



**Congressional
Research Service**

Informing the legislative debate since 1914

The International Whaling Convention (IWC) and Legal Issues Related to Aboriginal Rights

Kristina Alexander
Legislative Attorney

July 22, 2013

Congressional Research Service

7-5700

www.crs.gov

R40571

Summary

The International Whaling Commission (IWC) has 88 members divided almost evenly between countries that condone whaling and those that favor whale conservation. This situation leads to contentious votes and accusations that decisions are not based on science but on politics, in particular, whether or not a country favors whaling. Members of Congress have introduced measures to advance U.S. policy within the Commission to respond to IWC actions. One area of contention is the right of aboriginal groups to hunt whales (sometimes referred to as indigenous whaling). Aboriginal subsistence whaling catch limits are set by the IWC for aboriginal peoples in four countries: the United States (bowhead and gray); Denmark (Greenland) (fin, minke, bowhead, and humpback); Saint Vincent and the Grenadines (humpback); and Russia (gray and bowhead).

The International Convention for the Regulation of Whaling (the Convention) has addressed aboriginal whaling since it was signed on December 2, 1946, by the United States and 14 other countries. The Convention limits how many bowhead or gray whales U.S. aboriginal groups may harvest by setting catch limits for five-year periods. The parties could not agree to limits for the current period of 2013 through 2018 for all aboriginal groups, but the United States' catch limits were set at 336 for the period, with no more than 67 strikes per year.

Whaling also is restricted in the United States by three domestic laws: the Marine Mammal Protection Act (MMPA); the Endangered Species Act (ESA); and the Whaling Convention Act (WCA). The MMPA prohibits all whaling except for subsistence use by Alaska Natives. Similarly, the ESA prohibits taking listed whales except for subsistence use by Alaska Natives. The WCA, the enabling act for the Convention, allows whaling by aboriginal peoples to the extent it does not conflict with the Convention. Despite these statutory exceptions allowing aboriginal whaling, the Secretary of Commerce can restrict such whaling by adopting specific regulations under either the MMPA or the ESA. Currently, only the Cook Inlet stock of beluga whales is protected under such regulation. The Makah Tribe (in the state of Washington) is the only non-Alaska indigenous group in the United States with the legal right to kill whales. This right is based on treaty, but the Makah must still comply with the MMPA by receiving a permit that allows whale harvest. Compliance with U.S. law and the Convention determines the types and numbers of whales and where and when they are killed.

More recent legislation regarding whaling typically is done by resolution. The only legislation proposed in the 113th Congress is an amendment to end the tax deduction allowed to Alaska Native whaling (S.Amdt. 414 to S.Con.Res. 8). It was withdrawn. Legislation proposed in the 111th and 112th Congresses addressed ending all nonaboriginal whaling, including scientific whaling (H.Res. 714 (112th Congress); H.R. 2455, S. 3116 (111th Congress)), and would have made the U.S. representative to the IWC a federal employee (H.R. 2955 (111th Congress)). Previous Congresses have addressed whaling in general, and aboriginal whaling in particular. Legislative measures, primarily in the form of concurrent resolutions, have been proposed in four categories: protesting commercial, scientific, or community (nonaboriginal) whaling; ensuring aboriginal whaling rights; providing a tax break for aboriginal whaling captains; and addressing the United States' policy at the annual meetings of the IWC.

Contents

Structure and Organization of the International Convention for the Regulation of Whaling	1
Evolution of the IWC.....	5
Drawbacks and Benefits of the United States’ Continued Membership in the Convention.....	6
The Convention and U.S. Law.....	7
The Whaling Convention Act	7
Other U.S. Law Related to the IWC	8
Pelly Amendment	8
Packwood-Magnuson Amendment	9
Aboriginal Whaling Under Domestic Law	9
MMPA and ESA Regulations Restricting Aboriginal Whaling	10
Makah Tribe Whaling Rights	11
Subsistence Hunting Catch Limits	12
Aboriginal Hunting Tax Deduction	13

Figures

Figure 1. Catches of Whales Taken Under Scientific Permit.....	2
Figure 2. Whale Takes by IWC Members.....	4
Figure 3. New Members of the International Convention for the Regulation of Whaling	6

Tables

Table 1. Member Nations and Date of Entering Convention.....	13
Table 2. Cetaceans Listed Under the Endangered Species Act or Categorized as Depleted Under the Marine Mammal Protection Act	15

Appendixes

Appendix A. Catches by IWC Member Nations in the 2010 and 2010/2011 Seasons	16
Appendix B. Catches by IWC Member Nations in the 2009 and 2009/2010 Seasons	17

Contacts

Author Contact Information.....	18
Acknowledgments	18

Structure and Organization of the International Convention for the Regulation of Whaling

The International Convention for the Regulation of Whaling (the Convention) was signed December 2, 1946, by the United States and 14 other countries.¹ The purpose of the Convention is to restore and maintain a sustainable whale population by regulating whaling.² The Convention established the International Whaling Commission (the Commission or the IWC), made up of one representative from each member country. The Commission is chaired by a member state, typically following service as Vice Chair. The Chair is held by Jeannine Compton-Antoine from St. Lucia for a two-year term. The Commission has several committees: Conservation, Scientific, Technical, and Finance and Administration. Aboriginal subsistence whaling is addressed by a subcommittee of the Technical Committee.

The Convention also includes a Schedule, described within the Convention as providing “regulations with respect to the conservation and utilization of whale resources.”³ The Schedule includes the more operational provisions of the Convention, such as definitions, classifications of whales, limits on factory ships, jurisdictional limits on captures, information for scientific permits, and catch limits for aboriginal subsistence use (sometimes known as indigenous whaling). It is regularly amended by the parties, as allowed by Article V(1) of the Convention. The Schedule has the same force and effect as the Convention.

Some of the duties of the Commission are described in Article IV of the Convention, which requires the Commission to do the following: encourage, recommend, or organize studies and investigations relating to whales and whaling; collect and analyze statistical information concerning whale stocks and the effects of whaling activities thereon; and study, appraise, and disseminate information concerning methods of maintaining and increasing the populations of whale stocks.

Article V of the Convention authorizes the Commission to set catch limits for aboriginal subsistence whaling. These limits require a three-fourths majority to pass.⁴ The catch limits become effective on the member countries 90 days after notification, unless a country objects. The catch limits establish a five-year quota depending on the stock. The aboriginal subsistence whaling catch limits applicable to United States’ aboriginal peoples are for bowhead whales and gray whales. In addition to the United States, indigenous whaling is also conducted in Denmark (Greenland) (fin, minke, bowhead, and humpback), Saint Vincent and the Grenadines⁵ (humpback), and Russia (gray and bowhead). At its last meeting, in 2012, the parties were unable to reach a decision as to catch limits for the five-year period 2013-2018 for Greenland, but consensus was reached for the other aboriginal groups. The United States’ catch limit is 336

¹ TIAS 1849; Protocol amending 1956, TIAS 4228. Those countries were Argentina, Australia, Brazil, Canada, Chile, Denmark, France, the Netherlands, New Zealand, Norway, Peru, South Africa, the Soviet Union, and the United Kingdom. Some have withdrawn, some have rejoined, and some unions have split into multiple countries. There are now 89 members. See **Table 1** for the list of parties (also called member states) to the Convention.

