

Whose Whales? Developing Countries and the Right to Use Whales by Non-Lethal Means

José Truda Palazzo, Jr.¹

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Abstract

While the clash between whaling and anti-whaling interests in international fora, especially the International Whaling Commission (IWC), has escalated over the last two decades, very little attention, if any, has been paid to the active participation of developing country representatives and agencies (both governmental and non-governmental) in the issues surrounding whale conservation, research and sustainable use. The failure to recognize the interests of developing nations in non-lethal use of whales, as well as their marginalization in the IWC decision-making process, has contravened their sovereign rights and thwarted efforts to develop a solid consensus on many critical issues.

Keywords

Brazil; International Whaling Commission; International Convention for the Regulation of Whaling; non-lethal use of whales; developing countries.

1. Introduction: Is the International Whaling Commission a Forum Where Interpretation of the Law Cannot Evolve?

The 1946 International Convention for the Regulation of Whaling (ICRW),² which entered into force in 1948 and established the International Whaling Commission (IWC) as its management body, can hardly be portrayed as a conservation success story. ‘During the first three decades of the ICRW’s operation, commercial whaling nations consistently ignored the recommendations of the IWC’s Scientific Committee and opted for wholly unsustainable quotas for most species of larger whales.’³ However, in the 1970s and 1980s, many pro-conservation nations joined the IWC and many parties, including both developed and developing nations who had previously contributed to the decimation of stocks, adopted pro-conservation positions.⁴

Since the establishment of the indefinite moratorium on commercial whaling⁵ in 1982 (which entered into force in 1986), the Plenary of the IWC has been freed from the political allocation of kill

¹ Coordinator of the Brazilian Right Whale Project and Member of the Federal Working Group on Aquatic Mammals (GTEMA/IBAMA), Brazil, PO Box 5087, 88040-970 Florianópolis, SC, Brazil. E-mail: Brazilian_wildlife@zaz.com.br

² International Convention for the Regulation of Whaling, 2 December 1946, 161 U.N.T.S. 72 (entered into force 10 November 1948), hereafter, “ICRW.”

³ William C. Burns, *The International Whaling Commission and the Regulation of the Consumptive and Non-Consumptive Uses of Small Cetaceans: The Critical Agenda for the 1990s*, 13 WIS. INT’L L.J. 105, 109 (1994). Some nations, most prominently, the Soviet Union, also illegally exceeded the quotas established by the IWC during the first three decades of its existence. “[F]rom 1948 to 1973, the Soviet Union killed 48,477 humpback whales rather than the 2,710 it officially reported to the IWC.” David D. Caron, *The International Whaling Commission and the North Atlantic Marine Mammal Commission: the Institutional Risks of Coercion in Consensual Structures*, 89 AM. J. INT’L L. 154, 171 (1995).

⁴ William C. Burns, *The International Whaling Commission and the Future of Cetaceans: Problems and Prospects*, 8 COLO. J. INT’L ENVTL. L. & POL’Y 31, 42-45 (1997).

⁵ The amendment provides:

quotas loosely based on scientific advice, and has increasingly moved the organization towards a more comprehensive view of whale management. Issues such as whale-watching, contaminants in the marine environment and climate change have received extensive consideration in recent years. Sanctuaries have been established in the Indian Ocean and the Antarctic regions to protect certain species and stocks from commercial exploitation and to foster research.

A minority of member nations, especially Japan, has loudly opposed the shift in the IWC's priorities, characterizing many recent decisions as illegal departures from the 1946 Convention.⁶ As the Convention has no dispute settlement mechanisms, conflicts that arise from different interpretations of the ICRW are likely to remain unresolved. However, it may be useful to consider the issue in light of the customary practice of nations. It is widely accepted in legal regimes of Latin origin that the interpretation of legal texts must be done in view of their context in time to "define the true meaning and scope of the legal norm."⁷ Thus, "the Law," whether domestic or international in scope, does not exist in a vacuum, but is a socially mediated construct.⁸ For example, to apply the Brazilian Civil Code of 1916, a Brazilian court must take into account not only the text of the law and the intent of its drafters, but also the current sociocultural context, lest the law be applied in an entirely outdated - and socially inappropriate - manner.

