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LWXSTE003

LLM IN MARINE AND ENVIRONMENTAL LAW

**THE INTERNATIONAL REGULATION OF WHALING AND
CONSERVATION OF WHALES IN THE NEW MILLENNIUM**

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Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the LLM in Marine and Environmental Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LLM in Marine and Environmental Law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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ABBREVIATIONS & ACRONYMS

AAT	Australian Antarctic Territory
ACCOBAMS	Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area
AFZ	Australian Fishing Zone
AGPS	Australian Government Publishing Service
ASCOBANS	Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas
ASPS	Antarctic Specially Protected Species
ASW	Aboriginal Subsistence Whaling
AWS	Australian Whale Sanctuary
BWU	Blue Whale Units
CBD	Convention on Biological Diversity
CCAMLR	Convention on the Conservation of Antarctic Marine Living Resources
CEP	Committee for Environmental Protection
CHOGM	Commonwealth Heads of Government Meeting
CITES	Convention on the International Trade in Endangered Species of Wild Fauna and Flora
CMS	Convention on the Conservation of Migratory Species of Wild Animals
COP	Conference of the Parties
CSIRO	Commonwealth Scientific and Industrial Research Organisation
DML	Dolphin Mortality Limit
EEZ	exclusive economic zone
EIA	Environmental Investigation Agency
EPBC	Environment Protection and Biodiversity Act
FAO	Food and Agriculture Organization of the United Nations
HSI	Humane Society International Incorporated
HSUS	Humane Society US
ICJ	International Court of Justice
ICR	Institute of Cetacean Research

ICRW	International Convention for the Regulation of Whaling
IFAW	International Fund for Animal Welfare
IMO	International Maritime Organization
IOS	Indian Ocean Sanctuary
ITLOS	International Tribunal for the Law of the Sea
IUCN	International Union for Conservation of Nature and Natural Resources
IWC	International Whaling Commission
JARPN	Japanese Whale Research Programme under Special Permit in the North Pacific
JARPNII	Japanese Whale Research Programme under Special Permit in the North Pacific
JARPA	Japanese Whale Research Programme under Special Permit in the Antarctic
JARPAII	Japanese Whale Research Programme under Special Permit in the Antarctic
JPOI	Johannesburg Plan of Implementation
LOS	Law of the Sea Convention
MoU	Memorandum of Understanding
MPA	Marine Protected Area
MSY	Maximum Sustainable Yield
NAMMCO	North Atlantic Marine Mammals Commission
NCU	Non-consumptive use of Whales
NGO	non-governmental organization
NMP	new management procedure
ODA	Overseas Development Assistance
RFMO	Regional Fisheries Management Organization
RMP	revised management procedure
RMS	revised management scheme
RSPCA	Royal Society for the Prevention of Cruelty to Animals
SAWS	South Atlantic Whale Sanctuary
SC	Scientific Committee
SCAR	Scientific Committee on Antarctic Research
SOCER	State of the Cetacean Environment Report
SOS	Southern Ocean Sanctuary

SOWER	Southern Ocean Whale and Ecosystem Research Programme
SPREP	Secretariat of the Pacific Regional Environment Programme
SPWS	South Pacific Whale Sanctuary
SWGEC	Scientific Committee of a Standing Working Group on Environmental Concerns
UNCED	United Nations Conference on Environment and Development
UNCHE	United Nations Conference on the Human Environment
UNCLOS	United Nations Convention on the Law of the Sea
UNEP	United Nations Environment Programme
UNGA	United Nations General Assembly
UNICPOLOS	United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea
VCLT	Vienna Convention on the Law of Treaties
WATCH	Western African Talks on Cetaceans and their Habitats
WDAP	Whale and Dolphin Action Plan
WDCS	Whale and Dolphin Conservation Society
WSSD	World Summit on Sustainable Development
WWF	World Wide Fund for Nature

CHAPTER I

INTRODUCTION

The International Convention for the Regulation of Whaling (ICRW) was concluded with the objective of conserving whales to promote their sustainable harvest and furthering the commercial interests of the whaling industry. The practice of the International Whaling Commission (IWC) since the imposition in 1982 of the so-called 'moratorium' on commercial whaling, and its recognition of emerging principles of international environmental law such as the precautionary principle, the ecosystem approach and sustainable use, support an evolutionary as opposed to a strict, interpretation of the objectives of the Convention. The non-consumptive use of whales would, under this interpretative approach, fall within the definition of the term 'whaling industry'. There is legal support for the view that customary international law now requires that any lethal exploitation of whales must be sustainable as defined by emerging international environmental law principles. Furthermore, the precautionary principle and an integrated ecosystem based approach to biodiversity conservation must be applied in a bona fide manner by the IWC in considering scientific advice on the abundance of whales, and the necessity of maintaining the moratorium on their commercial lethal exploitation.

The IWC

is not a simple instrument for effecting administrative conservatory laws but is a highly complex and dynamic annual diplomatic conference, providing a forum for the political bargaining that must take place afresh each year to facilitate the compromises that are necessary to achieve the consensus for specific regulations that is indirectly, if not directly required, because of the Convention's objection procedures ... achieving the necessary changes in the law of conservation of marine mammals also requires solution of economic, social and political problems....¹

Three decades after Professor Patricia Birnie wrote these words we find the IWC grappling with the same political, social and economic problems.

¹ Patricia Birnie *International regulation of whaling: from conservation of whaling to conservation of whales and regulation of whale watching* Volumes I and II (1985) at 5.

The Commission is split into two distinct camps. The preservationist non-whaling members who view non-consumptive use of all cetaceans as the way forward, who promote a global whale sanctuary and the cessation of all lethal take of whales. Diametrically opposed to this view are the remaining three major whaling nations, Japan, Norway and Iceland and their political allies, who view cetaceans as a marine living resource to be exploited.