² Preface, Art. V.

³ Art. V(1).

⁴ Art. III(2).

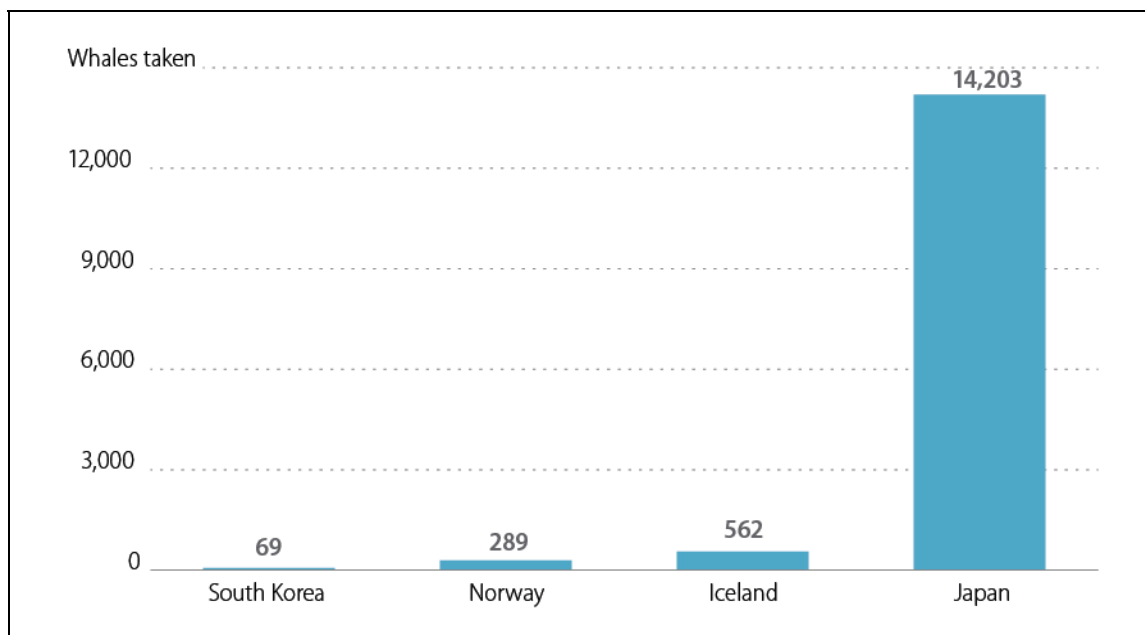
⁵ Saint Vincent and the Grenadines is located in the Caribbean Sea southeast of Puerto Rico.

whales landed during that five-year period, with not more than 67 strikes per year. Denmark has indicated it will use proposed catch limits for Greenland until the IWC reaches an agreement.⁶

The Schedule to the Convention describes date, location, and maturity limits on killing whales, based on the type of whale stock. Since 1986, commercial whaling has been banned.⁷ The Convention allows certain types of whaling, however, if done under a scientific permit: “any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit.”⁸

The only requirement for the scientific exemption is that the member state must report how many permits it issues.⁹ Scientific permits are a divisive issue among members. Only four countries have used the permits since a moratorium on commercial whaling went into effect in 1986: Japan, Iceland, Norway, and South Korea. Only Japan continues to use scientific permits for their whaling activities. Since 1985, Japan has killed more than 14,000 whales under scientific permits.

**Figure 1. Catches of Whales Taken Under Scientific Permit
1986-2011**



Source: Congressional Research Service, based on data from the International Whaling Commission, available at iwc.int/table_permit.

⁶ Letter from the Denmark Minister of Foreign Affairs to IWC Commissioners and Contracting Governments, *Greenland Aboriginal Subsistence Whaling* (July 1, 2013), available at <http://iwc.int/cache/downloads/c0mq34ohp4ck8ccko084ko0k/Letter%20from%20Denmark%20to%20IWC%20Greenland%20asw.pdf>.

⁷ The Schedule, III, 10(e). The Convention covers the 13 species of large whales, but does not cover small cetaceans, such as beluga whales. Therefore, while the IWC limits how many bowhead or gray whales aboriginal groups may harvest, aboriginal small cetacean harvest is not similarly restricted by the Convention.

⁸ Art. VIII.

⁹ Art. VIII(1).

Some Members of Congress have indicated displeasure over the practice, introducing resolutions expressing opposition to killing whales under scientific permits.¹⁰ Only S.Res. 226 (105th Congress) has passed, although the House passed a concurrent resolution in the 110th Congress.¹¹ No such legislation has been introduced in the 113th Congress. H.Res. 714, in the 112th Congress, expressed support to end all commercial whaling, even when done under scientific permit, pointing to the number of whales killed since the commercial ban went into place. H.R. 2455, in the 111th Congress, would have directed the U.S. representative to the IWC to refuse to condone lethal scientific whaling.

Also, despite the commercial whaling ban, Norway and Iceland hunt whales for commercial use under either an objection or reservation to that ban. Norway filed an objection at the time the ban was proposed and so is not bound by it.¹² Iceland quit the IWC after the ban went into place, but returned to membership in 2002, filing a reservation to the commercial ban.¹³ In the 2011 and 2011/2012 season, Norway killed 533 whales under objection, and Iceland killed 58 whales under reservation.¹⁴

¹⁰ See, e.g., H.Con.Res. 350 (110th Congress); S.Con.Res. 86 (110th Congress); H.Con.Res. 164 (109th Congress); S.Con.Res. 33 (109th Congress).