Thus, defenders of an interpretation of the 1946 Convention that limits the ambit of the "interests of the consumers of whale products and the whaling industry"⁹ to *whale killing* and its products violate the rules of treaty construction. The world has changed enormously since the adoption of the 1946 Convention, both in environmental and sociocultural terms. There has been a corresponding evolution of the IWC's management strategies, including adoption of the Precautionary Principle, as well as acknowledgement of the interests of those who oppose consumptive uses of cetaceans.

If the modern functioning of the IWC, as the proper forum for the management of whales, can incorporate these developments, must we read "*whaling industry*" as merely the sector that hunts and kills whales - the only use of these animals which was widespread in 1946? Would not it be more proper to construe the term as encompassing commercial exploitation/use of whales through all possible means, including non-lethal? Is not the right to profit from whale-watching a legitimate claim, and are not the consumers of this growing industry legitimate "consumers of whale products"¹⁰ whose rights may be protected by the IWC? It is our opinion that indeed they are, and that the IWC itself, by regularly

[c]atch limits for all 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.

Paragraph 10(e), IWC Schedule, Feb. 1983, at 13.

⁶ One supporting document for this view is a paper by R.L. Friedheim, submitted by the Government of Japan to the 48th Meeting of the IWC, Paper IWC/48/27, *The Executive Summary of the International Legal Workshop*. The document contains several factual errors, including references to the Vienna Convention on the Law of the Treaties, which expressly cannot apply to the ICRW, as Article IV of the Vienna Convention forbids any retroactive application (the Vienna Convention only entered into force in 1980, 32 years after the ICRW). The older treaty that could apply to the case, the Havana Convention, only contemplates a process of formal interpretation of a convention text in writing if there is general agreement among member States that this is necessary, something that clearly is not the case at the IWC.

⁷ A.B. BETTIOL, *INTRODUÇÃO AO DIREITO - NOÇÕES DE PROPEDEÚTICA JURÍDICA* (1989).

⁸ A.F. MONTORO, *INTRODUÇÃO À CIÊNCIA DO DIREITO*, Revista dos Tribunais (1994).

⁹ ICRW, *supra* note 1, at art. V. 2(d).

¹⁰ *Id.*

discussing the issue, adopting Resolutions¹¹ and establishing a whale watching study group in its Scientific Committee, has already asserted its jurisdiction and responsibility in this context.

This evolution, which was spearheaded by the United States, New Zealand, and the Netherlands as leaders of the pro-conservation block known as the “Like-minded Group”, has been supported and advanced by developing countries that are members of the IWC. However, as we will see below, participation by developing countries in formulating policy, and their right to continue their own path as regards whale management, is currently imperiled by developed countries, both whaling and non-whaling alike.

2. From Whaling Colonies to Neglected Partners

Developing countries have participated in the IWC since its inception.¹² However, their role in the whale killing that took place until the 1980s was shaped and directed from far beyond their geographical, political, and social boundaries. In Latin America, this was established well before the 1946 Convention was drafted; North American and European fleets decimated Southern Right Whales (*Eubalaena australis*) in the Western South Atlantic as early as the 18th century, and Norwegian whalers operated earlier in the 20th century in Argentinean territory.

Japanese companies took control of the exploitation of whales off South America in three countries, namely Chile, Peru and Brazil.¹³ Chile and Peru were “pirate” whalers for many years, consistently refusing to join the IWC, while supporting Japanese positions.¹⁴ Brazil did likewise, leaving and rejoining the IWC under the advice of Japan. When Norwegian whalers abandoned their operations off Argentina, Japan, a nation hitherto entirely absent from the waters of South America, asserted virtual hegemony over whale populations that bred around the continent.