The 1946 ICRW² is no longer up to the task of accommodating the opposing views of its Contracting Governments and of making progress towards the long term conservation of whales, an aim which falls within the agendas of both camps. However, 'the ICRW, which enables the maintenance of a fragile balance based on an endless compromise, remains the only though inadequate, option.'³

² International Convention for the Regulation of Whaling, Washington D.C 2 December 1946.

³ Maria Maffei 'The International Convention for the Regulation of Whaling' (1997) 12 *The International Journal of Marine and Coastal Law* 287 at 305.

CHAPTER II

HISTORICAL BACKGROUND

Hunting of whales has been carried out by man for thousands of years and records show that the first whaling expeditions were carried out by Norsemen and polar Eskimos four thousand years ago.⁴ The first commercial hunting of whales began in the Bay of Biscay and was undertaken by the Basques,⁵ who began exploiting Right whales as early as the 11th century.⁶ Having depleted the coastal stocks the Basques engaged in pelagic whaling, and by 1578 their vessels were found off the coast of Newfoundland.⁷ Over exploitation led to the cessation of the Basque whaling industry, and the hunting of bowhead whales off Greenland by Dutch, British, German and French whalers drove both the bowhead whale and the Right whale to near extinction by the end of the 19th century.⁸ Whalers began to target other species of whales and blue, humpback and fin whales were severely depleted during the 19th and early 20th century.⁹ At the beginning of the 20th century Antarctica was the only area left with sufficient stocks of whales to sustain commercial pelagic whaling operations, and in the next 60 years almost two million whales were captured in the southern hemisphere bringing about the commercial extinction of blue, fin and humpback whales.¹⁰

Freedom of the high seas is a firmly established principle of international law. High seas fisheries are a common property resource and the Grotian doctrine of 'mare liberum' stated that the sea is the common property of all 'because it is so limitless that it cannot become a possession of anyone, because it is adapted for use by all whether we consider it from the point of view of navigation or fisheries'.¹¹

⁴ William Burns 'The Berlin Initiative on strengthening the conservation agenda of the International Whaling Commission: toward a new era for cetaceans?' (2004) 13 *RECIEL* 72.

⁵ *Ibid.*

⁶ Birnie (note 1) at 66.

⁷ *Ibid.*

⁸ Burns (note 4) at 72.

⁹ *Ibid.*

¹⁰ *Ibid.* at 73.

¹¹ Grotius *The freedom of the seas or the right which belongs to the Dutch to take part in the East Indian Trade* translated by R Magoffin and JB Scott 1916 at 22 and Birnie (note 1) at 88.

Grotius did however envisage that high seas fisheries could be regulated or prohibited stating: 'if it were possible to prohibit any of these things, say for example, fishing, for in a way it can be maintained that fish are exhaustible, still it would not be possible to prohibit navigation, for the sea is not exhausted by that use'.¹² High seas fisheries have always been a common property resource and the history of whaling shows that whaling operations have been conducted under this doctrine.¹³

The failure of the pre war regulation of whaling by ad hoc agreements to halt the decline in whale stocks, and the post war establishment of the United Nations, led to a new initiative to establish a permanent international policy-making and law-making body.¹⁴ The International Whaling Conference was held in Washington in 1946 which led to the signing of the ICRW¹⁵ which retained the status of whales as a common property resource, allowing all states freedom of access to the resource¹⁶ which remained *res communis*.

The core of the ICRW is the establishment of a permanent International Whaling Commission (IWC) established under Article III of the ICRW and composed of one commissioner from each contracting government. The ICRW thus created an international regulatory body which could enact regulations governing its member states relating to the conservation and utilization of whale resources.¹⁷

The practice of the IWC in its first few decades of operation was to set quotas which were unsustainable and contrary to the views of the IWC's Scientific

¹² Ibid at 43 and Birnie (note 1) at 89.

¹³ Birnie (note 1) at 104.

¹⁴ Ibid at 141.

¹⁵ International Convention for the Regulation of Whaling (Washington, 2 December 1946). Available at <http://www.iwcoffice.org> [Accessed 5 February 2008].

¹⁶ Birnie (note 1) at 166.

¹⁷ Patricia Birnie 'Are twentieth-century marine conservation conventions adaptable to twenty first century goals and principals?' Part II (1997) 12 *International Journal of Marine and Coastal Law* 488 at 489. Neither of the terms 'Whale resources' nor 'whale' were defined. The Final Act of the 1946 Conference annexed a chart entitled 'Nomenclature of Whales', and paragraph IV of the Final Act noted that; The International Whaling Conference Recommends: That the Chart of Nomenclature annexed to this Final Act be accepted as a guide by the Governments represented at the Conference. The chart listed the great whales.

Committee.¹⁸ From 1949 to 1972 the IWC used the 'blue whale unit' (BWU) to establish annual catch limits, with one blue whale unit equivalent to one blue whale, two fin whales or 2.5 humpback whales, or six sei whales or an appropriate combination.¹⁹ This system did not limit the capture of individual species of whales and effectively led to the commercial extinction of these species. The ineffective regulation of whaling by the IWC during this period led to six of the 11 great whale species still being classified as endangered or vulnerable more than 30 years after commercial exploitation of these species ceased.²⁰ Once the effective commercial extinction of the great whales of Antarctica had taken place, the financial incentive to conduct large scale pelagic whaling operations in Antarctica disappeared and many of the whaling nations ceased commercial whaling.²¹ Furthermore, the rapid increase in the membership of the IWC to include a large majority of non whaling States led to an about turn in IWC practice, which ultimately led to the imposition of the moratorium on commercial whaling.

¹⁸ William Burns 'The International Whaling Commission and the future of cetaceans: problems and prospects' (1990) 8 *Colorado Journal of International Environmental Law Policy* at 35.

¹⁹ Alexander Gillespie *Whaling diplomacy* (2005) at 4.

²⁰ International Whaling Commission, Whale Population Estimates. Available at <http://www.iwcoffice.org/conservation/estimate.htm> [Accessed 5 February 2008].

²¹ Burns (note 4) at 73.

