

The Legislative History and Interpretation of Article 65 of the Law of the Sea Convention

Testimony Submitted by Patricia Forkan

Article 65, United Nations Convention on the Law of the Sea Marine Mammals

*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 co-operate 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.*¹

Introduction

The 1970s were a turning point for cetaceans in general and whales in particular, with attitudes shifting away from the exploitation of a resource towards conservation and protection of a unique creature. I have been attending meetings of the International Whaling Commission (IWC) since 1973, and have also had the privilege of being appointed in 1977 to the Marine Environment Sub-Committee of the Law of the Sea Advisory Committee which was involved in the negotiations leading up to the adoption of the final version of Article 65 of the United Nations Convention on the Law of the Sea (UNCLOS). Thus I have seen the evolution of both the IWC and the UNCLOS as parallel systems, one driving the other, and one influencing the other.

As the 1982 UN Convention on the Law of the Sea is largely considered a “constitution for the oceans”², its role in the conservation of marine mammals is of vast importance, and needs to be accurately understood and interpreted. This report therefore seeks to clarify the meaning of Article 65, and in particular its relation to the IWC

History of the Drafting of Article 65, UNCLOS

The marine mammal article of UNCLOS is considered a significant advance in our common efforts to stop the over-exploitation of marine mammals, especially whales and dolphins, and to conserve them.³ Nevertheless, it has been argued that potential ambiguity arises in relation to the second sentence of the final version of Article 65 which reads: “States shall co-operate 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.” Therefore, the historical

¹ www.globelaw.com/LawSea/ls82_2.htm#article_65_marine_mammals

² John Temple Swing, “What Future for the Oceans?”, *Foreign Affairs*, September/October 2003, p. 139

³ The 12th J Seward Johnson Lecture in Marine Policy, “Should the United States Ratify the New Law of the Sea Treaty?” by Ambassador T T B Koh of Singapore at the Woods Hole Oceanographic Institution, Woods Hole, MA, 6/4/1980

background that follows will go towards clarifying the meaning in particular of the *appropriate international organizations* referred to in the second sentence of Article 65, UNCLOS.

During the mid-seventies, there had been almost single-minded concentration on improving the IWC with regard to whale conservation, and the UNCLOS went largely ignored. In 1977 a meeting was convened to discuss the problem of the weak UNCLOS Marine Mammal article. This resulted in a new coalition of environmental and animal welfare groups being formed to urge the U.S. to work for improved protection of marine mammals in general and cetaceans in particular within UNCLOS.⁴

The U.S. spearheaded the movement to clarify the marine mammal conservation provisions of UNCLOS. An informal negotiating group, to which I was appointed by Ambassador Elliot Richardson, was established in the late seventies to consider revising the Informal Composite Negotiating Text (ICNT) provisions. The states were clearly aware of the need to conserve and protect marine mammals.⁵

⁴ This new coalition and effort was led by Dr. Robbins Barstow of the Connecticut Cetacean Society. He brought together members of Congress, NOAA, NMFS, Marine Mammal Commission and NGOs to strengthen whale protective provisions in the LOS Treaty. In a 6/18/1979 Letter to the Honorable John B. Breaux, Chairman of the Subcommittee of Fish and Wildlife Conservation and the Environment, House Committee on Merchant Marine and Fisheries, the National Wildlife Federation suggested that the U.S. should propose language at the next Law of the Sea meeting that would among other things make clear that “management of at least the large whales and direct catches of small cetaceans should be regulated by a single international organization, the International Whaling Commission”.

⁵ U.S. General Accounting Office, “The Law of the Sea Conference – Status of the Issues, 1978”, March 9, 1978

Initially, the agreed upon language, for the second sentence of Article 65, referred to “the appropriate international organization”. At a meeting of the informal negotiating group, the representative from Japan requested that the group consider changing the word organization from singular to plural. He explained that since this article covered all cetaceans, it would be better to leave the issue of cetacean by-catch associated with regional fisheries in the hands of those various entities. In order to be responsive to Japan, it was agreed that the word organization would be plural. Thereby, allowing by-catch to remain a regional fisheries responsibility.