In most of these cases, whaling concerns took great advantage of the fact that Latin American countries were governed by dictators or military juntas whose interests were more easily satisfied than would have been the case if the company had to negotiate concessions under a democratic and transparent system. Under this political environment, the killing of whales in disregard of the opinions of the IWC’s Scientific Committee was commonplace. Brazil more than once filed objections to established quotas and set its own catch limits to satisfy the Japanese-owned operations off its Northeastern coast.¹⁵ The political influence of the Japanese-owned companies, however, suffered a death blow when the winds of democracy swept over South America and the old regimes were toppled through popular elections. In Brazil, the first civilian President elected since 1964, José Sarney, took office in 1985. In that same year, he imposed a moratorium on the killing in Brazil and later made the ban permanent through a federal Law.¹⁶

3. The Awakening of National Interests: Consistent at Home but Ignored Abroad

¹¹ See 45 REP. INT’L. WHALING COMMISSION 32-33 (1995), and IWC Resolution 1994-14.

¹² It deserves to be noted that it was a memorandum written in 1925 for the League of Nations by an Argentinean diplomat, Mr. José León Suarez, which first formalized the concern with the continued decline of whale stocks and the need to protect them from abuse.

¹³ N. Carter & A. Thornton, *Pirate Whaling 1985 and a History of the Subversion of International Whaling Regulations* (1985).

¹⁴ See Small, *supra* note 4, at 72 & 156.

¹⁵ For details on the Japanese enterprise in Brazil, see J.T. Palazzo Jr. & L.A. Carter, *A Caça de Baleias no Brasil*, Porto Alegre, AGAPAN (1983).

¹⁶ Federal Law 7,643 of 18 December 1987.

Many ex-whaling developing countries have gone beyond merely banning the killing of whales to the establishment of sophisticated management regimes. In Brazil, the advent of governments free from Japanese economic and political pressure has led to the development of policies to foster research and promote proper management and conservation of cetaceans. In public universities and non-governmental institutions, cetacean research and conservation groups flourish, and there are currently about a dozen groups that participate regularly in scientific symposia and publish scholarly papers in the field. Two permanent research projects related to large whales have been in existence for several years, and a third one is being established with official support.¹⁷ The government has incorporated input from these groups into the formulation of government policy, including the Brazilian National Report to UNCED in 1992.¹⁸ Moreover, the establishment of the Special Working Group on Aquatic Mammals (GTEMA) by the National Environmental Authority (IBAMA/Ministry of the Environment) in 1994 has facilitated the creation of a National Action Plan for Research, Conservation and Management of Aquatic Mammals.¹⁹ GTEMA is a permanent information exchange and monitoring unit composed of both governmental and non-governmental members. It oversees the implementation of the Action Plan and provides technical advice to the federal government, including its Environment, Fisheries and Foreign Affairs branches, on management and policy issues related to cetaceans and other marine mammals.

It is laudable that the government has made this commitment to cetaceans in a country suffering from chronic economic and social problems, and with a shockingly small budget for environmental issues. It must be emphasized, however, that the apparently disproportionate interest in formulating policy and taking action regarding cetaceans in Brazil and other developing countries is not based on philosophical or aesthetic considerations. Any policy based solely on these grounds would not survive in a nation beset by problems that are more down-to-earth. Rather, the conservation of cetaceans is viewed as one mechanism to help Brazil achieve the elusive objective of sustainable development.

