

The Humane Society of the United States (HSUS)  
Position Statement for the 55<sup>th</sup> Meeting of the IWC

When the IWC came into force in 1946, many countries had large-scale whaling operations and whale stocks were on the decline. Nonetheless, it took several decades and the commercial extinction of nearly all the great whales for Parties to realize that the two are not compatible.

The IWC has a long and evocative history. In the early years, the IWC agreed to unsustainable quotas and was incapable of controlling or regulating commercial whaling. However, in more recent years, the IWC has undertaken some extremely progressive and dynamic conservation measures such as the moratorium on commercial whaling, and the creation of sanctuaries. For a Convention that was drawn up at the end of the Second World War, the IWC has shown that it is robust and can evolve to reflect modern conservation concerns and mores.

There are some Parties, however, who do not agree with the progression and direction of the IWC. This is their right. As member countries they can voice their opinions through resolutions and statements. But what they cannot do is take actions that undermine and diminish the effectiveness of the Convention.

Over the objections of a few very vocal whaling countries, the IWC has shifted its focus. Its primary concern is now whale conservation. Fifty years from now there may very well be another shift. However, the one constant is the ongoing obligation for contracting governments to act in good faith and not abuse the rights bestowed on them by the Convention.

The 1969 Vienna Convention on the Law of Treaties provides that “*Every treaty in force is binding upon the parties to it and must be performed by them in good faith*”. The Vienna Convention covers the most important areas in international treaty relations, and is the starting point for any description of the modern law and practice of treaties. Despite the fact that the ICRW came into force many years before the Vienna Convention was concluded, the rules in the Vienna Convention, which reflect customary international law, apply to treaties concluded before the entry into force of the Vienna Convention. Virtually every substantive provision of the Vienna Convention reflects customary law; therefore, the Vienna Convention governs the actions of all Parties to the ICRW even if they are not signatories to the Vienna Convention.

At the annual IWC meeting in 2001 the parties demonstrated further support for these principles by passing a resolution that endorsed and affirmed, inter alia, that “*good faith requires fairness, reasonableness, integrity and honesty in international behavior*”... and “*the importance of adherence to the requirements of good faith and transparency in all activities undertaken by the IWC and in all activities by Contracting Governments in respect of their involvement with the IWC*”. This Resolution also recognized Article 300 of the United Nations Convention on the Law of the Sea, which states, “*Parties shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right*”. Resolution on Transparency Within the International Whaling Commission 2001-1

The need to reflect and heed the words of this resolution is now timelier than ever. Taking reservations to core conservation measures and engaging in scientific whaling when the primary purpose is commercial are actions not based in good faith and in fact could be an abuse of rights.

When adhering to the ICRW (for the first or second time) if countries seek to secure special treatment under the ICRW by taking reservations to key conservation elements laid out in the Schedule, such actions could be viewed as contravening the Vienna Convention's rule of "good faith" and in opposition to the above-mentioned Resolution.

The obligation of States to act in good faith and the doctrine of abuse of rights are closely related. Some jurists have argued that a party is not acting in good faith when it abuses a right allowed by the Convention. While these principles may overlap in certain cases, international and judicial tribunals have employed these doctrines as distinct legal concepts, and in fact judicial tribunals have strengthened them in recent findings.

The abuse of rights doctrine has been defined as the fictitious exercise of a right for the purpose of evading a rule of law or a contractual obligation. Therefore, if a Party currently bound by the moratorium issues a special permit under Article VIII for a purpose other than scientific whaling, then the exercising of that right is an abuse contrary to international law.

The principles of abuse of right and good faith do not require evidence that a Party has acted exclusively in breach of its obligations. It is enough to show that these principles have been breached if the primary purpose for rejoining the Convention is to circumvent a core conservation measure, or if scientific whaling is for primarily commercial rather than for scientific ends.

The recourse for violating these principles is to seek redress in the International Court of Justice. This is a Court of last resort, and one hopes that such breaches could be rectified or resolved within the confines of the IWC. Halting these breaches and striving for good faith dealings amongst all Parties will do much to strengthen the Commission and enhance its reputation worldwide.

The IWC is not "broke" as some whaling nations have alleged. It has simply evolved into an organization that is now more concerned with whale conservation than in maintaining a whaling industry. Evolution and progress do not erode a Convention. Bad faith dealings and abusing rights, however, do strike at the very foundation of any multi-lateral agreement.