Over many months of ongoing negotiations, progress was clearly made as UNCLOS agreed to recognize marine mammals as unique and separate from other living resources, and as such not subject to “optimum utilization”. The provisions for other living resources under UNCLOS require coastal states to determine allowable catch, and if the coastal state cannot harvest the entire catch, they must give other states access to take the surplus. In the case of marine mammals this does not apply, and coastal states can be more restrictive than the international standard and can even protect marine mammals totally.

In addition, there was also a growing global demand from NGOs that the IWC move away from a strictly quota setting whale killing operation to one of conservation, protection and humanness towards these creatures. Thus UNCLOS and the IWC in the mid and late seventies were developing as parallel systems, and in order to accurately interpret Article 65 of UNCLOS, the changes being discussed at the time in relation to the IWC need to be examined. In 1978 the IWC held a Preparatory Meeting on the Revision of the International Convention for the Regulation of Whaling (ICRW), the culmination of years of work to change the thrust and general character of the IWC. The U.S. began to push for a re-negotiation of the ICRW to make it an International Cetacean Convention. The NGO community also strongly supported renegotiating the treaty calling for an International Cetacean Commission (ICC) – not only changing the emphasis from whaling to the whales themselves but to broaden jurisdiction to small cetaceans such as dolphins and porpoises. The future ICC was to be primarily a scientific research and study organization aimed at protecting cetaceans, not killing them, with jurisdiction on a global basis.⁶

⁶ On April 19, 1978, a “Briefing Seminar on Potential Options in the Pending Renegotiation of the IWC Treaty” was conducted at the National Headquarters of The Humane Society of the United States in Washington, D.C. It was co-sponsored by The HSUS and the American Cetacean Society. The seminar was attended by representatives of more than a dozen different whale and conservation organizations, and the program included background briefing presentations by a distinguished panel of experts from the United States Department of State, Department of Commerce (NOAA and NMFS), Marine Mammal Commission, and Council on Environmental Quality. As a result of the day’s deliberations, including the study of extensive background information documents provided each participant, a positive consensus was reached by NGO representatives in support of a statement of “Objectives for International Cetacean Conservation”.

In a letter to Ambassador Richardson⁷, one of the participants in the renegotiation of Article 65 listed one of the objectives as being to clearly establish the authority of a single international conservation organization to set the standards for protection and conservation of cetaceans throughout their range.

“At the present time such an organization exists (the IWC) although the United States has sought to strengthen it as an International Cetacean Commission, aimed less at ‘whaling’ and more at ‘cetacean protection’. The recent moratorium within the IWC suggests that the organization can be strengthened substantially along these lines and that within the next few years the time may be right for favorable international consideration of efforts for a strengthened ICC.”⁸

This clearly demonstrates that the U.S. position during the drafting of Article 65 was that the “appropriate international organization” for the conservation of cetaceans was the IWC, though the plural of the word “organization” leaves open the additional possibility for a successor organization such as an ICC to qualify as such. As another non-governmental organization succinctly stated: “While the text implies there is more than one organization for the conservation of cetaceans, the reference is intended to apply to the International Whaling Commission or a successor organization.”⁹ This was of course in addition to the role of regional fisheries in cetacean by-catch issues.

In 1979 at the same time as a partial moratorium passed at the annual IWC meeting, and votes for a total moratorium continued to increase, the proposed U.S. text for a new strengthened marine mammal article was accepted as a working document in Committee II of the Law of the Sea Conference. Finally, on March 21, 1980, the revised Article 65 was successfully adopted. Crucial to any interpretation of the article are Ambassador Elliot Richardson’s comments upon the occasion of its adoption:

“The text that was incorporated into the ICNT, Rev. 2 was the product of lengthy negotiations with approximately 25 States of all persuasions and geographical regions. It was supported (or not objected to) at an informal meeting of Committee II and in Plenary. In fact, several speakers represented States which were not part of the representative group. It was particularly gratifying that speakers included representatives of the major whaling nations as well as those States primarily interested in the protection and conservation of marine mammals.