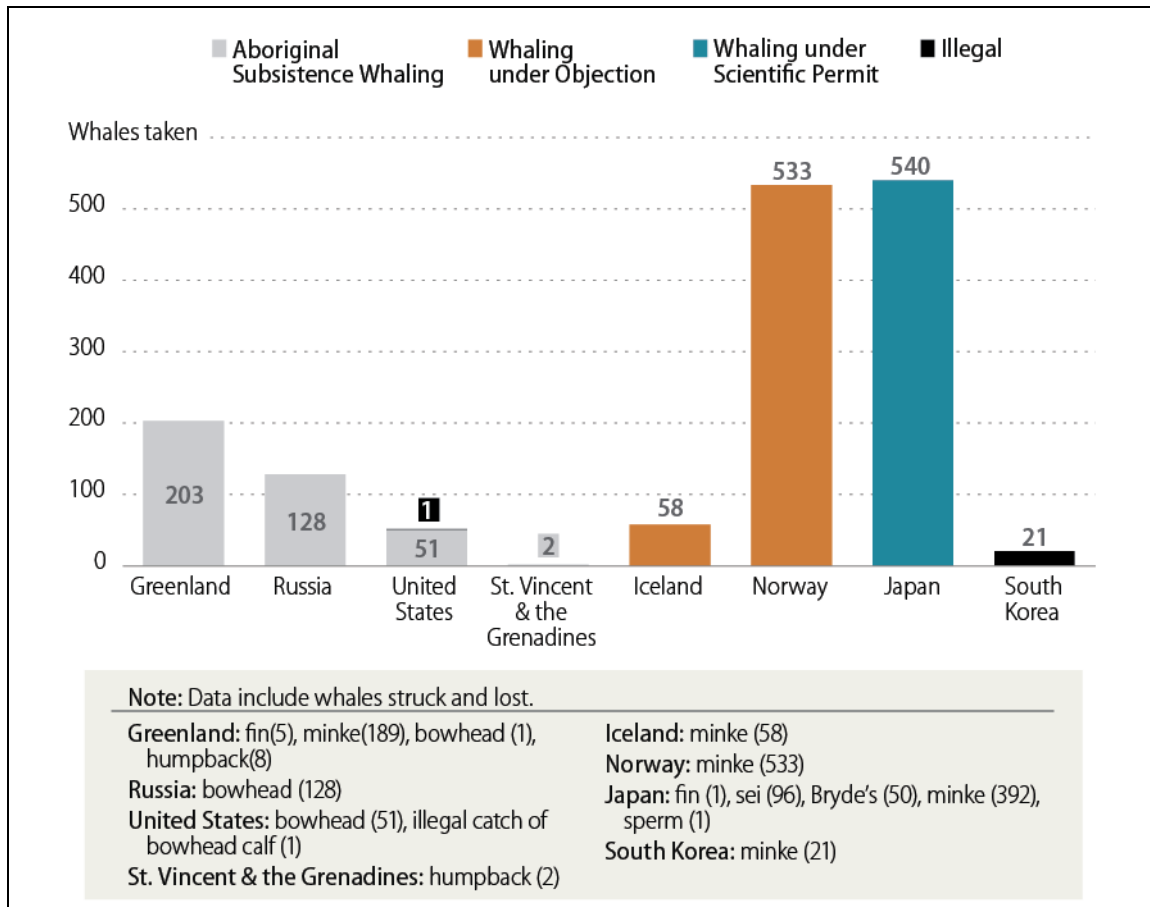
¹¹ That resolution stated in pertinent part: “That it is the sense of the Senate that at the 50th Annual Meeting of the International Whaling Commission in Oman the United States should ... oppose the lethal taking of whales for scientific purposes unless such lethal taking is specifically authorized by the Scientific Committee of the Commission.”

¹² See The Schedule, III, 10(e), footnotes.

¹³ See IWC Status of the Convention, footnote 39, available at http://iwcoffice.org/_documents/commission/convention_status.pdf.

¹⁴ IWC, *Annual Report of the International Whaling Commission 2011*, Annex I, available at http://iwcoffice.org/_documents/meetings/jersey/AnnexI-Catches.pdf.

Figure 2. Whale Takes by IWC Members
 2011 and 2011/2012 Season
 (data from previous seasons are available in **Appendix A** and **Appendix B**)



Source: Congressional Research Service, compiled from data from IWC, iwc.int/table_objection.

Each member state regulates its own compliance and enforcement under the Convention. Under Article IX, each party is required to take “appropriate measures to ensure the application of the provisions of [the] Convention.” There is no independent enforcement arm of the Commission. Article IX also provides that each member state must take enforcement action against vessels or persons under its jurisdiction that have violated the Convention.

The following infractions were reported for the 2011 whaling season:

- United States—take of one bowhead calf; and
- South Korea—take of 21 minke whales.¹⁵

¹⁵ IWC, *Report of the Infractions Sub-committee* (IWC/64/Rep4rev1) (March 7, 2012), p. 7, available at <http://iwc.int/cache/downloads/3aouz5nplyqs08oo88wcks8c8/64-Rep4rev1.pdf>.

Evolution of the IWC

Some have argued that the thrust of the Convention has nearly reversed since its inception, pointing out that the Convention initially allowed killing tens of thousands of whales, but now only allows several hundred takes and only by aboriginal hunters.¹⁶ This has been described as a move “from an institution aimed at preserving *whaling* to an institution seeking to preserve *whales*.”¹⁷

The Commission is divided almost evenly between pro-whaling and anti-whaling countries, leading to contentious votes and accusations that decisions are not based on science, but on politics, in particular whether a country favors commercial whaling. Because amendments to the Schedule require a three-quarters majority vote, decisions can be thwarted by either side. When this has happened, diplomacy has been the answer. For example, when the decision to set the 2008-2012 aboriginal subsistence quota for bowhead and gray whales was threatened with defeat (meaning no aboriginal whaling would be allowed), diplomatic action by the United States allowed the vote to go through, and the quota was established.

The fact that there is a division between pro-whaling and anti-whaling countries is worth reviewing, considering that very few countries actually hunt whales. Only seven member countries to the Convention kill whales,¹⁸ but the Convention has 88 members.¹⁹ Membership has surged as whaling has become more restricted. Each side accuses the other of “buying” countries’ memberships to stack votes in their favor. For example, landlocked countries that lack a whaling culture, such as Mongolia, Luxembourg, and Mali, have joined in the last decade. Of the 88 members, only 35 have submitted legislation regarding marine mammal management, as required, perhaps an indication of the importance of whales to those members.²⁰

¹⁶ John K. Setear, *Can Legalization Last?: Whaling and the Durability of National (Executive) Discretion*, 44 Va. J. Int'l L. 711, 732 (2003-2004).

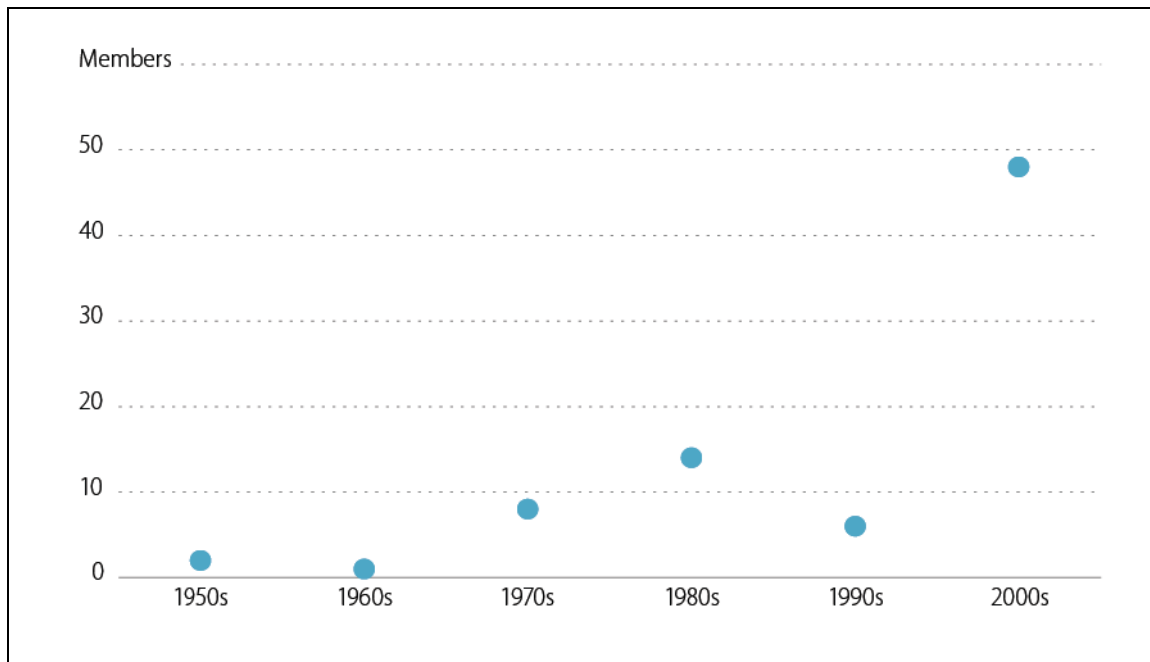
¹⁷ *Id.* (emphasis in original).