CHAPTER III

THE INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING (1946) AND THE FORMATION OF THE INTERNATIONAL WHALING COMMISSION (IWC)

1. Preamble

The ICRW begins with a Preamble, which although not binding on the parties, is indicative of the aims and objectives of the countries concluding the Convention. The language is far from clear and succinct: two main objectives appear from an analysis of the Preamble, firstly the conservation of whale stocks, and secondly the promotion of the development of the whaling industry. The conservation objective was not a preservationist one, but was aimed at preventing species extinction, and promoting the sustainable harvest of whales to further the commercial interests of the whaling industry.²²

2. Substantive articles

Article III establishes the International Whaling Commission (IWC), to be composed of one member from each Contracting Government. The Commission elects a Chairman and Vice Chairman, determines its own rules of procedure, and decisions are taken by a simple majority of members voting, except that a three quarter majority is a requirement for action in pursuance of Article V, (the amendment of the Schedule of regulations). The Commission may appoint its own Secretary and staff and set up such committees as it considers desirable.²³

Article I(i) incorporates the Schedule (as amended from time to time by the IWC) into the Convention as an integral part of it.²⁴ The ICRW thus creates a mechanism whereby a permanent body, the IWC, can regulate the conservation of whales and the whaling industry by the annual amendment of the Schedule of regulations. Article IV permits the Commission to undertake studies relating to

²² Birnie (note 1) at 171.

²³ Article III ICRW.

²⁴ Article I ICRW.

whales, collect statistical information on whale stocks and study methods to maintain and increase whale stocks. The Commission must arrange for publication of reports of its activities.²⁵ Article VI enables the Commission to guide the policies of its members relating to whales or whaling and to the objectives and purposes of the Convention.

Article VIII exempts from the operation of the ICRW, whales taken and treated under special permits that Contracting Governments are allowed to issue. A contracting Government may issue such permits for the purposes of scientific research subject to such restrictions as to number and such other conditions as the Contracting Government thinks fit.²⁶

Article V provides for a schedule of regulations which may be amended by the Commission from time to time by the requisite three quarter majority of voting members with respect to the conservation and utilization of whale resources.²⁷

The Commission may adopt regulations relating to:

- (a) protected and unprotected species;
- (b) open and closed seasons;
- (c) open and closed waters, including the designation of sanctuary areas;
- (d) size limits for each species;
- (e) time, methods, and intensity of whaling (including the maximum catch of whales to be taken in any one season);
- (f) types and specifications of gear and apparatus and appliances which may be used;
- (g) methods of measurement; and
- (h) catch returns and other statistical and biological records.

²⁵ Article IV ICRW.

²⁶ Article VIII ICRW, 'Notwithstanding anything contained in this Convention 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, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted'.

²⁷ Article V(1) ICRW.

The Commission was given the power under Article V(1)(e) to set an overall catch limit of whale stocks which could be amended annually or from time to time in accordance with the Article III(2) procedure.

The amendments to the provisions of the Schedule must comply with the following four criteria. Such amendments to the Schedule must:

- (a) be such as are necessary to carry out the objectives and purposes of the Convention and to provide for the conservation, development, and optimum utilization of the whale resources;
- (b) be based on scientific findings;
- (c) not involve restrictions on the number or nationality of factory ships or land stations, nor allocate specific quotas to any factory or ship or land station or to any group of factory ships or land stations; and
- (d) take into consideration the interests of the consumers of whale products and the whaling industry.²⁸

Article V(3) contains an objection procedure which allows member states to object to a Schedule amendment within prescribed periods.²⁹ A Schedule amendment comes into force only for those states which have not objected to the amendment in terms of Article V(3). States that have lodged objections are not bound by the Schedule amendment until they withdraw their objection.

The ability of the Commission to amend the regulations relating to the conservation and utilization of whales has enabled the IWC to significantly change

²⁸ Article V(2) ICRW.

²⁹ Article V(3) ICRW, 'Each of such amendments shall become effective with respect to the Contracting Governments ninety days following notification of the amendment by the Commission to each of the Contracting Governments, except that (a) if any Government presents to the Commission objection to any amendment prior to the expiration of this ninety-day period, the amendment shall not become effective with respect to any of the governments for an additional ninety days; (b) thereupon, any other Contracting Government may present objection to the amendment at any time prior to the expiration of the additional ninety-day period, or before the expiration of thirty days from the date of receipt of the last objection received during such additional ninety-day period, whichever date shall be the later; and (c) thereafter, the amendment shall become effective with respect to all Contracting Governments which have not presented objection but shall not become effective with respect to any Government which has so objected until such date as the objection is withdrawn. The Commission shall notify each Contracting Government immediately upon receipt of each objection and withdrawal and each Contracting Government shall acknowledge receipt of all notifications of amendments, objections, and withdrawals'.

its practice in the last 60 years from the setting of quotas in BWUs of 16 000 in 1949 for the commercial exploitation of whale stocks,³⁰ to the 1982 moratorium on all commercial whaling, the creation of the Indian Ocean Sanctuary (IOS) and the creation of the Southern Ocean Sanctuary (SOS).

The ICRW has wide jurisdiction and applies to member countries' factory ships, land stations and catchers and to 'all waters in which whaling is prosecuted',³¹ by them. The Convention leaves enforcement to each Contracting Government to take 'appropriate measures' to ensure application of the Convention.³² The Convention entered into force on 10 November 1948. Article XI provides for withdrawal from the Convention and has been used by, inter alia, Iceland, who after the adoption of the moratorium continued whaling outside of the Convention, but is currently a member, although its membership is disputed by some member States. There is no dispute settlement procedure in the Convention; the Commission has settled disputes through a process of negotiation and compromise.

As can be seen, the ICRW is outdated and does not contain provisions which are common in most modern environmental agreements. The Convention does not make reference to concepts such as precautionary management, integrated ecosystem management, and has no conflict resolution provisions. A weak enforcement regime, the Article VIII special permit provisions, and the ability of States to opt-out of conservatory schedule amendments, render the ICRW ineffective.