The new provision establishes a sound framework for the protection of whales and other marine mammals with critical emphasis on international cooperation. It exempts marine mammals from the optimum utilization requirements of other provisions of the ICNT Rev. 2 and permits States and competent international organizations to establish more stringent conservation regulations than otherwise mandated by ICNT, Rev. 2. Indeed, it explicitly permits States and international organizations to prohibit the taking of marine mammals. *The text also preserves and enhances the role of the International Whaling Commission (or a successor organization)* (emphasis added). It recognizes the role of regional organizations in the protection of marine mammals, which are often taken

⁷ The Honorable Elliot L. Richardson was Ambassador at Large, and Special Representative of the President to the Law of the Sea Conference, U.S. Mission to the United Nations.

⁸ Letter by John Norton Moore, Walter L. Brown Professor of Law and Director of the Center for Ocean Law and Policy, University of Virginia to The Honorable Elliot L. Richardson, August 15, 1979

⁹ Sierra Club, International Report, Volume VIII, Number eight, April 28, 1980

incidental to fishing operations. In sum, the article is a basic and sound framework with which States and international organizations may pursue the future protection of these wonderful creatures for generations to come.”¹⁰

As Ambassador Richardson indicated, the revised Article 65 received ample support in the Committee from non-whaling¹¹ and whaling nations alike. In floor statements in Committee II on the Deliberations on the Article 65 Amendment (3/21/1980), Japan, a strongly pro-whaling nation, for example raised some concerns about Article 65, but made no mention of the possibility of an organization other than the IWC fulfilling the “appropriate international organization” role. The floor statements of Japan were as follows:

“My delegation continues to consider that the concept of optimum utilization also applies to marine mammals. Consequently, there is no need to single out marine mammals in a special provision, or to focus on cetaceans in such a provision. As a practical matter, however, we can support this text on the understanding, with regard to the second sentence, that these activities do not necessarily need to be undertaken simultaneously with the first sentence, but on an individual (per species) basis when appropriate with consultations with other nations.”¹²

Norway and Iceland, also pro-whaling nations, merely stated their support for Article 65 without any further comments.¹³ Fast-forward 12 years to 1992 when Iceland withdrew from the IWC and tried to establish a new organization to manage whales. Iceland, Norway, Greenland, and the Faroe Islands formed a group called, NAMMCO, North Atlantic Marine Mammal Commission. The purpose of NAMMCO was to unseat the IWC as the organization with jurisdiction over whale conservation and management. For numerous reasons, NAMMCO has never been recognized as a legitimate organization, and in fact most countries view it as nothing more than an exclusive whalers club. By 2002 even Iceland realized that NAMMCO was not going to replace the IWC, and in that year, the country rejoined the IWC.

Neither Japan nor any other country has ever joined NAMMCO. However, 23 years after Japan agreed to the language and interpretation of article 65 they announced a change in plans. Japan is now arguing that the “appropriate international organizations” clause of Article 65 means that it is possible to have several organizations managing cetaceans under UNCLOS. In a recent statement Japan claims that they are considering setting up a rival organization to the IWC or joining NAMMCO because they are displeased with the recently adopted conservation measures at the IWC.¹⁴

¹⁰ Letter from Ambassador Elliot L. Richardson to Patricia Forkan, 4/29/1980

¹¹ Netherlands, a country in favor of conservation stated: “We acknowledge the great importance of marine mammal conservation, particularly through the IWC. This proposal is a contribution and we support it.” Committee II, Deliberations on Article 65 amendment, Floor statements, 3/21/1980

¹² Committee II, Deliberations on Article 65 amendment, Floor Statements, 3/21/1980

¹³ *Ibid.*

¹⁴ Japan Plans to Create Rival Organization of International Whaling Commission (IWC) From Atuna.com, Japan, October 10, 2003

The United States, both then and now has not wavered in their support of the language or the interpretation of article 65. The U. S.'s interpretation of Article 65 was clearly outlined in a statement prepared by the State Department in 1980 to be used as clarifying language on Article 65:

“The appropriate/primary international organization referred to in Article 65 is the International Whaling Commission or a successor organization. Certain regional organizations, which are concerned with the regulation of fishing, may also appropriately play a role as cetaceans are occasionally taken as incidental catch to fishing activities. It is further understood that the minimum international standards for the protection of cetaceans apply throughout the migratory range of such cetaceans whether within or beyond the exclusive economic zone.”¹⁵

The protection and conservation afforded to marine mammals in the exclusive economic zone¹⁶ of coastal States by Article 65 was expanded by Article 120 of UNCLOS to apply to the high seas as well. This expansion of coverage to the high seas also lends support to the interpretation that the IWC (or its successor) is the “appropriate international organization” for the conservation of cetaceans.

