

Almost Saving Whales: The Ambiguity of Success at the International Whaling Commission

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The international regulation of whaling has been a tremendous success. It has reduced whale hunting dramatically from its peak in the 1960s and brought almost all species of whales out of danger of extinction. Today, whaling conservation stands as a—or perhaps *the*—paradigm of a successful international regime. Yet the international organization responsible for this success is itself in such crisis that it may not survive.

The International Whaling Commission (IWC) is the international organization responsible for regulating whale hunting. Created after World War II, it now comprises both the main whaling nations and the main anti-whaling nations, and the split between the two is so stark that for years the organization has been barely functioning. Its opposing blocs of anti- and pro-whaling states have mutually exclusive understandings of what the regime permits and evenly divided power. Their mutual vetoes ensure that the dysfunctional status quo prevails, and the idea of “success” is coming to look increasingly unclear. The rules that the commission designed decades ago remain in place today, but the members cannot agree either to enforce them or to change them. Chief among these rules is the ban on commercial whaling, which has existed since the mid-1980s. Despite this ban, several members continue to openly hunt whales, arguing with technical legal reasoning why the ban does not in fact apply to their behavior. The 2010 annual meeting of the IWC presented what may have been the last chance to confront these differences directly, but it ended in a spectacular diplomatic failure, as I shall describe below.

The problems of the IWC vividly illustrate the larger dilemmas of international law and organization, and so they are of interest to scholars beyond the domain of whales and whalers. These include problems of supermajority decision rules,

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changes brought about by new members, contested amendments to the mandate of an organization, and the push and pull of civil-society groups. Disagreement over the substance of the whaling regime has been displaced; it has been recast as a set of disputes over legal technicalities regarding how and when states are allowed to make reservations to treaties and what counts as “scientific” research on whales. The whaling regime has thus become a microcosm of the problems of international law and diplomacy, where a shared commitment to the rule of law coexists with deep disagreements over the meaning of compliance. The case illustrates what can go right and what can go wrong in the design of international institutions, and in the dynamics among state interests, regimes, and activists.

THE WHALING REGIME

The IWC’s legal instrument is the International Convention for the Regulation of Whaling (ICRW). This treaty, from 1946, sets out the goal of protecting “all species of whales from further over-fishing.” It gives the commission power to set catch limits, gear limits, and otherwise to “adopt regulations with respect to the conservation and utilization of whale resources.” This includes a “schedule” of whale-hunt quotas for member countries attached to the treaty and renegotiated at periodic general meetings, much like the World Trade Organization’s Schedule of Concessions.

The regime really came into its own in the beginning of the 1970s, as industrial-scale whaling pushed many species toward extinction. Whaling states had dominated the IWC up to that point, and annual quotas were set very high—so high, in fact, that they sometimes went unfilled. Oran Young has called the IWC in the 1960s “a whalers club unable to make tough decisions about restrictions needed to rebuild stocks.”¹ The power of the club produced dramatic declines in whale stocks and a consequent move by anti-whaling states to join the IWC in order to shift the position of its median voter.

With new members, many backed by new anti-whaling nongovernmental organizations, the IWC began using its authority to constrain annual catches to a level below what was already practiced. This turned the right to hunt whales into a scarce commodity and led to a rebound in most whale populations. Most significantly, in 1982 the IWC agreed on a complete moratorium on commercial whaling, declaring that “the catch limits for the killing for commercial purposes of whales from all stocks . . . shall be zero.”

The moratorium, which came into effect in 1986, was intended originally as a temporary measure to allow whale stocks to recover and for biologists to agree on sustainable levels of whale hunting. However, since 1986 the members of the IWC have not been able to agree on a procedure to revisit the moratorium or reconsider its usefulness, and so it continues today and sets the context for all contemporary debate about the whaling regime.

Whale hunting continues as well, despite the moratorium. Two features of the regime make it possible for hunting to coexist with the ban. First, the moratorium allows governments to issue special permits to their citizens to “kill, take, and treat whales for purposes of scientific research subject to restrictions as to number and subject.”² Second, the convention allows governments that object to amendments to the treaty to exempt themselves from those changes simply by lodging an objection to that effect.³ All treaties must somehow deal with the puzzle of institutional change: if changes can be passed by a qualified majority of members, what are the legal rights and obligations of the minority? The IWC solves this problem by permitting objectors to opt out of amendments. Other organizations approach the dilemma differently: the UN Charter, for example, sets a high bar on amendments, but then requires that even dissenters accept the changes; the Rome Statute of the International Criminal Court specifies that dissenters can opt out of changes to some crucial clauses, but that most of the treaty can be amended for all members by a two-thirds vote of the states parties.