³⁰ Birnie (note 1) at 212.

³¹ Article I ICRW.

³² The 1956 Protocol to the International Convention for the Regulation of Whaling provided for an inspection scheme in the form of the exchange of observers under bilateral agreements between States.

CHAPTER IV

THE MORATORIUM ON COMMERCIAL WHALING

1. Introduction

The 24th meeting of the IWC held in London in 1972 took place immediately after the United Nations Conference on the Human Environment (UNCHE) at Stockholm which had adopted a resolution calling for a ten year moratorium on commercial whaling.³³

The IWC had in its first two decades of operation failed to achieve its objectives of conservation of whale stocks and development of the whaling industry.³⁴ Its practice of setting high quotas which did not differentiate between whale species, had caused whale stocks to become increasingly depleted, causing concern both from the economic perspective of the whaling industry and from the conservation perspective of the non-whaling nations.³⁵

The IWC's scientific committee considered the Stockholm resolution, but concluded that a blanket moratorium was an attempt to conserve all stocks as one, and that whale stocks should be regulated individually.³⁶ The motion to amend the Schedule to enable zero quotas to be set was rejected by a vote of four in favour, seven against and three abstentions.³⁷

In 1974, the IWC approved the Australian proposal to implement the New Management Procedure (NMP), which proposed that stocks of all whales be classified into Initial Management Stocks, where commercial whaling would be permitted, Sustained Management Stocks, where commercial whaling would be permitted subject to the advice of the Scientific Committee, and Protection Stocks

³³ Report of the United Nations Conference on the Human Environment. United Nations document A/conf 48/14/rev 1 at 16 to 17 Recommendation 33. Birnie (note 1) at 368.

³⁴ Maffei (note 3) at 293.

³⁵ Birnie (note 1) at 407.

³⁶ Ibid at 422.

³⁷ Ibid at 423.

which are fully protected, and no commercial whaling is allowed.³⁸ The period from the adoption of the NMP in 1975, until prior to the resolution by the IWC adopting the moratorium in 1982, was characterized by great change in the IWC's practice. The NMP enabled the IWC for the first time to theoretically fulfil its objective of conserving whale stocks at optimum levels.³⁹

Proposals for moratoria on commercial whaling were made at the 32nd meeting in 1980, the 33rd meeting in 1981, (where an indefinite moratorium on Sperm Whaling was approved), and at the historic 34th meeting in 1982, of the IWC.⁴⁰ At the 1982 meeting, the Seychelles' proposal of fixing zero quotas subject to review, on all commercially exploited stocks for the 1986 coastal and 1985/86 pelagic seasons, was approved by a vote of 25 in favour, seven against with five abstentions.⁴¹ The amendment of the Schedule states:

Notwithstanding the other provisions of paragraph 10, catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985 and 1986 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific advice and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits.⁴²

2. Scientific basis of the moratorium

The votes against and the abstentions from the Seychelles Resolution were based on the view that the implementation of zero quotas was not based on scientific findings as required by Article V(2)(b) of the ICRW.⁴³ The Scientific Committee had made no recommendations concerning the appropriateness of the imposition of zero quotas

³⁸ Ibid at 453.

³⁹ Ibid at 507.

⁴⁰ Ibid at 602.

⁴¹ Ibid at 614.

⁴² Amendments to the Schedule adopted at the 34th Annual Meeting of the IWC, Classification of Stocks, paragraph 10(e). The Governments of Japan, Norway, Peru and the Union of Soviet Socialist Republics lodged objection to paragraph 10(e) within the prescribed period. For all other Contracting Governments this paragraph came into force on 3 February 1983. Peru withdrew its objection on 22 July 1983. The Government of Japan withdrew its objections with effect from 1 May 1987 with respect to commercial pelagic whaling; from 1 October 1987 with respect to commercial coastal whaling for minke and Bryde's whales; and from 1 April 1988 with respect to commercial coastal sperm whaling. The objections of Norway and the Russian Federation not having been withdrawn, the paragraph is not binding upon these Governments.

⁴³ Birnie (note 1) at 615.

on all stocks of whales subject to commercial exploitation.⁴⁴ The specialist committees are designated by the IWC to make recommendations to it, and the Commission, when acting in good faith, should take their scientific recommendations into account. The IWC is not obliged to follow the committee's view.⁴⁵ The IWC had presumably acted in good faith and, as required by the Convention, taken all of the relevant scientific information into account before adopting the Resolution.

The entry into force of the moratorium was delayed for three years to take the Convention's preambular prohibition on causing economic distress into account, and to comply with Article V(2)(d), by taking the interests of the commercial whaling industry into consideration, allowing the industry time to prepare for the moratorium. The provision for review, based on scientific advice, and full assessment by 1990 of the effect of the decision on whale stocks, likewise complied with the stipulations of Article V. At the same time as the Scientific Committee was to have completed its assessment of the effect of the moratorium on whale stocks, it was directed to develop the Revised Management Procedure (RMP) to replace the NMP. The RMP, adopted by the IWC in 1994,⁴⁶ is a more conservative risk adverse management model than the flawed NMP.⁴⁷

The moratorium has been reconsidered and updated since the 1990 meeting on an annual basis, setting the catch limits for the lethal exploitation for commercial purposes of whales from all stocks at zero, for the subsequent pelagic and coastal seasons. (Currently the 2007/2008 pelagic season and 2008 coastal season.)⁴⁸ The IWC has also developed the Revised Management Procedure (RMP) to regulate the sustainable harvest of whales⁴⁹ and has been negotiating the Revised Management Scheme (RMS) which should include:

- (i) an effective inspection and observation scheme;

⁴⁴ Birnie (note 1) at 616 states that several members of the Scientific Committee had commented separately on the proposal.

⁴⁵ Alexander Gillespie 'The Southern Ocean Sanctuary and the Evolution of International Environmental Law' (2000) 15 *International Journal of Marine and Coastal Law* 293 at 299.

⁴⁶ IWC Resolution 1994-5.

