientific research has shown that whales consume huge quantities of fish making the issue a matter of food security for coastal nations and requiring that the issue of management of whale stocks must be considered in a broader context of ecosystem management⁷⁷ since eco-system management has now become an international standard.”⁷⁸

The European Union is a economic and political partnership between 27 European countries. The union is based on the rule of law and all treaties by the EU are voluntarily and democratically agreed by all member countries.⁷⁹ Whaling is an issue with the EU, the Commission proposes to its member states to guarantee effective protection of whales at international level. The EU has prohibited their members from whaling and trading with whale products, legislation within the Union on these matters are: Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (the Habitats Directive). Which states that it requires member states to maintain all cetacean species in, or restore them to, a favourable conservation status. All cetacean species are strictly protected

⁷³ Anable, Kaye, 'NAMMCO Defies the International Whaling Commission's Ban on Commercial Whaling: Are Whales in Danger Once Again?' (1993) 6 Transnat'l Law. 637 P. 646

⁷⁴ Supra, note 72

⁷⁵ Supra, note 55 p. 206

⁷⁶ Supra, note 73 p. 647

⁷⁷ Ecosystem management is a process that aims to conserve major ecological services and restore natural resources while meeting the socioeconomic, political and cultural needs of current and future generations.

⁷⁸ St Kitts and Nevis Declaration (www.unesco.org) (link in bibliography)

⁷⁹ Basic information on the European Union, (www.europa.eu) (link in bibliography)

from deliberate disturbance, capture or killing within Union waters. It also prohibits the keeping, transport and sale or exchange, of specimens taken from the wild. Also there is Council Regulation 338/97/EC of 9 December 1996 on the protection of species of wild fauna and flora which bans the introduction of cetaceans into the Community for primarily commercial purposes by implementing the provisions of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). All nations that join the union would have to follow these measures laid down in legislation of the EU. For a country like Iceland that has been contemplating with joining the EU, their whaling may be a huge stumbling block in doing so.

United Nations Convention on the Law of the Sea (LOSC) was signed in December 1982, and entered into force November 1994.⁸⁰ It provides a thorough framework for the regulation of the seas. Article 65 of the convention is what concerns whales and whaling, it 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.”

From this cetaceans have a special protection in the EEZ, Article 120 of the convention also applies to the conservation and management of marine mammals in the high seas.⁸¹ From article 65 it is implied that though you are not a member of the IWC, you have to work with them, if you are a party of the LOSC and accept the IWC as “the appropriate international organizations”. It requires cooperation among states concerned for conservation of these stocks, so opting out of the moratorium could possibly be a derogation of the duty to cooperate in conservation. There seems to be an international support for IWC interpreted as the appropriate international organisation, the USA interpretation of article 65 was outlined in a statement in 1980, “the appropriate/primary international organization referred to in article 65 is the International Whaling Commission.”⁸² Also to date CITES has accepted the argument that the IWC is the international body responsible for the regulation of whaling.⁸³ There has also been a support by this from a pro-whaling country, Iceland interpreted

⁸⁰ Status of the Convention and its implementing Agreements, (www.un.org) (link in bibliography)

⁸¹ United Nations Convention on the Law of the Sea (UNCLOS) (opened for signature on December 10, 1982, entered into force on November 16, 1994)

⁸² Senate, *United States Congressional Serial Set, Serial No. 14881, Senate Executive Reports, Nos. 9-14* p.156

⁸³ CITES (Convention on International Trade in Endangered Species) and the International Whaling Commission, (www.defra.gov.uk) (link in bibliography)

article 65 as the IWC had jurisdiction over whale management, when Iceland was contemplating leaving the IWC in 1991, they felt that IWC membership was irrelevant and that it had to adhere to the IWC quota regulation, a strong argument can be made that this was acknowledged again when Iceland who left the IWC in 1992 to form their own commission re-entered the IWC in 2002.⁸⁴ Japan on the other hand, who initially agreed many years ago the interpretation of article 65 are arguing now that the “appropriate international organisation” is the possibility of several organizations managing cetaceans under LOSC, and they would consider joining NAMMCO or setting up their own organization.⁸⁵