The vast majority of the world’s whaling today is done by a small number of IWC members that argue for its legality by invoking either the scientific research clause or their right to opt out of the moratorium. The main whaling states today are Japan, Norway, Iceland, Denmark (by way of Greenland and the Faroe Islands), Russia, and the United States. Norway is responsible for the largest whale hunt; it opted out of the moratorium and set for itself a quota of about 1,300 whales in 2011—more than double the level it set ten years ago. Japan has maintained that its whale hunt is a strictly scientific program and has generally killed about 1,000 whales per year. However, the 2010 tsunami destroyed much of its whaling capacity, and the government of Japan has not yet decided if it will invest in rebuilding the fleet. The remaining whaling countries have all opted out of the moratorium, with Iceland taking about 250 whales per year, Russia about 140, Greenland about 150, and the Faroe Islands about 500. Both Greenland and the Faroe Islands are represented at the IWC by the delegate from Denmark; and since Denmark itself opposes whale hunting, the delegate

must make clear in meetings which territory he or she is speaking for at each moment. The United States allows some aboriginal hunting, which accounts for about 50 whales per year.⁴

Major decisions in the IWC require a three-quarters majority to pass. The original moratorium passed this threshold, but the pro-whaling bloc has since recruited new states to the organization that are willing to vote with them. Today the commission has eighty-nine member states, and membership is about evenly split between the two blocs, meaning that neither side dominates. Political pressure and side payments are used to keep both blocs together. As a result, the status quo wins by default any time the matter is reopened in annual meetings, and the existing moratorium can be neither abandoned nor enforced.

The stability of this stalemate was recently tested by an attempted compromise. A diplomatic initiative from 2007 to 2010 sought to convince the two sides to accept lower but nonzero whaling quotas. This was presented as essentially splitting the difference between the pro and anti positions: the anti states would have to accept giving up the moratorium, while the pro states would accept quotas lower than their current kills as well as a new South Atlantic sanctuary where no hunting could take place.

The plan also called for an end to all objections and reservations to the schedule. The target was to bring all whaling within the terms of the schedule and the convention. It would end the legally uncomfortable situation of members being able to choose for themselves whether the key rule of the regime applied to their conduct or not. If successful, it would represent a major accomplishment for the IWC, and for the idea of a coherent rule of law in international regimes more generally: whaling practices would once again be entirely within the confines of the treaty and its commission rather than escaping beyond them. The plan, however, proved unsuccessful, and for reasons that bear important lessons for students of international negotiation.

To foster the compromise, the commission organized a series of meetings from 2008 to 2010 outside the regular schedule of annual conferences, where the details were worked out. It invited diplomatic superstars, including the Peruvian diplomat and longtime UN official Álvaro de Soto, to broker the process, and a tentative formula was arranged ahead of the 2010 annual meeting in Agadir, Morocco. As the plan became public, however, activists on both sides came out against the proposal. They turned against their governments, which then turned against their diplomats who had negotiated the plan, who then turned against the

commissioner who had shepherded it through. The IWC chairman, Cristián Maquieira of Chile, was forced to resign, and the 2010 meetings ended up replicating the same stalemate around the same blocs as previous years' conferences. The status quo had triumphed again.

The immediate cause of the failure was that the compromise offended powerful activist groups. It asked the anti-whaling community to give up the moratorium in exchange for reduced levels of whaling. This they were not willing to accept. Media coverage largely interpreted the change as abandoning the moratorium and therefore as a move toward more whaling, and anti-whaling NGOs seized on this view to mobilize opposition to the proposal. Thus, even for a reduction in actual whale killing, they were unwilling to accept a step back from the political symbolism of a zero-hunting rule. Opposition in pro-hunting communities focused on the expansion of the whale sanctuaries in the southern oceans and (to a lesser extent) on the nationalist impulse to resist the further internationalization of whaling regulation.

The ferocity of the opposition to the plan therefore suggests a more deeply seated reason for its failure, and one more conceptually revealing for students of global governance. The compromise placed its bets on a mathematical reading of the anti-whaling position: that is, it assumed that the anti-whaling coalition would be happier to see, for instance, half as many whales killed next year as last. In 2008 hunting killed about 2,000 whales, almost all under "scientific" permits or by states that object to the moratorium. The compromise might have reduced this to fewer than 1,000 whales, and legalized it under the category of "commercial" whaling.

The anti-whaling groups rightly saw this as allowing the return of legal commercial whaling and were therefore strongly motivated to defeat it. They understood the change as raising the legal limit from zero to some higher number, rather than as reducing the actual number of whales killed. It was the change in the legal status of the hunt that made it seem a retrograde step, despite the fact that in the eyes of whale-hunting states all their whaling is *already* legalized by the scientific exception or their persistent objection to the moratorium.