⁴⁷ William Aron et al 'The whaling issue' (2000) 24 *Marine Policy* 179 at 180.

⁴⁸ 59th Annual Meeting of the International Whaling Commission. Amended Schedule available at <http://www.iwcoffice.org/commission/schedule.htm> [Accessed 5 February 2008].

⁴⁹ Maffei (note 3) at 294.

- (ii) arrangements to ensure that total catches over time are within the limits set under the Revised Management Scheme; and
- (iii) incorporation into the Schedule the specification of the Revised Management Procedure and all other elements of the Revised Management Scheme.⁵⁰

These negotiations reached an impasse in 2006.⁵¹

3. Scientific certainty and the precautionary approach

Article V(2)(b) of the ICRW states that amendments to the Schedule shall be based on scientific advice. The Commission in its practice of renewing the moratorium since 1990 has based its decision on the application of the precautionary⁵² principle.⁵³

The emergence of the precautionary principle as the guiding principle for IWC policy was positive in that it drew attention to the need for scientific uncertainty to be allowed for in the design of cetacean management regimes and led to more research.⁵⁴

The precautionary principle is essentially a loose set of guidelines intended to help policy makers manage scientific uncertainty in the course of developing environmental policies and avoid consequences science may be unable to foresee. The principle's fundamental purpose is to encourage the adoption of policies that reduce the risk of environmental damage by erring on the side of caution.⁵⁵

Illustrative of the scientific uncertainty still reigning in the Scientific Committee are the abundance estimates for Antarctic minke whales which range from the 760 000 estimated by the Scientific Committee in 1990, to the current analyses of surveys through the 1990s which predict a reduction from the earlier

⁵⁰ IWC Resolution 1996-6.

⁵¹ 2006 Chairman's Report from the IWC's 58th Annual Meeting at 61. Available at <http://www.iwcoffice.org> [Accessed 5 February 2008].

⁵² Michael Heazle 'Scientific uncertainty and the International Whaling Commission: an alternative perspective on the use of science in policy making' (2004) 28 *Marine Policy* 361 at 365.

⁵³ Michael Heazle 'Scientific uncertainty and the International Whaling Commission: an alternative perspective on the use of science in policy making' (2004) 28 *Marine Policy* 361 at 365.

⁵⁴ *Ibid* at 372.

⁵⁵ *Ibid*.

estimate by as much as 65 per cent, to 268 000 animals.⁵⁶ The effect of whaling catches under special permits, illegal whaling statistics, and cetacean mortality from incidental capture, ship strikes and marine pollution impact on the scientific certainty debate.^{57 58}

The moratorium continues to be extended by the IWC on the basis of the scientific uncertainty relating to whale stocks.⁵⁹ Anthropogenic threats to cetaceans, cetacean habitat, whale abundance and related ecosystem complexities all contribute to the scientific uncertainty regarding whale stocks and their possible sustainable commercial exploitation.⁶⁰ Although the moratorium has brought some relief to whale stocks they are still far from their previous optimum levels. Member States must apply their minds in a bona fide manner to determine whether the amount of scientific uncertainty which exists, justifies the use of the precautionary principle by the IWC, to continue setting zero catch limits for commercial whaling.

⁵⁶ Phillip Clapham et al 'The whaling issue: conservation, confusion, and casuistry' (2007) 31 *Marine Policy* 314 at 316.

⁵⁷ *Ibid* at 316.

⁵⁸ Heazle (note 52) at 372.

⁵⁹ Clapham (note 56) at 317.

⁶⁰ Birnie (note 1) at 7 and 8.

CHAPTER V

INTERPRETATION OF THE ICRW

1. Introduction

Article V states that the commission may amend the provisions of the Schedule,⁶¹ by a three fourths majority of those members voting,⁶² by adopting regulations relating to the conservation and utilization of whale resources.⁶³ The Commission may fix the time, methods and intensity of whaling including the maximum catch of whales to be taken in any one season.⁶⁴ Any amendments of the Schedule by the Commission must be such as are necessary to carry out the objectives and purposes of the Convention and to provide for the conservation, development and optimum utilization of the whale resources⁶⁵ and must be based on scientific findings.⁶⁶

What then are the objectives and purposes of the ICRW, and what does the Article V language “conservation, development and optimum utilization of whale resources” mean? The Preamble to the Convention sets out its first two objectives as:

- intergenerational interest in safeguarding whale stocks and
- protection of all species of whales from further over fishing.

These are clearly conservation orientated aims, protecting whales for future generations. The next two objectives in the Preamble are:

- that the proper regulation of whaling will bring about increased sustainable yields of whales to be captured and
- that whaling should be confined to species best able to sustain exploitation.

These are clearly aims which favour the development of a sustainable lethal whale capturing industry. The aim of the common interest to achieve the optimum level of

⁶¹ Article V(1).

⁶² Article III(2).

⁶³ Article V(1).

⁶⁴ Article V(1)(e).

⁶⁵ Article V(2)(a).

⁶⁶ Article V(2)(b).

whale stocks relates to both conservation of whale stocks and to their sustainable utilization.

The final definitive objective⁶⁷ states ‘having decided to conclude a convention to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry’. The Convention’s aim is therefore the conservation of whale stocks and the development of the whaling industry.⁶⁸ Professor Birnie raises the question whether both of these aims must be pursued simultaneously, or whether the IWC

can decide to give precedence to conservation: particularly since developments in scientific and public awareness of the ecological complexities now involved in determining both the conservation status and the measures required to restore and maintain stocks in equilibrium with their environment has increased the difficulties of interpreting such terms as “conservation” and the “optimum level” of whale stocks.⁶⁹

Birnie points out other relevant environmental principles:

There is no mention in the Convention, unsurprisingly given the date of its negotiation, of the need postulated in the LOS Convention to take into account the effects of exploitation on interrelated species or the restoration of these, or to qualify the aim of maximum yield by sustainability and thus the need to take account of environmental as well as economic factors, and of interdependence of stocks and, since UNCED’s Framework Convention on Climate Change, the possible effects of climate change. Nor is there reference to the need to preserve the whales’ habitat and their contribution to the biological diversity of the oceans, as advocated in UNCED and the Convention on Biological Diversity and in the provisions of the LOS Convention on protecting rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species....⁷⁰

The decision by the IWC in 1982 to impose the moratorium was an interpretation of the Convention by the requisite majority of members voting, that the setting of zero catch limits was in the interests of conservation of whale stocks, and in the interests of the whaling industry.⁷¹

⁶⁷ Birnie (note 17) at 491.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ For a contrary view see WT Burke ‘Memorandum of Opinion on Legality of Designation of the Southern Ocean Sanctuary by the International Whaling Commission’ 1995 Chairman’s Report of the IWC’s 47th Meeting Agenda item 13 at 7.