The veritable renaissance in Brazil of scientific research on cetaceans through non-lethal means was paralleled by the birth of a whale and dolphin-watching sector. Free from the pressures of pro-whaling foreign interests, government agencies and private tour operators started to realize that the gigantic area covered by Brazilian jurisdictional waters, where cetaceans large and small were either abundant or at least making a sustained comeback, could provide direct and immediate profits through ecotourism. Moreover, it was realized early in the planning process that a significant portion of these profits could be earned by local communities where other traditional ways of life, such as artisanal fishing, were already suffering from severe declines – primarily attributable, again, to foreign fishing interests. Currently, whale and dolphin-watching enterprises are firmly established in several areas along the coast of Brazil,²⁰ and their economic and social importance has been emphasized in reports by the Government of Brazil to the IWC, Opening Statements and frequent Plenary interventions by Commissioners in recent years. To ensure that this development is actually sustainable, and that no harm will result to cetacean populations, IBAMA

¹⁷ Namely, the Right Whale Project working in Southern Brazil, the Humpback Whale Project covering the Abrolhos Banks region off Bahia State, and the recently created Minke Whale Project, which is surveying the former Japanese whaling grounds off Paraíba State in the Northeast.

¹⁸ “In 1987, the killing, capture or any form of intentional harassment of any cetacean in Brazilian jurisdictional waters was forbidden. This determination consolidated the view that cetaceans are a resource to be indirectly exploited, with ecological, scientific and even tourist values that surpass their utilization as a source of animal by-products”. BRASIL. *O Desafio do Desenvolvimento Sustentável*. Brasília, Federal Government of Brazil, 1991, at 118.

¹⁹ BRASIL.. *Mamíferos Aquáticos do Brasil - Plano de Ação*. Brasília, Instituto do Meio Ambiente e dos Recursos Naturais Renováveis, 1997.

²⁰ Such as Abrolhos in the State of Bahia (Humpback Whales), the Imituba region in Santa Catarina State (Southern Right Whales) and the National Marine Park of Fernando de Noronha in the oceanic archipelago named likewise (spinner dolphins).

established the National Aquatic Mammals Research and Management Center in late 1998, and federal legislation has been constantly updated.

The proliferation of research groups and whale -watching operations has both led to another, less palpable, but by no means less important social phenomenon: *the development of strong public recognition of the need to protect coastal and marine ecosystems*. In developed countries, the creation of such awareness and its reinforcement through public campaigns is taken for granted. However, such initiatives are scarce in developing countries because governments and NGOs usually lack the funds for sustained environmental awareness campaigns. By acting as flagship species, highlighted by the work of research/conservation groups, cetaceans are providing a focal point of enormous importance to educate Brazilian society about the oceans, their ecology and their conservation needs. This is especially important for coastal communities. The educational aspects of whale watching have been recently highlighted by an international panel of experts that included Brazilian representatives.²¹

Cetaceans protected from slaughter and valued as part of the natural heritage therefore provide extremely important *products and services* to developing nations like Brazil, namely:

- the *advancement of biological and oceanographic sciences*;
- *direct economic gain* through whale and dolphin-watching, and the distribution of this gain in a *socially equitable manner*;
- the creation of *educational and public awareness opportunities* that help shape individual and community perceptions of the marine environment.

The rights of local, traditional coastal communities in Brazil and other developing countries to enjoy these benefits, and ensure their existence for future generations, are at least commensurate with that of aboriginal peoples to harvest whales. In fact, it can be argued that these interests are more legitimate than aboriginal rights advocated in the IWC in recent years. Instead of trying to maintain, or even more anomalously “revive,” whale-killing traditions, heavily subsidized by developed country governments and agencies, these developing country communities are building sustainable ways to use whales that can be continued well into the future if properly managed.