The collapse of the compromise proves that it is a mistake to think about the dispute as centered on the continuous variable of hunt quotas, where hunters want a high number and conservationists want a low number. Rather, it is better seen in terms of a binary variable defined by the moratorium: it is in place or it is not; commercial hunting is illegal or it is legal. The ban on commercial whaling

represents a key victory for anti-whaling activists, and it has been turned into an indivisible social fact, one that is not amenable to compromise. Binary goods make poor material for compromise, as negotiators arguing over indivisible territory have learned many times.⁵ Because the moratorium occupies a position in the negotiations that is above all other questions, the anti-whaling coalition was motivated to defend the formal rule of zero hunting even at the cost of losing a possible chance to reduce numbers in the actual hunt.

Absent an exogenous change, it appears unlikely that the IWC will find a way to negotiate its way back to life. The pro-whaling forces have found ways to continue, even to increase, whaling despite the various limits imposed by the IWC. They have constructed a whale-hunting legal scheme outside of the IWC and they can therefore be seen as status quo powers, relatively happy with the current arrangement.

The anti-whaling coalition therefore finds itself in the more urgent position, seeking to change the existing system. They have a number of tactics to work with. The Sea Shepherd environmental group has had success with direct action against whale-hunting ships, for instance, forcing a Japanese fleet to abandon its Southern Ocean hunt in February 2011 (a success that ironically led to the vessels being available to help ferry supplies for tsunami relief).

A very different channel is being used by the government of Australia, which filed a dispute with the International Court of Justice (ICJ) in 2010 claiming that Japan violated its commitments under the ICRW treaty by, among other things, abusing the category of “scientific research.” While the ICJ can only consider cases in which all parties agree to its authority, Australia’s case can go forward because both Japan and Australia have previously agreed to the court’s compulsory jurisdiction, under Article 36(2) of the ICJ Statute.

Anti-whaling activists have been very successful in creating an international norm against whale hunting. This, as Charlotte Epstein reports, is a striking example of norm entrepreneurialism.⁶ It has overturned centuries of tradition in which whale hunting was accepted as a normal mode of exploiting oceans. However, it is possible that this norm has reached its peak, and the minority who remain unconvinced in Japan, Norway, Iceland, and elsewhere retain domestic political influence that goes beyond both their numbers and their economic impact.

This implies that the future of the anti-whaling movement may lie in the domestic politics of the pro-whaling countries. In all these countries, whale hunting is

sustained by government subsidies. It is essentially a nationalized industry. These subsidies presumably continue because the governments believe that some voters value them. Competing opinion polls produce competing results on public support for whaling in Japan, Iceland, and Norway, and it is impossible to know the importance of the industry in broader society. There is some support in the whaling towns of Japan and Norway, for instance, and some diffuse nostalgia for whaling as a component of a “traditional” way of life. Budget priorities, as in post-tsunami Japan, and changes in public opinion could drive these countries to end their whaling industries, building on the pressures already created by the IWC.

WHALING AND INTERNATIONAL LAW

The whaling regime today is characterized by (1) a comprehensive ban on commercial whaling, which is supported by about half of its members, and (2) the two paths by which the ban can be circumvented legally. Is this a success?

By most measures, one should probably conclude that it is. In 1961, some 66,000 whales were hunted, according to official statistics; in 1989, 326 whales were killed. The number is increasing, however, and in 2008 about 2,000 whales were killed. Nevertheless, anti-whaling has established itself as the dominant discourse on the subject: it has created a powerful norm of anti-whaling, which has led to great reductions in yearly catches and the adoption of a legal ban on commercial whaling, and has set the baseline for future negotiations at zero hunting. At the same time, as noted above, this has had the effect of pushing pro-whaling states to the fringes of the regime, where they find legal resources to justify behaving in anti-regime ways. Thus, the practice of whaling has increasingly moved out of the ambit of the IWC and into a semi-unregulated space outside the regime. It is increasingly a unilateralist practice, consciously avoiding the rules of the multi-lateral regime.

Ultimately, the centralizing force of the IWC has had a decentralizing effect: the legal regime on whaling has become increasingly fragmented and particular rather than coherent and unified. States’ legal obligations depend on the specific interpretation and scope that they have agreed to. At one level this reflects the normal condition of international law, where states are only obligated to comply with rules to which they have consented. But it shows that the effort to codify and formalize legal obligations can lead to more diversity of practice rather than less. Legalization may not help organize the world; in this case, it helps disorganize it.