2. Rules of treaty interpretation

When a treaty like the ICRW establishes an international body (the IWC) without establishing an independent tribunal to interpret the treaty, two presumptions arise:

1. The organ itself, the IWC in this case, must interpret the treaty.
2. Where such an organ establishes a practice, the presumption is that it is *intra vires*.⁷²

The interpretation of the ICRW revolves around its objectives and the provisions of Article V. As seen above, the aims of the Convention are both conservatory and promotion of development of the whaling industry. The question is whether the moratorium fulfils the objectives of the convention. Does the moratorium, which clearly fosters conservation, also promote ‘the development of the whaling industry’⁷³ and the ‘optimum utilization of whale resources’.⁷⁴

Clearly at the time of the imposition of the moratorium whale stocks were so depleted that the conservation of such stocks by the imposition of the zero catch limit was necessary for the recovery of the commercial whaling industry.⁷⁵ Although there is consensus that there are currently whale species which could be commercially harvested due to their population growth over the past twenty years, there is no scientific consensus whether they should be harvested. Is the IWC acting *ultra vires* by enforcing the precautionary principle as a justification for its continued imposition of the moratorium on commercial whaling?

Does the interpretation of the ICRW allow for a solely conservation orientated approach, and does “whaling industry” and “optimum utilization of whale resources” mean their lethal utilization by such industry, or does it also encompass the non-lethal utilization of whales, so that non-consumptive use of whales forms part of the whaling industry?

⁷² Birnie (note 17) at 497. The Certain Expenses of the United Nations (1962) ICJ Rep cited in support of this conclusion.

⁷³ Preamble to the International Convention for the Regulation of Whaling.

⁷⁴ Article V(2)(a) ICRW.

⁷⁵ Birnie (note 1) at 407.

The vast majority of the IWC members are countries which either have no whaling industry, or have whaling industries based on non-consumptive use of whales (NCU) i.e. whale watching industries. The NCU industry has grown dramatically in the 20 years since the imposition of the moratorium, and these countries clearly interpret ‘optimum utilization’ of whales as the non-consumptive use of whales, and also interpret this form of exploitation as the way in which they wish to promote their interest in the whaling industry.⁷⁶

3. Legitimacy of interpretation

Does an interpretation of the ICRW to include the non-consumptive use of whales as part of the whaling industry defeat the major purpose of the ICRW as a Convention promoting a whaling industry based upon the lethal utilization of whales, or does the subsequent practice of the IWC support a wider interpretation of its objective?

There are three schools of thought relating to treaty interpretation:

1. The subjective school would ascertain the intention of the parties, and give effect to their intentions. This could be done through looking at the course and scope of the negotiations preceding the treaty and the purpose of the treaty.⁷⁷
2. The textual school interprets the treaty in accordance with the ‘ordinary and apparent signification’ of its terms.⁷⁸
3. The teleological approach which allows subsequent developments to be taken into account to determine the traditional and *emergent* objectives and purposes of the treaty (emphasis added).⁷⁹

⁷⁶ Gillespie (note 45) at 307.

⁷⁷ Ibid at 309.

⁷⁸ Ibid at 310.

⁷⁹ Ibid. Ian Brownlie *Principles of Public International Law* 5 ed (1998) at 632.

Although not retroactive and thus strictly speaking not applicable to the ICRW, the Vienna Convention on the Law of Treaties (VCLT) 1969 can be regarded as an attempt at codification of the principles of customary international law of treaty interpretation.⁸⁰ The VCLT states that the language of a treaty can be interpreted in the light of the contemporaneous meaning of its terms⁸¹ and any ‘subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its application’⁸² should be taken into account.

The precautionary principle has been recognized and applied by the IWC, and the Indian Ocean Sanctuary (IOS), the Southern Ocean Sanctuary (SOS), and the moratorium, are examples of practice by the IWC of a conservatory approach favouring preservation, as opposed to ‘the sustainable utilization’, of whales. This practice of the IWC has protected whale stocks which are not endangered.⁸³

A teleological interpretation of the objective of the ICRW would result in a much wider meaning being ascribed to the terms ‘whaling industry’ and ‘optimum utilization’ of whales to include both the lethal and non-consumptive whaling industries.⁸⁴ Such an interpretation would not defeat the major purpose of the Convention, as although the ICRW started out as a Convention entered into between whaling states to promote and regulate lethal commercial whaling⁸⁵ (with the conservation of whales a function of the promotion of the commercial lethal whaling industry), the practice of the IWC since the adoption of the NMP, the IOS, the moratorium, the RMP, and the SOS, has been conservatory. The whaling industry has also seen expansion from an industry devoted solely to the lethal exploitation of whales to an industry where the predominant economic use of whales is the non-lethal whale watching industry.⁸⁶

⁸⁰ *Ibid* at 311.

⁸¹ Brownlie (note 79) at 629. Also see Article 31(1) Vienna Convention on the Law of Treaties (1969) ILM8.679.

⁸² Article 31(3)(b) of Vienna Convention on the Law of Treaties (1969) ILM8.679.

⁸³ Gillespie (note 45) at 314.

⁸⁴ *Ibid* at 316.

