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Marine Pollution Bulletin 46 (2003) 924–926

MARINE
POLLUTION
BULLETIN

www.elsevier.com/locate/marpolbul

Correspondence

Is the IWC finished as an instrument for the conservation of whales and the regulation of whaling?

The International Whaling Commission (IWC) is uniquely charged under the UN Convention on the Law of the Sea, together with *Agenda 21* (the basic document from the UN Conference on Environment and Development, held in Rio, 1992), with the conservation of the Highly Migratory whales—in all the waters they inhabit—and the management of all whaling. Controversy usually circles around differences of opinion about the practices of watching, studying and protecting whales in contrast with enjoyment of the profits from killing and selling them.

A Special Meeting of the IWC in Cambridge, 14 October, has made a move which threatens the future of whales and of the IWC itself by further undermining the Commission's ability to take decisions that are binding on its Member States. This Meeting was primarily called for by the Chairman of the IWC and the governments of USA and Russia, to secure agreement on an aboriginal-subsistence quota of bowhead whales traditionally caught by their indigenous peoples in the Arctic, for 2003 summer whaling season in 2003.

The International Convention for the Regulation of Whaling 1946 (ICRW) has three “escape routes” by which whaling countries from time to time exempt themselves from such decisions. These are: using a strictly time-limited process, set out in the ICRW, for “objection” to otherwise binding decisions; leaving the IWC (an action taken by Norway in the 1960s; and engaging in unregulated commercial whaling under the guise of scientific research done by several countries, most notoriously and on large scale by Japan and Iceland). Another—a combination of the first two—has now been added: leave the IWC and rejoin later with a “reservation” to decisions to which one's government had not previously objected. A precedent has now been created opening the way even for *new* countries to accede to the ICRW but in doing so repudiate the regulations already enacted under it—something that is certainly not permitted by the ICRW.

At the annual meeting of the IWC in June, 2002 in Shimonoseki, Japan, Japan had used the muscle it has acquired through purchase of the votes of a clique of small nations, to block adoption of a *bowhead* quota. The Chairman of the IWC, and United States and

Russian governments, called for the Cambridge Meeting to try to put this right. At the opening of the meeting the Government of Norway contested its validity on the grounds that it had been called for the sole purpose of overturning a decision made by the Commission at its regular annual meeting earlier in the year. No Government supported Norway in this extraordinary claim. In fact the whole point was that the annual meeting had been unable to reach a decision, because of the procedural games played there. Interestingly there is a precedent for such an action: in 1964 no quota for pelagic baleen whaling in the Antarctic had been agreed at the annual meeting; a special meeting was called, by Norway and other whaling nations, where a quota was agreed by consensus. The US and Russia got the consensus on a quota they desired, but at the price of voting for the first time in support of a resolution put forward by Japan calling for a “special allocation” of minke whales for its *commercial* coastal whalers.

Japan has for many years demanded such an “allocation”—outside the rules laid down in the ICRW—but that has always been rejected because it was clear that acceptance of it by a simple majority vote (instead of by the three-fourths majority required by the Commission's rules for making changes to the Schedule of the ICRW which specifies catch limits and other regulations) would undermine the existing moratorium on commercial whaling, and even open the way to important decisions being adopted or reversed casually. (In fact Japan has made a practice of seeking to have resolutions adopted by simple majority which would appear to bind the IWC to actions which formally require a three-fourths majority, even though such a tactic is specifically prohibited by the IWC's rules.)

In Cambridge, despite the defection by the United States, and despite the Swedish Chairman allowing the delegation of Iceland to vote (see below), the Japanese demand was again rejected; it will undoubtedly be made again when the IWC next meets, in May 2003 in Berlin.

Although the Cambridge meeting had been called specifically to decide on the bowhead quota, most of it was taken up with a new item, added to the agenda at the last moment, concerning the acceptance of Iceland as a voting Member of the IWC. At the 2001 meeting, in London, Iceland's application for renewed Membership (Iceland left the IWC in 1992) was rejected; it failed to secure a simple majority vote in favour. This was because Iceland included in its application a “reservation”

denying the moratorium on commercial whaling, which it had accepted when that measure was adopted in 1982. The ICRW does not allow any such *conditional* membership; hence the most unusual voting process concerning an application for IWC membership. The London decision that Iceland's application was unacceptable was upheld at the Commission's next regular meeting, in 2002.

So, as far as most countries were concerned Iceland was not a voting Member when it turned up in Cambridge, and one would have expected that this would determine the voting practice now to be followed by the Chairman. However, a minority of countries take the view that the IWC is not itself legally competent on the matter of accession to the ICRW. As far as *they* were concerned Iceland was already a full Member in 2001. The United States, as the Depository Government of the ICRW, had shirked its responsibility to offer a view on whether or not Iceland's letter of conditional accession was valid.