Nevertheless, the IWC remains a powerful legitimating device for both sides, as evidenced by the way that both sides try to use its name in defense of their positions. It makes it possible for the Sea Shepherd group to claim that its interference with Japan's whale hunt in the Antarctic Ocean is a defense of international law, that Japan's behavior is illegal under the IWC, and that Sea Shepherd is enforcing the rules on behalf of the IWC. On the other side, it also provides the language that Japan uses to justify its behavior—that is, that there is a legal difference between scientific and commercial whaling, and that its behavior is “research” rather than “hunting.”

The IWC case also highlights the subtle means by which international law shapes state behavior. A legal skeptic might use the case to illustrate how self-interested states are capable of evading legal obligations, and this might be considered evidence of the weakness or irrelevance of international law. But such a view is too simplistic, since it requires ignoring the ways in which states are making use of the rules to justify and legalize their behavior. The pro-whaling states reveal themselves to be intensely interested in how the rules are written and in finding means to fit their behavior within them. The effect of the law is evident in all the ways that states have adapted their language and their policies as a consequence: some have given up whaling altogether; others have reconstituted their hunts as scientific; and still others have made the effort to redefine their legal obligations by opting out of the moratorium. It is clear that these changes are not all in the direction anticipated by the designers of the ban, but nonetheless they show the complex ways that international law interacts with state behavior.

More directly, the whaling regime has increased the social and political costs of whaling. Many whaling states have been offered strong incentives from the United States to abandon the practice. And many non-whaling small states, in turn, have been offered inducements to vote with pro-whaling governments in the IWC. Thus, whale hunting is an increasingly expensive proposition, both politically and financially. Internationally, it appears that the social status of whale hunting has fallen since the 1970s, and in no country does whale hunting have broad popular support (with the possible exception of the Faroe Islands). In 1973, the Food and Agriculture Organization helped modernize and expand whaling in Indonesia, but it is hard to imagine any UN organization today engaging in that kind of support.

A gap between compliance and law is usually called noncompliance or rule breaking. But in international law the matter is not so clear. Governments are

active agents in making, interpreting, and limiting international law, and they are therefore equipped with various tools to structure their legal obligations around their desired policies. It is not self-evident what counts as “rule following” in international law or what counts as “rule breaking.”

CONCLUSION

The problems of the IWC provide important lessons for students of international cooperation and organizational design. The member states have come to be divided into two camps defined by opposing views on fundamental questions about the purpose of the organization. As a result, every new attempt at deliberation and compromise seems to end up sharpening the disagreement between the two. Theorists of deliberation generally believe that talking about problems helps to resolve them, or at least helps to reveal the possible path to a compromise. The IWC, by contrast, proves that the opposite is also true: deliberation sometimes makes clearer that the parties really do have irreconcilable differences.

If the end is coming for the IWC, the important question for the future of whales is what replaces it. It seems unlikely that it will be a return to the status quo ante, of an entirely unregulated whale-hunting regime. More likely we are going to see new groups of anti-whaling states that seek to enforce regional conservation measures, such as the southern sanctuary. This might lead to more high-seas confrontations between the defenders of the sanctuary and whaling fleets, and these mini-crises might in fact be a path toward renewed multilateral negotiations.

The IWC has successfully managed the historical transition from open whale hunting to highly restricted hunting. It has stopped all but the most highly motivated whale-hunting countries. This success has made its life more difficult, since it has left the hardest part of the problem for last. Its current condition of paralysis may signal that it has reached the limits of pro-hunting states' willingness to reduce their kills and of anti-hunting states' willingness to tolerate the hunters' use of the IWC to legalize their hunts. If that is the case, a revival will not come from inside the organization—it will have to wait for an external change to shift the positions of its leading governments.

NOTES

- ¹ Oran Young, *Institutional Dynamics: Emergent Patterns in International Environmental Governance* (Cambridge, Mass.: MIT Press, 2010), p. 124.

- ² ICRW Art VIII(1). Government can also allow whale hunting if it is “used exclusively for local consumption by the aborigines.” ICRW Schedule, para. 2. The United States is the main user of this rule, permitting around fifty whales a year to be killed.
- ³ ICRW Art. V(3).
- ⁴ These figures are based on official statistics or permits and do not account for either unauthorized hunting or misrepresentation by the governments.
- ⁵ On how negotiations make some goods indivisible, see Stacie E. Goddard, *Indivisible Territory and the Politics of Legitimacy: Jerusalem and Northern Ireland* (Cambridge: Cambridge University Press, 2010).
- ⁶ See Charlotte Epstein, *The Power of Words in International Relations: The Birth of an Anti-Whaling Discourse* (Cambridge, Mass.: MIT Press, 2008).