U.S. Position on Marine Mammal Conservation

Since the wording of Article 65 of UNCLOS originated with a United States proposal, an accurate interpretation of this provision necessitates an understanding of the U.S. position towards marine mammal conservation in general and whaling in particular.

Setting the scene for the U. S. position on marine mammals was the passage in 1972 of the far-reaching Marine Mammal Protection Act (MMPA). The MMPA was amended in 1977 to forbid commercial whaling within the U.S.'s 200-mile zone. This, in effect, recognized that coastal states have the right to take action more restrictive than that agreed upon in the international body, but not less restrictive action which would weaken internationally accepted conservation measures. The MMPA also required the renegotiation of relevant treaties to reflect its standards. The MMPA was therefore an important impetus for the U.S. position within UNCLOS that coastal states could be more protective of whales than the IWC, but not less.

The U.S. government began in the early 1990s to oppose more forcefully all commercial whaling,¹⁷ and in 1993 both houses of Congress unanimously adopted a resolution, H. Con. Res. 34 (103rd Congress), calling for the U.S. to oppose “any resumption of commercial whaling.”

¹⁵ Drafted by George Taft (State Department) et al at the last session of the Law of the Sea Conference, 8/22/1980

¹⁶ The exclusive economic zone is a 200-mile zone in which coastal states have sovereign rights over resources and other activities related to economic exploration and exploitation.

¹⁷ CRS Report 97-55, “Norwegian Commercial Whaling: Issues for Congress”, Carl Elk, December 31, 1996

The U.S. has also relied upon the threat of unilateral sanctions to induce whaling nations to give greater consideration to whale conservation.¹⁸ It has done this mainly through the 1971 Pelly Amendment¹⁹ to the 1954 Fishermen's Protective Act, which allows fishery product imports to be prohibited from nations acting to diminish the effectiveness of international fishery (including whaling) agreements. Presidential authority under the Pelly Amendment was expanded to impose sanctions against non-fishery imports from nations acting contrary to IWC guidelines in the 102nd Congress.²⁰ In addition, the 1979 Packwood-Magnuson Amendment²¹ to the Fishery Conservation and Management Act of 1976 allows the U.S. to reduce or suspend fishing privileges in U.S. waters for nations acting contrary to IWC guidelines.²² Although Pelly amendment sanctions have never been imposed for whaling, the U.S. has used its certification process to obtain some concessions from offending nations to improve whale conservation and has influenced whaling nations to join the IWC.²³ Norway, Japan, and Canada have all been certified under the Pelly amendment in the past for undermining the IWC.

The strong position of the U.S. that the IWC is the "appropriate international organization" under Article 65 of UNCLOS was reinforced in 1996, when Canada permitted the harvesting by Inuit of two bowhead whales. The U.S. supports aboriginal whaling when it is managed through the IWC, the global body charged with responsibility for the international conservation and management of whale stocks and the regulation of whaling.²⁴ Although Canada was not a member of the IWC at the time, the U.S. still certified Canada under the Pelly amendment, taking the view that the bowhead whale harvest had undermined the effectiveness of the IWC. In a message to Congress, President Clinton stated that, under international law, Canada was obligated to work through the IWC with regard to any whaling activities.²⁵

As recently as June of this year, members of the Senate reaffirmed that at the 55th Annual Meeting of the IWC the U.S. should "remain firmly opposed to commercial whaling".²⁶

International Reinforcement of the IWC's Role in Relation to Article 65

Apart from the very clear position of the United States both during the negotiation process and in subsequent years that Article 65 of UNCLOS is to be interpreted so that the IWC (or an even stronger conservation-oriented successor organization such as an

¹⁸ CRS Report 97-588, "Whale Conservation and Whaling", Eugene H. Buck

¹⁹ 22 U.S.C. 1978

²⁰ Section 201 of P.L. 102-582

²¹ 16 U.S.C. 1821

²² The threat of Packwood-Magnuson sanctions is no longer influential, since no foreign whaling nation currently fishes in U.S. waters.