¹⁸ Denmark (Greenland), Iceland, Japan, Norway, Russia, Saint Vincent and the Grenadines, and the United States. See **Figure 2** for data on whaling by these countries.

¹⁹ Greece withdrew from the IWC effective June 30, 2013. See Circular Communication to Commissioners and Contracting Governments, Withdrawal of Greece from the Convention, IWC.CCG.1063 (July 2, 2013), available at <http://iwc.int/cache/downloads/dgofwnmucu804cscogswck04/IWCCCG1063.pdf>.

²⁰ IWC, *Report of the Infractions Sub-committee* (IWC/64/Rep4rev1) (March 7, 2012), p. 3, available at <http://iwc.int/cache/downloads/3aouz5nplyqs08oo88wcks8c8/64-Rep4rev1.pdf>.

Figure 3. New Members of the International Convention for the Regulation of Whaling (1950-2013)



Source: Congressional Research Service, based on data from the IWC, available at <http://www.iwcoffice.org/commission/iwcmain.htm>.

Drawbacks and Benefits of the United States' Continued Membership in the Convention

The United States plays a unique role in the IWC. The United States allows indigenous takes of whales but is a strong opponent of commercial whaling. This may give the United States a centrist role between the two factions of pro-whaling and anti-whaling member countries. The United States also provides significant financial support and scientific expertise to the IWC.

The future of the IWC has been a topic of discussion among its members for many years. Some argue that the Convention plays a significant role in whale management, not just by setting quotas, but by its research through the Scientific Committee. The IWC is the primary international body for the worldwide study of whales. This may be seen as a benefit to the aboriginal hunters. By using scientific data as the underlying basis for the aboriginal subsistence quotas, the political pressures to stop that whaling are perceived as neutralized.

On the other hand, if the United States were no longer a member, its aboriginal people might not be limited by a quota, and could take whales under the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA), provided the takes were for subsistence use and not wasteful. The United States could control the taking by exercising its regulatory authority under

the MMPA and ESA for depleted stocks and/or listed species.²¹ (See “Aboriginal Whaling Under Domestic Law,” below, for more discussion on these acts.)

The IWC appointed a Small Working Group on the Future of IWC to address the issues facing the Commission. The Small Working Group produced a progress report in February 2009, noting the IWC’s uncertain future: “the international whaling regime as embodied in the [Convention] is at a crossroads, beset by seemingly fundamental disagreements between Contracting Governments as to its nature and purpose.”²²

The Convention and U.S. Law

The Whaling Convention Act

The International Convention for the Regulation of Whaling was approved by the Senate and ratified by the President as a treaty. In the United States, for the purposes of domestic law, this and any other treaty is as legally binding as the Constitution. Article VI of the U.S. Constitution provides that “this Constitution ... and all Treaties made, or which shall be made ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.” Not only is a treaty the supreme federal law, but provided that it is otherwise constitutional, it also is binding on states.²³ As a Convention party, the United States is bound by its Convention obligations internationally and is expected to carry out Convention obligations in good faith.

The Senate found that the Convention was not entirely self-executing, meaning that implementing laws were required: “legislation is needed to enable the United States to discharge the obligations assumed under the agreement.”²⁴ The Whaling Convention Act of 1949 (WCA) implements the Convention under U.S. law.²⁵ The WCA makes it illegal to engage in whaling in violation of the Convention, or to purchase, sell, import, or export any whale product taken in violation of the Convention. Convictions can result in up to a year in prison, or a fine of up to \$200,000 for corporations and \$100,000 for individuals.²⁶ Enforcement is shared among many agencies, including the National Oceanic and Atmospheric Administration (NOAA), the Coast Guard, and Customs and Border Patrol.²⁷ As a procedural matter, the WCA authorizes the Secretary of State to make any objections to amendments to the Schedule on behalf of the United States, with the

²¹ MMPA—16 U.S.C. §1371(b) (providing that where a stock is depleted, NOAA may set regulations for the taking of marine mammals); 16 U.S.C. §1539(e)(4) (providing NOAA may regulate the taking of whales listed under the ESA where NOAA determines that the taking may materially and negatively affect the species).

²² Report on the Small Working Group (SWG) on the Future of the International Whaling Commission, Chairs’ Suggestions on the Future of the International Whaling Commission, p. 3 (February 2, 2009). Document available from CRS. In 2010, the Commission considered the Chairs’ report as part of this process, but failed to reach consensus and the process was “paused.” The Commission decided to continue the “pause” at its 2011 meeting.

²³ *Missouri v. Holland*, 252 U.S. 416, 434-35 (1920).

²⁴ 1950 U.S. Code Cong. & Admin. News 2943 (H.Rept. 81-2514) (repeating in substance the Senate Report).

²⁵ 16 U.S.C. §§916-916l.

²⁶ 16 U.S.C. §916f (providing that violations may be punished by up to one year in prison). See also, 18 U.S.C. §§3559, 3571 (designating violations punishable by up to one year in prison as Class A misdemeanors with a criminal fine of up to \$100,000 for individuals, and \$250,000 for corporations). The whale parts and products are subject to forfeiture. 16 U.S.C. §916f.

²⁷ 16 U.S.C. §916g. Also, state employees may be authorized to enforce the act. 16 U.S.C. §916j(c).

concurrence of the Secretary of Commerce.²⁸ This eliminates any need for re-ratification of an amended Schedule.