⁸⁵ Elisa Morgera ‘Whales Sanctuaries: An Evolving Concept within the International Whaling’ (2004) 35 *Ocean Development and International Law* 319 at 328.

⁸⁶ Gillespie (note 45) at 308.

The practice of a body such as the IWC means the acts taken by the body itself acting in terms of the provisions of its constituent Convention.⁸⁷ The amendments by the IWC of its Schedule of regulations to provide for zero quotas, the IOS and the SOS passed by the requisite three-quarters majority are clearly practice of the IWC and the divergent views of individual member states do not constitute such practice.⁸⁸ The practice of the IWC in the application of the ICRW, clearly establishes the agreement of the parties to an interpretation of the ICRW which includes objectives which encompass the development of both the consumptive and the non-consumptive whaling industries.⁸⁹

A constituent body such as the IWC must take emerging legal and political developments in its field of application into account.⁹⁰ Members of the IWC should, in their practice, take such developments into account irrespective of whether these have become rules of customary international law.⁹¹ The principles set out at the 1972 United Nations Conference on the Human Environment (UNCHE)⁹² and at the 1992 United Nations Conference on Environment and Development (UNCED),⁹³ particularly those of intergenerational equity and the precautionary approach⁹⁴ to the conservation of the marine environment and marine living resources, specifically marine mammals,⁹⁵ should be taken into account by the IWC when interpreting the ICRW.⁹⁶ The IWC should in its practice take the provisions of UNCLOS⁹⁷, particularly those of Article 65,⁹⁸ into account (in part V relating to the EEZ), which

⁸⁷ P Birnie 'Are Twentieth-Century Marine Conservation Conventions Adaptable to Twenty-First Century Goals and Principle?' Part I, *International Journal for Marine and Coastal Law* 12 (1997) 307 at 333.

⁸⁸ *Ibid.*

⁸⁹ Gillespie (note 45) at 307 and 308.

⁹⁰ Birnie (note 87) at 330.

⁹¹ *Ibid.*

⁹² See Birnie and Boyle 'International Law and the Environment' 2 ed (2002) at 39.

⁹³ See Birnie (note 87) at 338. Chapter 17 of UNCED's Agenda 21 lays down special provisions for marine mammals based on Article 65 of the LOS Convention. In para 17.62 states recognize the responsibility of the IWC for the conservation and management of whale stocks.

⁹⁴ Birnie (note 87) at 308.

⁹⁵ Birnie (note 17) at 491.

⁹⁶ Morgera (note 85) at 328.

⁹⁷ The United Nations Convention on the Law of the Sea (1982) A/Conf.62/122, 7 October 1982.

⁹⁸ The United Nations Convention on the Law of the Sea, Article 65 states: '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 cooperate 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'.

Article 120 applies the provisions of Article 65 to the conservation and management of marine mammals on the high seas.

The determination of sustainability and the application of the precautionary principle entail value judgments. Scientific opinion does not exist in a vacuum, and the level of precaution to be applied is influenced by social, economic and political factors.⁹⁹ This is apparent in the practice of the Scientific Committee (SC) of the IWC and has led to a polarisation of views within the SC.

4. Environmental governance and the IWC

It is clear from an analysis of the ICRW and the practice of the IWC that both the structure of the Convention concluded 60 years ago and the practice of the Commission in implementing the Convention falls far short of the requirements of modern environmental governance. The Convention has no reference to the precautionary principle, ecosystem based management, integrated management of resources, and sustainability, taking the habitat and prey of cetaceans into account.

Other major weaknesses of the Convention are the lack of an effective compliance and enforcement mechanism, the lack of dispute resolution provisions, and the ability of States to opt-out of decisions by entering reservations to a decision in terms of the Convention's procedure.¹⁰⁰ Environmental governance requires international co-operation between parties and it is particularly important where species such as cetaceans migrate between areas under national jurisdiction and the high seas. The objectives of the ICRW formulated in 1946 fall short of the principles of integrated management and sustainable development of the oceans as called for in the 1987 Brundtland Report,¹⁰¹ the 1992 Rio Declaration,¹⁰² the Johannesburg Plan of

⁹⁹ Heazle (note 52) at 361.

¹⁰⁰ See Article V(3) of the ICRW.

¹⁰¹ World Commission on Environment and Development, 'Our Common Future', UN Doc. A/42/47, 4 August 1987 ("Brundtland Report"). Available at http://www.are.admin.ch/are/en/nachhaltig/international_uno/unterseite02330 [Accessed 5 February 2008].

¹⁰² Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3 to 14 June 1992 (Rio Declaration), UN Doc. A/CONF.151/26/Rev.1. Available at <http://www.unep.org/Documents/multilingual/Default.asp?DocumentID=78&ArticleID=1163> [Accessed 5 February 2008].

Implementation (JPOI)¹⁰³ and the 2005 World Summit Outcome.¹⁰⁴ In the last four decades many new threats to the conservation and sustainable development of whales have emerged, such as climate change, noise pollution, ship strikes of whales, entanglement in fishing gear, and depletion of prey species. The ICRW does not incorporate the implementation of ecosystem based management of resources and considerations of habitat, prey depletion, and marine ecosystem integrity are not referred to in the Convention. The World Summit on Sustainable Development's JPOI¹⁰⁵ endorsed the ecosystem approach for fisheries, biodiversity protection, and sustainable development and called for its implementation by 2010,¹⁰⁶ and specifically encourages 'the application by 2010 of the ecosystem approach, noting the Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem and decision 5/6 of the Conference of Parties to the Convention on Biological Diversity'.¹⁰⁷ In 2001 the IWC acknowledged that better understanding of marine ecosystems including interactions between whales and fish stocks would contribute to the conservation and management of marine living resources. As the competent organization for the conservation and management of whale stocks the IWC decided to make the study of interactions between whale and fish stocks a matter of priority.¹⁰⁸ At the 2006 meeting of the IWC the St Kitts and Nevis Declaration stated that the Commissioners were:

Accepting that scientific research has shown that whales consume huge quantities of fish making the issue a matter of food security for coastal nations and requiring that the issue of *management of whale stocks must be considered in a broader context of ecosystem management* since eco-system management has now become an international standard (emphasis added).¹⁰⁹

Although this Resolution appears politically motivated by pro-whaling States and an attempt to draw a link between fisheries depletion and recovery of whale stocks, the IWC does recognize that the eco-system approach, which should of course be applied

¹⁰³ World Summit on Sustainable Development, Johannesburg Plan of Implementation. Available at http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm [Accessed 5 February 2008].