The discussion of this issue in Cambridge was a morass of procedural motions. Without going into the details of these¹ the upshot was that the Chairman proceeded as if the IWC *does* have legal competence to resolve controversial constitutional questions—no other legally competent forum is on offer—and called votes. But, paradoxically, in doing so he called upon Iceland itself to vote, including in the crucial roll-call on its own admission. It was this vote, together with the support of the Chairman's deputy, the Alternate Commissioner for Sweden, that led, by default, to the admission of Iceland being ostensibly upheld by a majority of one vote, with its "reservation" apparently tolerated. The other Nordic countries—that is Norway, Denmark and Finland—all voted with Sweden and Iceland, confirming the purely political—not legal—nature of this argument in their eyes. It is worth noting that ten of the IWC's current Members were absent from the Cambridge meeting—presumably not expecting that constitutional matters would be deliberated there—and two more had no voting rights, being in arrears with their payments.

Iceland's renewed application had been accompanied by a declaration that it would not begin whaling for several years or until the IWC has adopted the Revised Management System which is now being negotiated. Such a "promise" has no binding power, and whaling nations have virtually never abided by similar promises in the past. (When Norway resumed full-scale commercial whaling in the 1993 under an objection to the moratorium, the Government announced that it would set its unilateral quota of Northeast Atlantic minke whales according to the IWC's agreed Revised Man-

agement Procedure for baleen whales. But now it regularly awards itself two to three times the number of whales that the RMP would permit. And in 1960 Japan formally "promised" to accept scientific advice in reducing the Antarctic quota to sustainable level, and reneged on that three years later, when it did not like the advice given.) Within 48 hours of the close of the Cambridge meeting Icelandic authorities were announcing an intention to resume "scientific whaling" under special permit, perhaps as soon as next year.

So what of the connection between this shambles and the vote on the Japanese resolution regarding a special quota of minke whales in the North Pacific? The ICRW is clear that the moratorium, or other binding decisions, can only be overturned by a three-fourths majority of voting participants in a meeting. For several years it has been recognised that it would be embarrassing if Japan could secure a simple majority for its proposals to lift the moratorium, and to abolish the whale Sanctuaries in the Southern and Indian Oceans, though this would have no legal effect. The simple majority is now perilously close; only a couple more new "purchased" Members plus one or two abstentions by some non-whaling countries that tend to adopt perverse voting tactics would do the trick.

The apparent acceptance of Iceland's admission represents in effect an amendment to the Schedule. This is because valid objections and accepted reservations are footnoted in the Schedule itself. Just as the Schedule is an integral part of the ICRW, the footnotes are integral parts of the Schedule, and they modulate its application. Thus it may be argued that a valid vote for the admission of Iceland, given its conditional nature, would in any case have required a three-fourths majority in favour, not a simple majority, regardless of the validity of Iceland's own "vote" and of the unacceptability in principle of conditional adhesion to the ICRW.

It is possible that some Governments will be so concerned about the collapse of the IWC's fragile authority that they will seek a reversal of the disastrous Cambridge decision at the Berlin meeting in May 2003. The events recounted here may give some impetus to those who already regard the IWC as a failed organisation and therefore are looking to fundamental amendments of the ICRW to strengthen it, or even to replace it. This can, however, play into the hands of Japanese and Norwegian whalers, whose propaganda repeatedly trumpets the failure of the IWC. They are, after all, doing quite well with no international regulation of their current whaling activities.

There may be only one way out of the looming catastrophe, though it is getting late in the day for radical action, since the collapse of an Irish initiative a few years ago. That is for both whaling and non-whaling countries to engage for the first time in serious negotiations. Rigorous, precautionary management rules are needed,

¹ For details see *Briefing for IWC Commissioners*, October 2002. Produced by a Coalition of NGOs and distributed free from The Old Chapel, Fairview Drive, Bristol BS6 6PW, UK.

generally along the lines proposed in the past two years by the IWC Chairman on behalf of the Swedish delegation, but backed by a stern regime to secure compliance with the rules—something that whaling countries have virtually never done. Such a regime should not—and indeed could not—ban all commercial whaling in principle, but countries that did not adhere fully to it should be prohibited from engaging in any commercial whaling, and that prohibition enforced if necessary by sanctions.

In such negotiations a few non-whaling countries would need to drop their pretence that a permanent end to commercial whaling can be brought about by vote in the IWC. That pretence is dissonant with the original 1982 “moratorium” decision, which simply mandated an indefinite *pause* in commercial whaling while a better management system was assembled, and to allow depleted whale populations some time to recover. However, it is timely now to remind those whaling countries seeking to overturn the moratorium by various devices that in 1982 it was decided that a prior condition for reconsideration of the decision is “a comprehensive assessment of (its) effects”. This assessment was supposed to have been made by 1990 at the latest, but in fact it has never been made, because the Commission’s Scientific Committee found it was technically not fea-

sible on account of the impossibility of detecting small recoveries of whale populations in a very short space of time.

Most commercial whaling operations terminated during the past three decades. All ended for economic reasons, nudged by international decisions and social changes. It is by no means certain that whaling operations which might be *biologically* sustainable—even with highly precautionary quotas—can be *economically* sustainable in the longer run. Of course, they can be profitable in the short run, but profit (including provision for investment in replacements of old vessels and equipment) has in the past, and without exception, come from biologically unsustainable operations. That is still true, and is why Japan subsidises its commercial “scientific whaling” and has extended that to more species, and why Norway has discarded its claim to be following the IWC rules for setting precautionary catch limits.

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