Other U.S. Law Related to the IWC

Pelly Amendment

Two other statutes address the Convention. Under 22 U.S.C. Section 1978(a)(2), if another country is violating the Convention, the United States may impose sanctions: “When the Secretary of Commerce determines that nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program, the Secretary of Commerce shall certify such fact to the President.” Sanctions are addressed by Section 1978(a)(4):

Upon receipt of any certification made under paragraph (1) or (2), the President may direct the Secretary of the Treasury to prohibit the bringing or the importation into the United States of any products from the offending country for any duration as the President determines appropriate [as allowed by the World Trade Organization and other applicable trade law].²⁹

This law is referred to as the Pelly Amendment (to the Fisherman’s Protective Act of 1967). The Supreme Court describes the amendment as Congress’s reaction, in part, to “the IWC’s inability to enforce its own quota.”³⁰ It applies to the Convention because *international fishery conservation program* is defined within the statute as including any multilateral agreement “the purpose of which is to conserve or protect the living resources of the sea, including marine mammals.”³¹

In 2004 and 2011, the Secretary of Commerce certified to the President that Iceland was undermining the effectiveness of the Convention.³² Among the reasons for the 2011 certification were Iceland’s continued harvest of endangered fin whales and Iceland’s participation in commercial whaling by exporting whale meat. The Iceland Ministry of Fisheries and Agriculture responded that fin whales were abundant and that Iceland’s harvest of fin whales was as sustainable as the United States’ aboriginal harvest of bowhead whales.³³ The 2011 Certification indicates that Japan is under three certifications for its use of scientific permits for whale hunting.³⁴ However, the history of the Pelly Amendment is one of certifications without

²⁸ 16 U.S.C. §916b.

²⁹ Prior to 1992 the embargo was limited to fish and wildlife products, but was amended to include any products. P.L. 102-582 §201(a)(1).

³⁰ *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 225 (1986).

³¹ 22 U.S.C. §1978(h)(3).

³² See Letter to the President of the United States from the Secretary of Commerce (July 19, 2011), available at http://www.noaanews.noaa.gov/stories2011/pdfs/pellygrantsignedletter_final.pdf. The 2004 Certification was retained in 2006.

³³ Iceland Ministry of Fisheries and Agriculture, Press Release, *Surprise over Pelly Amendment Certification of Iceland by the US Department of Commerce* (July 20, 2011), available at <http://eng.sjavarutvegsraduneyti.is/news-and-articles/nr/10580>.

³⁴ See Letter to the President of the United States from the Secretary of Commerce (July 19, 2011), at 3.

sanctions.³⁵ In response to the 2011 Iceland Certification, President Obama directed federal agencies to “raise concerns regarding commercial whaling,” among other administrative evaluations and diplomatic pressures, but did not impose any sanctions.³⁶ In the season following the certification, Iceland did not catch any fin whales.³⁷

Packwood-Magnuson Amendment

The Packwood-Magnuson Amendment (to the Magnuson Fishery Conservation and Management Act) allows a similar certification by the Secretary of Commerce: “that nationals of a foreign country, directly or indirectly, are conducting fishing operations or engaging in trade or taking which diminishes the effectiveness of the International Convention for the Regulation of Whaling.”³⁸

Such a certification acts procedurally the same as one made under the Pelly Amendment. However, the sanctions are different. While the Pelly Amendment speaks of discretionary import bans, if a certification is made under the Packwood-Magnuson Amendment, the Secretary of State is directed to reduce the allowable level of U.S.-permitted fishing by not less than 50%.³⁹ However, since no foreign countries have fishing rights in U.S. waters, this sanction is no longer used.

Aboriginal Whaling Under Domestic Law

Three U.S. laws that otherwise prohibit most whaling allow aboriginal groups to kill whales: the MMPA, the ESA, and the WCA. The MMPA,⁴⁰ passed in 1972, prohibits killing or harassing whales, unless otherwise permitted under the statute.⁴¹ Taking whales may be permitted for scientific research, enhancing the survival or recovery of the species, and when incidental to an otherwise lawful activity. The MMPA also provides that any “Indian, Aleut, or Eskimo” who lives on the coast of Alaska may take a marine mammal for subsistence purposes or for native handicrafts and clothing, provided the take is not wasteful.⁴²

The ESA⁴³ also prohibits whaling, to the extent that whales are listed under the act. (Bowhead whales are an endangered species; the stock of gray whales hunted by U.S. indigenous peoples is not. See **Table 2** for a list of whales and whether they are listed under the ESA.) Generally speaking, the ESA prohibits killing or harming listed species, and prohibits the trade, possession, or transport of listed animal species or products made from them. Like the MMPA, it has an

³⁵ See *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221, 225 (1986).

³⁶ Memorandum from President Barack Obama to Cabinet Secretaries, et al., Memorandum Regarding Pelly Certification and Icelandic Whaling (September 15, 2011), at <http://www.whitehouse.gov/the-press-office/2011/09/15/memorandum-regarding-pelly-certification-and-icelandic-whaling>.

³⁷ See IWC, *Catches Under Objection Since 1985*, at http://iwc.int/table_objection.

³⁸ 16 U.S.C. §1821(e)(2)(A).

³⁹ 16 U.S.C. §1821(e)(2)(B).

⁴⁰ 16 U.S.C. §§1361-1384.

⁴¹ 16 U.S.C. §1372.

⁴² 16 U.S.C. §1371(b).

⁴³ 16 U.S.C. §§1531-1544.

exception for Alaska natives, but the ESA exception applies not just to Indians, Aleuts, and Eskimos, but also to any permanent resident of an Alaskan native village.⁴⁴ The exception allows those parties to take listed species when the taking is “primarily for subsistence purposes,” which may include selling authentic native handicrafts.

These two statutes, if viewed by themselves, would allow Alaskan Natives to kill any whale, even an endangered one, provided the harvest is for nonwasteful subsistence use (and that no special regulation restricts harvest, as discussed below).⁴⁵ However, aboriginal groups must also comply with the WCA. The WCA states that it is illegal to kill whales in violation of the Convention.⁴⁶ The Commission sets subsistence whaling catch limits for bowhead and gray whales.⁴⁷ Accordingly, while subsistence whaling by Alaskan groups has few restrictions under the MMPA and the ESA, it is limited by the IWC catch limits, although, as noted above, the IWC regulates only large whales, and not small cetaceans such as beluga.

MMPA and ESA Regulations Restricting Aboriginal Whaling

Despite exceptions allowing subsistence harvest, both the MMPA and the ESA authorize regulations preventing Alaskan natives from killing protected species where that killing would undermine the acts’ purposes.

The MMPA allows regulations to limit taking “any species or stock of marine mammal” by Alaska Natives under 16 U.S.C. Section 1371(b). The regulations may restrict the subsistence harvest based on “species or stocks, geographical description, ... season, or any other factors ... consistent with the purposes of this chapter.”⁴⁸ Under 16 U.S.C. Section 1373, the regulations must be based on the “best scientific evidence available” and follow a formal agency hearing.

The ESA authorizes the Secretary to restrict aboriginal takes where the harvest “materially and negatively affects the threatened or endangered species.”⁴⁹ Following notice and hearing required by 16 U.S.C. Section 1539(e)(4), the regulations may be based on “species, geographical description of the area included, the season for taking, or any other factors ... consistent with the policy of [the ESA].”