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is an international agreement between governments with currently 175 members to the convention. It was originally drafted in 1963 by the the IUCN (The World Conservation Union) and then agreed by representatives of 80 countries in 1973, in 1975 CITES enter into force. The aim of the agreement is ensuring that any international trade in specimens of wild animals or plants does not threaten their survival. It is an agreement that states adhere to voluntarily. CITES is legally binding on state parties to the convention, which are obliged to adopt their own domestic legislation to implement its goals.⁸⁶ CITES has no independent mechanisms to enforce its regulatory. CITES states in article VIII.1 "the Parties shall take appropriate measures to enforce the provisions of the present convention." CITES works by subjecting international trade in specimens of selected species to certain controls. All import, export, re-export and introduction from the sea of species covered by the Convention has to be authorized through a licensing system. Each party to the Convention must set a management authority which would be in charge of administering that licensing system, and a scientific authority that advises on the effect of a trade on the status of the species.⁸⁷ In the convention animals are divided into three groups, which are listed in separate appendix and each of these group marks how endangered the animal is and how much protection they need. In appendix I there are species which are threatened with extinction and need the highest protection with trading specimens of these species permitted only in exceptional circumstances, which are listed in article III of the Convention. Appendix II includes species not necessarily threatened with extinction, but in which trade must be controlled in order to avoid utilization incompatible with their survival. Export permits for appendix II are listed in

⁸⁴Supra, note 82 p.157

⁸⁵Ibid p.156

⁸⁶ What is CITES? (www.cites.org) (link in bibliography)

⁸⁷ Ibid

article IV of the Convention. Appendix III contains species that are protected in at least one country, which has asked other CITES Parties for assistance in controlling the trade.⁸⁸ The Convention approach is to restrict listings on appendix II to species which are not hunted at a level ensuring their continued existence, international trade will not be impeded if a species falls within the population or range measurements associated with Appendix II AND III.⁸⁹

All species of whales managed by the International Whaling Commission (IWC) are listed in appendix I of CITES (except the population of West Greenland minke whales *Balaenoptera acutorostrata*, which is included in appendix II). No whales are included in appendix III.⁹⁰ Concerning whale issues article XV.2.b. of the CITES states the follow:

“ For marine species, the Secretariat shall, upon receiving the text of the proposed amendment, immediately communicate it to the Parties. It shall also consult inter-governmental bodies having a function in relation to those species especially with a view to obtaining scientific data these bodies may be able to provide and to ensuring co-ordination with any conservation measures enforced by such bodies. The Secretariat shall communicate the views expressed and data provided by these bodies and its own findings and recommendations to the Parties as soon as possible. ”

CITES implies cooperation with the IWC when it states that it shall consult inter-governmental bodies having function in a relation to those species, which is the IWC on this subject, which is important for effective management of whale species. As with most typical international treaties, e.g. like with the IWC you can opt out of a binding effect of an amendment. CITES has this option, article XXIII states:

“ 1. The provisions of the present Convention shall not be subject to general reservations. Specific reservations may be entered in accordance with the provisions of this Article and Articles XV and XVI.

2. Any State may, on depositing its instrument of ratification, acceptance, approval or accession, enter a specific reservation with regard to:

(a) any species included in Appendix I, II or III; or

(b) any parts or derivatives specified in relation to a species included in Appendix III.

⁸⁸ How CITES works, (www.cites.org) (link in bibliography)

⁸⁹Eldridge. Kevin, 'Whale for Sale?: New Development in the Convention on International Trade in Endangered Species of Wild Fauna and Flora' (1994-1995) 24 Ga. J. Int'l & Comp. L. 549 p. 563

⁹⁰ Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (opened for signature in 1973, entered into force on 1 July 1975)

3. Until a Party withdraws its reservation entered under the provisions of this Article, it shall be treated as a State not a Party to the present Convention with respect to trade in the particular species or parts or derivatives specified in such reservation. ”

That would mean a state could exempt themselves from rules promulgated for species regarding to listing of appendix I, II, III. Norway, Iceland and Japan have ratified CITES but have reservations to the decision to list the minke whale on Appendix I, which prohibits international trade. Thus these countries are not bound by this trade prohibition and have been known to export whale products.⁹¹

4. Whaling and what the future holds

In an historic vote on 18.june 2006 the International Whaling Commission confirmed the moratorium on commercial whaling was no longer necessary.⁹² Members of the international commission which regulates whaling voted on The St Kitts and Nevis Declaration by 33 in favour to 32 against the declaration to support commercial whaling. Japan was joined by other countries who have been pushing to lift the ban as a way to protect fish stocks from whales and give their small countries food security. It is worth mentioning that Japan increased aid to countries such as Belize, Mali, Togo, Gambia which were recent members of the IWC and that Japan gave \$300m to a string of Caribbean islands, ostensibly to develop their fishing industries. The group said the resolution was needed to force the IWC to take up its original mandate of managing whale hunts, not banning them altogether. But still the Pro-whaling countries need 75% of votes in the IWC to end the moratorium all together.⁹³ Till this day the whaling moratorium still holds, but this clearly shows a big step forward for pro-whaling countries towards their aims to end the whaling ban, and to quote Rune Frovik secretary of the Norwegian pro-whaling lobby the High North Alliance "This is historic for the first time in more than two decades the Whaling Commission expresses support for commercial whaling and this shows the power balance is shifting".⁹⁴