The protection of these social values are undeniably a legitimate right of sovereign States, and must thus be recognized both by the IWC, and other international regimes and their member countries. The fact that no whales are being killed to achieve these objectives does not diminish the sovereign rights of States to assert and maintain sustainable uses. Rather, using cetaceans non-lethally during part or the entirety of their natural life cycle is a *management option* that not only promotes sustainability, but also facilitates their use in the same manner by other nations and peoples.²²

The history of whaling, especially the widespread establishment of satellite whaling colonies in the Southern Hemisphere by distant nations, makes it clear that the positive social developments engendered by non-lethal use of cetaceans are far from stable and safe. Plagued by economic distress, developing countries remain dangerously vulnerable to external pressure to change their domestic policies, and thus sacrifice their sovereignty, as the recruitment of small developing island States to form a pro-whaling bloc in the IWC clearly demonstrates.²³ Brazil, and other countries that choose to use cetaceans non-lethally for

²¹ IFAW, WWF & WDCS, *Report of the International Workshop on the Educational Values of Whale Watching*, (1997).

²² Southern Right Whales (*Eubalaena australis*), of which individuals in the same population are viewed in whale-watching both in Southern Brazil and in Argentina in alternate individual migration cycles, are a concrete example.

²³ See IFAW/ECCEA, *Japan's Strategy to Control the World's Living Marine Resources - A Case Study: the Eastern Caribbean* (1997).

the various objectives described above have the right to participate in the deliberations of international fora such as the IWC to protect their interests.

4. Questionable Representation and Poor Cooperation

The development of international policy to protect these sovereign rights has been actively pursued by Brazil. Both in the IWC and in the Convention on Trade in Endangered Species²⁴ it has reasserted its view that mankind as a whole, and developing countries in particular, are best served by the non-lethal use of cetacean resources. However, there seems to be, at least in the IWC, a broad misunderstanding of the policy pursued by Brazil and several other (albeit less vocal) developing countries.

The United States, the United Kingdom, New Zealand, and Australia are the undisputed leaders of the Like-Minded bloc, with the Netherlands strongly supporting the bloc's positions. The policies of these countries reflect a developed country perspective. Developing country members of the Bloc, such as Argentina, Brazil and Chile, are treated with diplomatic deference and courtesy, but a sense of benign disinterest in their discrete agendas pervades the Bloc's proceedings.

Struggling to implement their own policies, pro-conservation developing countries at the IWC are therefore largely taken for granted. Their participation in the inner workings of the IWC is hampered by their limited ability to attend intersessional meetings due to budgetary constraints, but mostly by what seems to be a lack of interest by developed nation members to forge a more comprehensive and respectful alliance within the IWC. The rather tepid support of the Like-Minded bloc (with the exception of the United States) for the Brazilian interest proposal for a South Atlantic Whale Sanctuary,²⁵ is the most recent and visible expression of disregard for the agenda of developing State members. This may impede efforts to break the current logjam in the IWC as recently suggested by Fletcher.²⁶

Relations with non-governmental organizations (NGOs) from developed nations have also been troubled. Issues such as the humaneness of whale-killing and funding for research on the impacts of environmental change on cetaceans are at the top of the agenda of environmental and animal rights NGOs in the developed world. However, while these issues are relevant to the non-lethal use of whales in developing nations, far more important is funding for basic research and monitoring, as well as support for the development of whale-watching enterprises. Unfortunately, developed nation NGOs view developing country delegates at IWC meetings as little more than votes to support the NGOs' agendas. Consequently, developing country delegates have become wary of the methods of many NGO observers in international fora.²⁷

5. The "Irish Compromise": Another Deal Between the Big Few?

²⁴The Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243, ELR Stat. 40336.

²⁵Article V.1 (c) of the ICRW, *supra* note 2, which states that "The Commission may amend from time to time the provisions of the Schedule by adopting regulations with respect to the conservation and utilization of whale resources, fixing . . . (c) open and closed waters, including the designation of sanctuary areas . . ."

²⁶Kristin Fletcher, *The 49th Annual Meeting of the International Whaling Commission: prelude to the next fifty years*, 1(1) J. INT'L WILDLIFE LAW & POL'Y 134-142 (1998).

²⁷NGOs such as the UK-based Whale and Dolphin Conservation Society have earned respect in many parts of the developing world for their support of cetacean conservation projects designed and operated solely by nationals of developing countries.