Regulations adopted pursuant to the MMPA restrict subsistence whaling of the Cook Inlet stock of beluga whales. Aboriginal harvest of those whales has been controversial. The Cook Inlet stock of beluga whales is an endangered species, and is also protected under the MMPA. In 1999, Congress temporarily prohibited killing Cook Inlet beluga whales under an MMPA exemption

⁴⁴ 16 U.S.C. §1539(e)(1).

⁴⁵ 16 U.S.C. §1371(b), and 16 U.S.C. §1539(e)(4), respectively.

⁴⁶ 16 U.S.C. §916c(a)(1). To the extent that whale products were sold or moved across state or international boundaries, subsistence whaling could also violate the Convention on the International Trade of Endangered Species of Wild Fauna and Flora (CITES), which prohibits trade without the appropriate permit(s), and the Lacey Act, which prohibits the transport across federal or state lines of species that were taken in violation of a state, federal, or international law.

⁴⁷ The catch limits are set by whale species, not by country. Any nation with aboriginal hunting rights could take bowhead and gray whales, but the countries have agreed that the United States’ aboriginal hunting will be of bowhead while the Russian aboriginal hunting will be of gray whales. Once permitted, the Makah would hunt gray whales from the same stock as the Russians.

⁴⁸ 16 U.S.C. §1371(b).

⁴⁹ 16 U.S.C. §1539(e)(4).

unless done via a cooperative agreement between NOAA and the “affected Alaskan Native organizations.”⁵⁰ In 2008, following a formal rulemaking procedure, which included hearings before an administrative law judge, public comments, and environmental reviews, NOAA issued regulations under the MMPA to limit aboriginal harvest.⁵¹ Under the regulation, NOAA will set harvest levels every five years based on current population levels as well as 10-year growth levels. A five-year abundance average of more than 350 is required for any harvest to be conducted.⁵²

Makah Tribe Whaling Rights

The MMPA and the ESA allow subsistence whaling only by Alaska Natives. Therefore, Indian tribes outside of Alaska are not authorized under these statutes to engage in subsistence use hunting. However, the United States has recognized the right of the Makah Tribe’s right to continue its traditional practice of whaling under the Treaty of Neah Bay in 1855. The Makah, of Washington State, hunt gray whales from the eastern Pacific stock, which are no longer protected under the ESA. However, in 2004 the Ninth Circuit held that the treaty right alone was not enough to authorize whaling.⁵³ According to the court, the Makah treaty rights had to be regulated under the MMPA to achieve the “conservation necessity” of protecting whales.⁵⁴ The Ninth Circuit held that the Makah must still obtain a waiver under the MMPA from NOAA, and that NOAA must prepare an environmental impact statement under the National Environmental Policy Act (NEPA).

A waiver provision within the MMPA is used to authorize Makah whaling activities. Section 1371(a)(3)(A) of the MMPA allows NOAA to waive portions of the statute to allow taking whales, provided it is “compatible” with the conservation principles of the statute’s overall moratorium, in consideration of the distribution, abundance, and breeding habits of the whales. This is done using a formal rulemaking procedure, including a NEPA review.⁵⁵ The quotas set by the rulemaking match those designated by the Convention Schedule.

The Makah waiver is still pending. According to NOAA, there is scientific uncertainty regarding the gray whale stock which the Makah would hunt.⁵⁶ New information suggests members of the endangered western Pacific gray whale stock migrate into Makah hunting grounds on their way to

⁵⁰ P.L. 106-31, §3022.

⁵¹ 73 Fed. Reg. 60976 (October 15, 2008).

⁵² As of 2008, there were fewer than 350 Cook Inlet belugas. 73 Fed. Reg. at 60978.

⁵³ *Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2004).

In a different case, five Makah Tribesman were charged with violating the MMPA and the WCA for killing a gray whale in 2007. On February 19, 2008, a U.S. Magistrate Court Judge found the WCA was too vague, and dismissed the charges. No written decision is available. *United States v. Gonzales*, 3:07-cr-05656 (W.D. Wash. 2008). However, the judge refused to dismiss the MMPA charges against another defendant, holding that whatever the treaty agreements, killing whales required a permit. *United States v. Noah*, 2008 WL 916973 (W.D. Wash. April 2, 2008). According to a news report, three of the defendants pled guilty and received community service; two underwent a bench trial and were sentenced to imprisonment; and all were fined between \$25 and \$50 each. Lynda V. Mapes, *2 Makahs to Serve Time for Illegally Killing Whale*, *Seattle Times* (July 1, 2008).

⁵⁴ *Anderson*, 371 F.3d at 497-501.

⁵⁵ A draft EIS was available May 9, 2008. See 73 Fed. Reg. 26375 (May 9, 2008).

⁵⁶ Telephonic communication with Steve Stone, NOAA, Protected Resources Division, and the author, August 18, 2011.

Baja, Mexico, and also that Eastern Pacific whales may halt their Arctic migration along the Pacific Coast in Makah hunting grounds.⁵⁷

Subsistence Hunting Catch Limits

The number of whales allowed to be killed under the Convention depends on the catch limit set by the Schedule. The five-year catch limit (2008-2012) for bowhead whales is 280 takes and 67 strikes (meaning a whale is hit but not harvested).⁵⁸ The five-year quota for gray whales is no more than 620 takes, with no strike limits. The United States and Russia share the aboriginal quotas for these whales, with U.S. native groups taking almost all of the bowhead whales, and the Russian groups taking almost all of the gray whales. After a five-year catch limit is set by the Commission, NOAA acts to set a yearly quota,⁵⁹ based on data from previous years. The notice of the one-year catch limit is published in the *Federal Register*. According to the most recent IWC report on aboriginal whaling, the 2010 Alaska bowhead hunt resulted in 71 strikes from which 45 whales were landed.⁶⁰ The 2010 total of takes for aboriginal hunting from all four countries engaged in indigenous whaling (United States, Russia, Denmark (Greenland), and Saint Vincent and the Grenadines) was 406.⁶¹

IWC sets catch limits for a whale species. Aboriginal groups of the United States could violate the WCA by hunting those species for subsistence.⁶² It is possible that future quotas could be severely reduced or eliminated altogether as the number of bowhead whales continues to shrink and as political issues occupy the IWC membership. In 1977, the IWC banned bowhead whaling. Notwithstanding U.S. aboriginal dependence on bowhead hunting, the United States abstained from supporting this amendment to the Schedule, but did not file an objection despite a lawsuit brought by Alaskan subsistence hunters to force the United States to object.⁶³ In choosing not to challenge the bowhead ban, the State Department noted that if the United States became the first nation to challenge the catch limit, the United States' role as an advocate for the conservation of whales could be jeopardized.⁶⁴ The United States was eventually able to negotiate a bowhead catch limit.⁶⁵

⁵⁷ *Id.*

⁵⁸ The bowhead quota allows some carry-over for the strikes. While the strike limit is 67 for the stock, the Schedule allows carrying forward up to 15 whales to the next year's strike quota, should the total not be met for the year. For 2010, the U.S. reported 26 strikes that were not landed. IWC, *Report of the Aboriginal Subsistence Whaling Subcommittee*, IWC 63, 5.1.1 (July 6, 2011), available at http://iwcoffice.org/_documents/commission/IWC63docs/63-Rep3.pdf.