Australia has proceeded before the International Court of Justice against the Government of Japan for alleged breach of international obligations concerning whaling. Australia claim that Japan's continued pursuit of a large scale programme of whaling under Special Permit in

⁹¹ Japan approves whalemeat import, (news.bbc.co.uk) (link in bibliography)

⁹² Whaling Commission Condemns Moratorium, (www.icrwhale.org) (link in bibliography)

⁹³ Whalers secure crucial vote win in bid to overturn ban, (www.guardian.co.uk) (link in bibliography)

⁹⁴ Ibid

the Antarctic is in breach of obligations assumed by Japan under the International Convention for the Regulation of Whaling (ICRW), as well as other international obligations for the preservation of marine mammals and marine environment.⁹⁵ The case is pending at the ICJ as both Australia and Japan have handed in written proceedings, the International Court of Justice has reserved the subsequent procedure for further decision.⁹⁶ This will be the first case before the ICJ that will test the legality of whaling.

A method worth mentioning to profit from whales and to enjoy them as well is whale watching and the perspective that whale is worth much more alive than dead. Between 1991 and 2008, the number of whale watchers grew from 4 million to 13 million, making it one of the fastest developing tourism industries.⁹⁷ With competitive tourism industry it is critically important to maintain a country's tourism image. A pro-whaling country support for whaling may detrimentally affect its tourism industry because of tourists' negative attitudes toward whaling. The size and rapid growth of the industry has led to complex and continuing debates with the whaling industry about the best use of whales as a natural resource. These questions concerning if whale watching may be the way to maximize economic benefits, or if whales cause depletations of fish stocks among other in these highly debatable topic will though not be answered here.

5. Concluding remarks

With the zero-quota catch (moratorium) on whales and more than 26 years have passed there are still differences in opinions by pro-whaling and anti-whaling countries and it creates many conflicts that leads to a deep divide within the members of the IWC. But there was a fundamental difference in these whaling countries, those nations that gave up whaling principally whaled for oil and threw everything else usable from the animal. Whaling countries today want to be able to harvest their own natural resources within their EEZ, that form a integral part of their history and culture.

Whales were being over exploited and with awakening of environmental issues these creatures were saved from extinction. While the fact remains that none of the nations want the whales to become extinct, they argue that whales can be harvested without depleting the stocks. Pro-whaling countries are showing that environmental principles of sustainable

⁹⁵ International Court of Justice (ICJ), Press release No. 2010/16 1 June 2010

⁹⁶ International Court of Justice (ICJ), Press release No. 2012/18 18 May 2012

⁹⁷ Promoting whale watching, (www.ifaw.org) (link in bibliography)

development and the precautionary principle are consistent with the terms of the ICRW which they fail to go by. These failures of the IWC to apply these principles only contributes to its declining credibility among states which encourages the development of other international organization, e.g. NAMMCO.

Members of the IWC can exercise their right to withdraw from the ICRW under Article 11, and States outside of the IWC like Canada can conduct commercial whaling, members of the IWC that have reserved the moratorium decision can do the same, if not by a timely objection, it can withdraw from the Convention and rejoin with reservation (with necessary support). Most states do in fact oppose whaling and have made public pronouncements to that effect, but the persistent objectors are the main reason that whale preservation is not yet customary international law.

The pro-whaling countries are growing larger in numbers and it is merely a matter of time when the moratorium on commercial whaling will be lifted. But at the time the ICW is powerless to enforce their regulations, reservation to the ICRW and other international treaties are possible, states can exempt themselves from rules promulgated for species regarding to listing of appendix I, II, III of International Trade in Endangered Species of Wild Fauna and Flora (CITES), whaling nations have therefore to work in good faith with the international scheme to protect the whales. As whales are a *res communis* resource as states in UNCED held in 1972, no nation, or group of nations, has the right to exploit them for economic gain and that their actions can be harmonized with the aspirations of the rest of the world.

With whale watching becoming so highly profitable, it may be the future for many nations and it does not seem ethical wanting the whale to approach the boat for enjoyment and at the same time kill them, as pro-whaling nations are exercising. But they argue that whales are depleting the fish stocks with eating large quantities of fish and for full economic benefits they see that whale watching and whale hunting in a sustainable development for preserving fish stock can go together.

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