²³ *Supra* n. 17

²⁴ NOAA Press Release, 12/18/1996, "Commerce Department Certifies Canada Under Pelly Amendment for Whaling", at www.publicaffairs.noaa.gov/pr96/dec96/noaa96-r194.html

²⁵ President William J. Clinton, Message to Congress on Canadian Whaling Activities, 2/10/1997, 33 *Weekly Comp. Pres. Doc.* 175 (1997)

²⁶ S. Con. Res. 55 (108th Congress), 6/12/2003

International Cetacean Commission) is understood to be the “appropriate international organization”, there is also international support for this interpretation.²⁷

International organizations recognize IWC’s primacy for the conservation of whales. Most notably, Chapter 17 of Agenda 21, the environmental action plan endorsed by the 1992 United Nations Conference on Environment and Development adopts Article 65 of UNCLOS, and provides that states recognize:

- “(a) The responsibility of the International Whaling Commission for the conservation and management of whale stocks and the regulation of whaling pursuant to the 1946 International Convention for the Regulation of Whaling;
- (b) The work of the International Whaling Commission Scientific Committee in carrying out studies of large whales in particular, as well as of other cetaceans.”²⁸

This position was bolstered by language in an IWC Resolution on the interaction of fish stocks and whales that was passed by consensus. The parties acknowledged at the outset of the Resolution that “the IWC is the universally recognized international organization with competence for the management of whale stocks.”²⁹

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) has always recognized IWC primacy over whale management and conservation. In 1986, in deference to the IWC’s commercial whaling moratorium, all great whales were placed on Appendix 1 (meaning whales and whale products cannot be traded internationally). Moreover, CITES has adopted several resolutions that relate to whales and the IWC that were consolidated in 2000 in Resolution 11.4 on “Conservation of cetaceans, trade in cetacean specimens and the relationship with the International Whaling Commission”. This resolution recognizes the primacy of the IWC over whale management and conservation.

²⁷ There even appears to be support for this interpretation from pro-whaling nations.

One commentator notes that Iceland, a pro-whaling nation, interpreted Article 65 of UNCLOS to mean that the IWC is the appropriate international organization with jurisdiction over whale management. “In 1991, Iceland, a party to the 1982 Law of the Sea Convention, was contemplating withdrawing from the IWC. It appears that Iceland took the view that Article 65 required it to adhere to IWC quota regulations irrespective of its membership in the IWC.” Ted L. McDorman, “Canada and Whaling: An Analysis of Article 65 of the Law of the Sea Convention”, *Ocean Development & International Law*, 29: p. 183-184 (1998)

A commentator from Norway, also a pro-whaling nation, has stated:

“However poorly the IWC may be seen to function, as measured against what it was intended to be, or could have been, it is a fact that by the large majority of member states it is seen as the only legitimate international body for dealing with the whaling issue. These nations include the US, all the main EU (European Union) states, most major western countries, including most Nordic countries.” Steinar Andresen, The Fridtjof Nansen Institute, Oslo Norway, “NAMMCO, IWC and the Nordic Countries” from *Whaling in the North Atlantic – Economic and Political Perspectives*, Ed. Gudrun Petursdottir, University of Iceland, 1997. Proceedings of a conference held in Reykjavik on March 1, 1997, organized by the Fisheries Research Institute and the High North Alliance, at www.highnorth.no/Library/Publications/Iceland/na-iw-an.htm

²⁸ Agenda 21, para. 17.61 at www.on.org/esa/sustdev/documents/agenda21/english/agenda21chapter17.htm

²⁹ IWC, Proposed Resolution on Interactions Between Whales and Fish Stocks, Resolution 2001-9 (2001)