⁵⁹ 50 C.F.R. §230.6(a).

⁶⁰ IWC, *Annual Report of the International Whaling Commission 2011*, Annex I, available at http://iwcoffice.org/_documents/meetings/jersey/AnnexI-Catches.pdf. Other 2010 takes were reported as follows: Russia—118 gray whales, 2 bowhead; Greenland—195 minke, 5 fin, 3 bowhead, and 9 humpback whales; and Saint Vincent and the Grenadines—3 humpback whales. For data on the 2009 takes, see **Appendix B**.

⁶¹ *Id.*

⁶² See *United States v. Nusunginya*, No. A88-063 CR, 1988 WL 142333 (D. Alaska November 15, 1988).

⁶³ *Adams v. Vance*, 570 F.2d 950 (D.C. Cir. 1978) (reversing the lower court's order to enter an objection, holding that the court could not intrude into the core concerns of the State Department regarding foreign policy absent an extraordinarily strong justification).

⁶⁴ Statement of John D. Negroponte, Deputy Assistant Secretary of State for Oceans and Fisheries, as quoted in *Hopson v. Kreps*, 462 F. Supp. 1374, 1378-80 (D. Alaska 1979).

⁶⁵ See M.S. Wilson and E.H. Buck, *Changes in Eskimo Whaling Methods*, *Carnivore*, Vol. 2, No. 1, pp. 35-42 (1979).

The WCA authorizes licenses for aboriginal hunting via a licensing procedure provided under the WCA regulations.⁶⁶ Under this procedure, certain qualified individuals may obtain a license from NOAA to conduct whaling in compliance with the Convention. The same regulations impose reporting requirements.

Aboriginal Hunting Tax Deduction

The federal government supports aboriginal whaling through tax policy. The tax code allows aboriginal hunters to claim a charitable deduction of up to \$10,000 per year for whale hunting expenses.⁶⁷ The deduction applies only to sanctioned bowhead whale hunting, and allows deduction of reasonable and necessary expenses such as acquisition and maintenance of whaling boats, weapons, and gear; food for the crew; and storage and distribution of the catch. The only legislation proposed in the 113th Congress was an amendment to end that tax deduction (S.Amdt. 414 to S.Con.Res. 8). It was withdrawn.

Table I. Member Nations and Date of Entering Convention

Nation ^a	Date of Entry	Nation	Date of Entry
Antigua & Barbuda	07/21/82	Kiribati	12/28/04
Argentina	05/18/60	Republic of Korea	12/29/78
Australia	11/10/48	Laos	05/22/07
Austria	05/20/94	Lithuania	11/25/08
Belgium	07/15/04	Luxembourg	06/10/05
Belize	06/17/03	Mali	08/17/04
Benin	04/26/02	Republic of the Marshall Islands	06/01/06
Brazil	01/04/74	Mauritania	12/23/03
Bulgaria	08/10/09	Mexico	06/30/49
Cambodia	06/01/06	Monaco	03/15/82
Cameroon	06/14/05	Mongolia	05/16/02
Chile	07/06/79	Morocco	02/12/01
People's Republic of China	09/24/80	Nauru	06/15/05
Colombia	03/22/11	Netherlands	06/14/77
Republic of the Congo	05/29/08	New Zealand	06/15/76
Costa Rica	07/24/81	Nicaragua	06/05/03
Côte d'Ivoire	07/08/04	Norway	03/03/48
Croatia	01/10/07	Oman	07/15/80
Cyprus	02/26/07	Republic of Palau	05/08/02
Czech Republic	01/26/05	Panama	06/12/01

⁶⁶ 50 C.F.R. Part 230.

⁶⁷ 26 U.S.C. §170(n).

Nation^a	Date of Entry	Nation	Date of Entry
Denmark	05/23/50	Peru	06/18/79
Dominica	06/18/92	Poland	04/17/09
Dominican Republic	07/30/09	Portugal	05/14/02
Ecuador	05/10/07	Romania	04/09/08
Eritrea	10/10/07	Russian Federation	11/10/48
Estonia	01/07/09	St. Kitts and Nevis	06/24/92
Finland	02/23/83	St. Lucia	06/29/81
France	12/03/48	Saint Vincent & The Grenadines	07/22/81
Gabon	05/08/02	San Marino	04/16/02
The Gambia	05/17/05	Senegal	07/15/82
Germany	07/02/82	Slovak Republic	03/22/05
Ghana	07/17/09	Slovenia	09/20/06
Greece	w/drew 6/30/13	Solomon Islands	05/10/93
Grenada	04/07/93	South Africa	11/10/48
Guatemala	05/16/06	Spain	07/06/79
Guinea-Bissau	05/29/07	Suriname	07/15/04
Republic of Guinea	06/21/00	Sweden	06/15/79
Hungary	05/01/04	Switzerland	05/29/80
Iceland ^b	10/10/02	Tanzania	06/23/08
India	03/09/81	Togo	06/15/05
Ireland	01/02/85	Tuvalu	06/30/04
Israel	06/07/06	United Kingdom	11/10/48
Italy	02/06/98	United States of America	11/10/48
Japan	04/21/51	Uruguay	09/27/07
Kenya	12/02/81		

Source: IWC website: <http://www.iwcoffice.org/commission/members.htm> (as of 12/03/09).

- a. Canada was an original signatory but withdrew from the Convention in 1982, and now acts as an observer.
- b. Iceland withdrew from the Convention in 1992 in opposition to the whaling moratorium, and rejoined in 2002 with an objection to the moratorium. Some countries do not recognize Iceland's reservation, including the United States.