The IWC finds itself in a deadlock: the commercial whaling moratorium cannot be lifted because member States cannot agree on measures for supervision and control of any future commercial whaling operations. In the meantime, catches of minke whales, both by Norway under its reservation to the moratorium²⁸ and by Japan under the rubric of “scientific whaling,”²⁹ are on the rise.

In order to prevent further erosion of the IWC’s authority, which has been increasingly challenged by the Japanese and Norwegian governments and their allies, the IWC’s Chairman, Mr. Michael Canny from Ireland, has proposed for discussion what has become commonly referred to as the “Irish Compromise.” The proposal includes, *inter alia*, a provision for the resumption of commercial whaling in coastal areas, in exchange for a *de facto* whale sanctuary on the high seas, and the cessation of “scientific” whaling.³⁰

There are many side issues related to the Irish proposal that are not relevant in the context of this paper. However, from the perspective of the developing nations there is the grave threat that the compromise would open the floodgates for the establishment of new ‘whaling colonies’ worldwide. Ignoring the fact that the vast majority of coastal whale populations are neither in Japan’s nor in Norway’s waters, but in the Exclusive Economic Zones of developing countries, could prove to be the most serious mistake made by the IWC since the endorsement of floating-factory whaling in the Antarctic.

Endorsement of coastal whaling by the IWC might result in foreign interests seeking to bring pressure on coastal states to weaken domestic conservation and management policies. This could undermine decades of concerted efforts by some developing countries to promote whales as vectors for sustainable development.

To achieve real progress, the “Irish Compromise” must be comprehensive enough to acknowledge the independent concerns of pro-conservation - but largely non-aligned - developing countries. Mr. Canny has repeatedly declared his intent to engage in transparent dialogue. However, his hasty decision to discuss the matter intersessionally in February 1998, despite being strongly requested not to do so by Brazil and other developing countries, did raise doubts as to whether this process would indeed be conducted in a manner consistent with his stated intent.

6. Conclusion

Despite the steady stream of acrimonious statements by IWC parties who wish to harvest whales, it is quite clear that the IWC as a management body has imbued the term ‘whaling’ with contemporaneous meaning and has taken responsibility for ensuring that all uses of whales are sustainable. Non-lethal uses have been accorded equal or greater importance than the killing of whales, and many member nations (developed and developing alike) have taken advantage of the benefits of non-lethal use of cetacean resources. A resumption of commercial whaling might benefit a handful of developed nations, but it would seriously jeopardize the gains of developing countries that have opted for non-lethal sustainable use of cetaceans.

There were several favorable developments at the 51st Meeting of the IWC in Grenada this past May, including strong support by the United States for both the South Atlantic Whale Sanctuary proposed by Brazil and enhanced bilateral cooperation in management issues, as well as acknowledgment by the Chairman about the potential threats of coastal whaling. On the other hand, the intention of whaling nations to propose downlisting of several species and populations of large whales at the next year’s CITES

²⁸ Using Article V.3(a) of the ICRW, *supra* note 2.

²⁹ Using Article VIII of the ICRW, *id.*

³⁰ For an extensive discussion of the Canny proposal, see William C.G. Burns, *The Forty-Ninth Meeting of the International Whaling Commission: Charting the Future of Cetaceans in the Twenty-First Century*, 1997 COLO. J. INT’L ENVTL. & POL’Y Y.B. 67, 68-70.

meeting in Kenya emphasizes the ongoing threat to whales is quite real. It also demonstrates that a solution that accommodates the interests of both whaling interests and those who oppose such operations is not in the offing in the foreseeable future.

The schizophrenia that whale-killing interests try to impose upon the IWC and its identity as a management body will grow if efforts at compromise deny pro-conservation developing countries full participation. It is critical that developed parties of the IWC take into consideration the interests of developing nations and seek to develop a consensus that will strengthen the conservation agenda of the IWC in the next century.

Acknowledgments

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