The Evolution of the IWC

Finally, it needs to be said that the evolution of the IWC itself into a more conservation and welfare oriented organization reinforces the interpretation that the IWC is the appropriate international organization as envisioned by the negotiators of Article 65 of UNCLOS. Some commentators have argued that Article 65 reflects a trend in the protection of cetaceans beyond economic value, to include considerations of a moral and ethical nature.³⁰

Since the IWC implemented a commercial whaling moratorium in 1986, it has placed greater emphasis on conservation of whales than regulating their exploitation. For example, it has designated established sanctuaries in the Southern and Indian Oceans. Today, a majority of IWC members are more concerned with protecting and conserving whales (and small cetaceans) than promoting and defending an industry that previously decimated whale stocks and proved impossible to regulate.³¹ The IWC has also taken on a welfare mandate, advancing “humane killing” and discussing associated welfare issues in various committees.

In addition, the IWC has adopted at least fifteen resolutions whose purpose is to improve the welfare of whales, and the most recent meeting of the World Parks Congress agreed that marine species require “protection” and that their habitat needs “conservation” through domestic and high seas protected area systems.³²

At this year’s 55th annual IWC meeting, the Berlin Initiative was passed, strengthening the IWC’s conservation agenda by forming an official committee to deal with such issues as by-catch and pollution. The initiative provides for the creation of a conservation committee to draft a “Conservation Agenda” as well as the means to implement it. This finally brings the IWC into the 21st century, and seems to settle the question of the IWC’s future direction.

An International Cetacean Commission, as envisioned by the U.S. at the time of the drafting of Article 65 in the late 1970s never materialized. Nonetheless, in accordance with its objective of “providing for the proper conservation of whale stocks”, the IWC has become increasingly focused on the conservation of cetaceans. A clear majority of IWC members now oppose the commercial exploitation of whales and support whale conservation and protection. Since Article 65 reflects a worldwide interest in and the belief that marine mammals in general and cetaceans in particular are unique, and must be protected on a global basis, the only accurate interpretation is that the IWC is the “appropriate international organization” to conserve, manage and study whales. A few

³⁰ Maffei, M.C., 1992, The Protection of Endangered Species of Animals in the Mediterranean Sea in *The Law of the Sea: New Worlds, New Discoveries, Proceedings of the 26th Annual Conference of the Law of the Sea Institute*, Edited by Miles & Treves, Law of the Sea Institute, Honolulu

³¹ Kitty Block and Sue Fisher, “Legal precedents for whale protection”

³² World Parks Congress, 2003, The Durban Accord and Recommendation 5.22 Building a Global System of Marine and Coastal Protected Area Networks and Recommendation 5.23 Protecting Marine Biodiversity and Ecosystem Processes Through Marine Protected Areas Beyond National Jurisdictions, Vth IUCN World Parks Congress, World Conservation Union and World Commission on Protected Areas, Durban, South Africa

whaling nations cannot now alter or rewrite the history of Article 65 simply because they do not wish to honor the conservation measures adopted at the IWC. The commercial whaling moratorium adopted at the IWC in 1982, and still in place today, reflects the will of nations and civil society³³. We must not allow the purpose and meaning of article 65 to be distorted and become the excuse or justification for whaling nations to ignore their conservation obligations at IWC and form a new organization that endorses the resumption of commercial whaling.

As someone who spent five years working on Article 65 and thirty years at the IWC, I am very pleased that the United States intends to ratify UNCLOS. I thank you on behalf of our 8 million members and constituents for the opportunity to speak on this very important issue and to clarify on the record the correct meaning of article 65³⁴.

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³³ In Stockholm in 1972, delegates to the United Nations Conference on the Human Environment called for a moratorium on commercial whaling. The resolution proposed by the United States called for a ten-year moratorium on commercial whaling. It passed by fifty three votes to zero (Japan, Brazil and South Africa abstained).

³⁴ I would also like to thank Bettina Camcigil, Director of Research, Investigative Services, HSUS and Kitty Block, Special Counsel to the United Nations and Treaties Department, HSUS, for their help and assistance in the researching and the drafting this testimony.