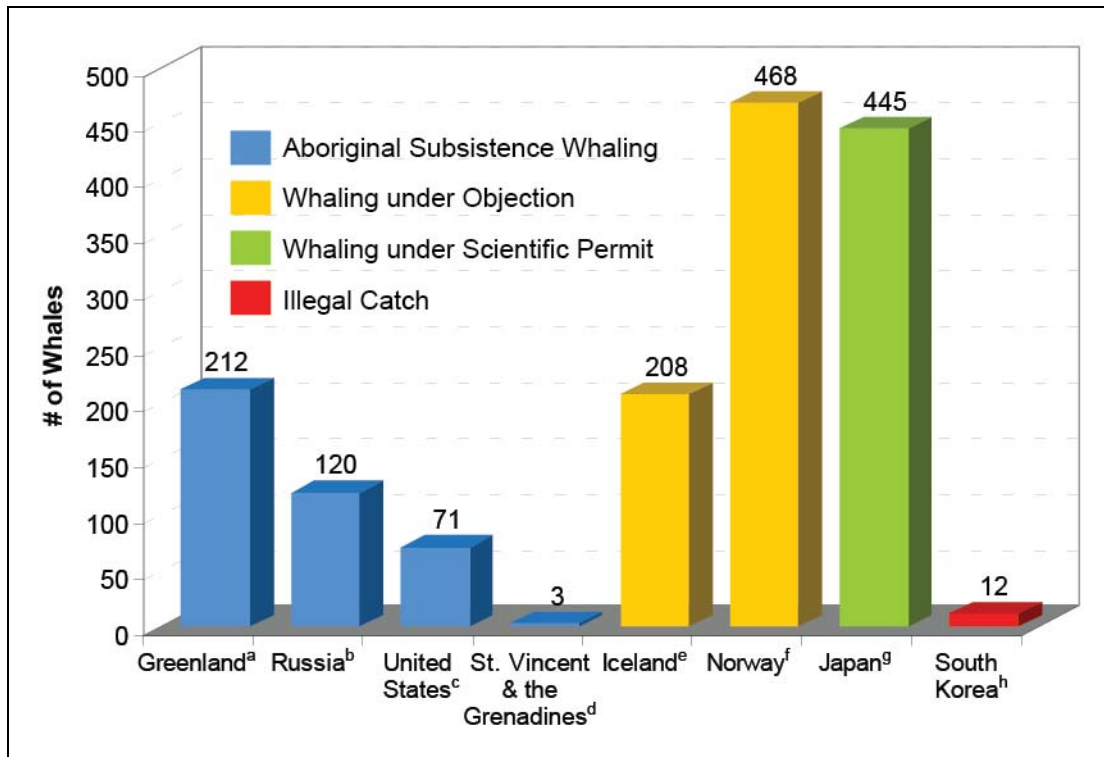
Table 2. Cetaceans Listed Under the Endangered Species Act or Categorized as Depleted Under the Marine Mammal Protection Act

Common Name of Cetacean / stock (if applicable)	ESA Status	MMPA Status
beluga whale / Cook Inlet	endangered	depleted
blue whale	endangered	depleted
bottlenose dolphin / Western N. Atlantic coastal	not listed	depleted
bowhead whale	endangered	depleted
Chinese River dolphin	endangered	depleted
fin whale	endangered	depleted
gray whale / Western N. Pacific	endangered	depleted
gray whale / Eastern N. Pacific	delisted	
Gulf of California harbor porpoise	endangered	depleted
humpback whale	endangered	depleted
Indus River dolphin	endangered	depleted
killer whale	endangered	depleted
North Atlantic right whale	endangered	depleted
North Pacific right whale	endangered	depleted
sei whale	endangered	depleted
spinner dolphin / Eastern	not listed	depleted
Southern right whale	endangered	depleted
sperm whale	endangered	depleted

Source: NOAA website: <http://www.nmfs.noaa.gov/pr/species/mammals/cetaceans/>.

Note: Bryde's whales are not protected under the ESA nor categorized as depleted under the MMPA.

Appendix A. Catches by IWC Member Nations in the 2010 and 2010/2011 Seasons

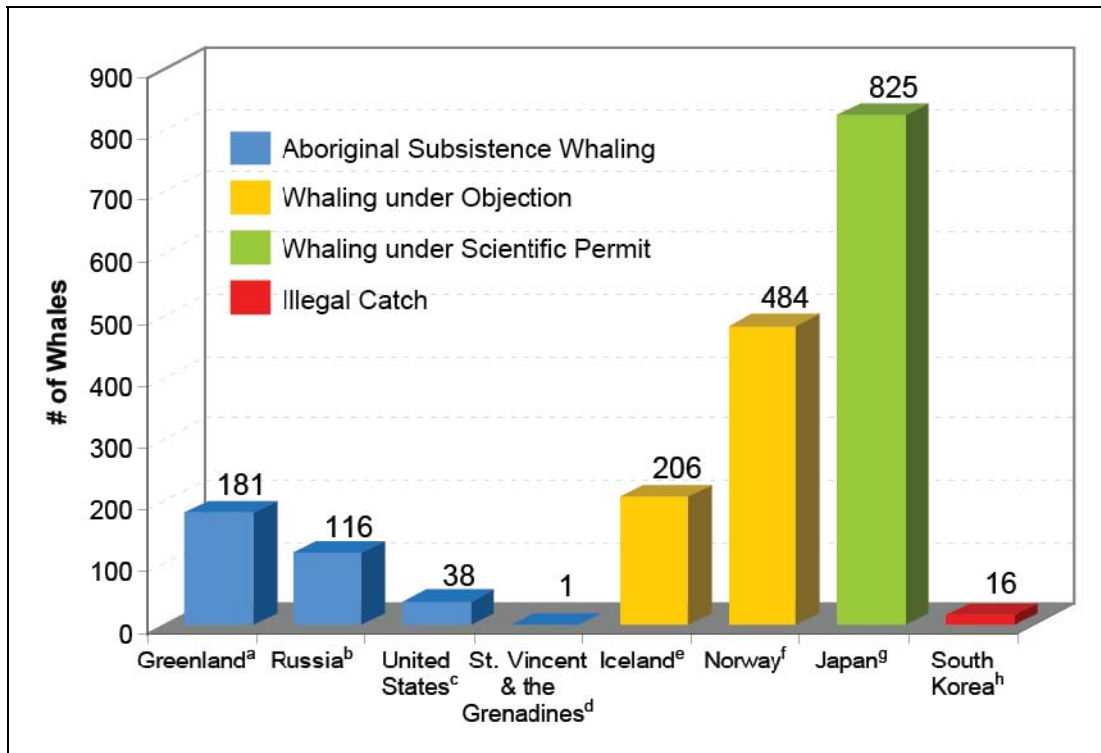


Source: Congressional Research Service, compiled from data at IWC Chair's Report 2011, Annex I (IWC 63), available at <http://iwc.int/catches>.

Notes: These data include whales struck and lost.

- a. Fin—5; minke—195; bowhead—3; humpback—9;
- b. Bowhead—2; gray—118;
- c. Bowhead—71;
- d. Humpback—3;
- e. Fin—148; minke—60;
- f. Minke—468;
- g. Fin—2; sei—100; Bryde's—50; minke—290; sperm—3;
- h. Bryde's—1; minke—11.

Appendix B. Catches by IWC Member Nations in the 2009 and 2009/2010 Seasons



Source: Congressional Research Service, compiled from data at IWC Chair's Report 2010, Annex K (IWC 62), available at http://iwcoffice.org/_documents/meetings/agadir/AnnexK.pdf.

Note: Data include whales struck and lost.

a. Fin—10; minke—168; bowhead—3;

b. Gray—116;

c. Bowhead—38;

d. Humpback—1;

e. Fin—125; minke 81;

f. Minke—484;

g. Sei—101; Bryde's—50; minke—672; sperm—1;

h. Minke—16.

Author Contact Information

Kristina Alexander
Legislative Attorney
kalexander@crs.loc.gov, 7-8597

Acknowledgments

The author would like to thank Eugene H. Buck, former CRS Specialist in Natural Resources Policy, for sharing his expertise.