¹⁰⁴ World Summit Outcome 60/1 2005. Available at <http://www.un.org/summit2005> [Accessed 5 February 2008].

¹⁰⁵ JPOI (note 103).

¹⁰⁶ Ibid para 29.

¹⁰⁷ Ibid.

¹⁰⁸ IWC Resolution 2001-9, Resolution on interactions between whales and fish stocks (2001). Available at <http://www.iwcoffice.org/meetings/resolutions/resolution2001.htm> [Accessed 5 February 2008].

¹⁰⁹ IWC Resolution 2006-1, St. Kitts and Nevis Declaration. Available at <http://www.iwcoffice.org/meetings/resolutions/resolution2006.htm> [Accessed 5 February 2008].

scientifically, is the correct management approach for the IWC. The Declaration goes on to state the IWC's commitment to 'normalizing the functions of the IWC based on the terms of the ICRW and *other relevant international law* ... and the fundamental principles of *sustainable use of resources* and the need for science based policy and rule making that are accepted as the world standard for the management of marine resources' (emphasis added).¹¹⁰ From this Declaration it seems clear that the IWC is committed to the use of the precautionary and ecosystem approaches in its management of marine resources. The IWC is collaborating with the Secretariat of CCAMLR and participating in a United Nations Food and Agriculture Organization (FAO) expert consultation on the ecosystem approach to marine resource management.¹¹¹

The St Kitts and Nevis Declaration was sponsored by the pro-whaling bloc and passed by a majority of one vote.¹¹² The hypothesis that whales should be culled as they 'consume huge quantities of fish making the issue a matter of food security for coastal nations',¹¹³ does not reflect serious scientific opinion.¹¹⁴ The ecosystem approach requires an integrated approach to management rather than an approach which focuses on the culling of predators such as whales.¹¹⁵

The ecosystem approach emphasizes a holistic, participatory and integrated approach and is contrasted with a more narrowly focused biological and usually single species-orientated approach. It aims to manage human interactions with ecosystems and all associated organisms, rather than only individual species.¹¹⁶

¹¹⁰ Ibid.

¹¹¹ 2006 Chairman's Report from the IWC's 58th Annual Meeting in St Kitts and Nevis at 64. Available at www.iwcoffice.org [Accessed 5 February 2008].

¹¹² Ibid at 65.

¹¹³ IWC Resolution 2006-1.

¹¹⁴ Sidney Holt 'Whales competing with Humans?'. Study by the International League for the Protection of Cetaceans at 4. Available at <http://www.vardagroup.org/whalesymposium> [Accessed 5 February 2008].

¹¹⁵ D Currie 'Ecosystem-Based Management in Multilateral Environmental Agreements: Progress toward Adopting the Ecosystem Approach in the International Management of Living Marine Resources' WWF position paper IWC/59/18 Agenda item 9. Available at http://assets.panda.org/downloads/wwf_ecosystem_paper_final_wlogo.pdf [Accessed 5 February 2008].

¹¹⁶ Ibid at 1.

It is clear therefore that in following an integrated ecosystem approach the IWC must take into account anthropogenic threats to cetaceans as well as precautionary stock estimates when making management decisions regarding whale populations.

CHAPTER VI

WHALING UNDER SPECIAL PERMIT ISSUED UNDER ARTICLE VIII OF ICRW

1. Introduction

Since the setting of zero quotas for all species of whales from 1986, whaling under special permit for scientific research (the so-called ‘scientific permit’) has increased dramatically. Prior to the imposition of the moratorium approximately 2 000 whales were caught under national special permits over a period of 40 years.¹¹⁷ The imposition of the moratorium brought about an immediate and dramatic increase in special permit catches by Japan, Iceland and Norway. Special permit lethal research by these countries has resulted in more than 11 000 whales killed over the last 20 years. The Japanese lethal scientific research programmes have been steadily increasing in geographic scope, numbers, and species of whales targeted.¹¹⁸

Japan’s JARPAII¹¹⁹ programme is a large scale Antarctic programme that has just completed its two year feasibility study during which 1 377 minke whales were killed and 13 endangered fin whales. The programme proposes an annual take of 850 Antarctic minke whales, 50 humpback whales and 50 fin whales and commenced during the austral summer of 2007/08.¹²⁰ Japan intends to review the programme every six years and revise it as it feels appropriate, as the programme is for an undefined period. Humpback whales are listed by the International Union for the Conservation of Nature and Natural Resources (IUCN) as ‘vulnerable’ and fin whales are listed as ‘endangered’ on the IUCN red list.¹²¹ The JARPNII is a programme focused in the western North Pacific and proposes the taking of 150 minke whales, 50 bryde’s whales, 50 sei whales and ten sperm whales annually in

¹¹⁷ Special Permit catches since 1985. Available at http://www.iwcoffice.org/documents/table_permit.htm [Accessed 5 February 2008].

¹¹⁸ Scientific Permit Whaling. Available at <http://www.iwcoffice.org/conservation/permits.htm> [Accessed 7 February 2008].

¹¹⁹ Japanese Whale Research Programme under Special Permit in the Antarctic.

¹²⁰ The JARPAII is available at <http://www.iwcoffice.org/conservation/permits.htm> [Accessed 5 February 2008].

¹²¹ 2006 Chairman’s Report from the IWC’s 58th Annual Meeting at 43. Available at <http://www.iwcoffice.org> [Accessed 5 February 2008].

the western North Pacific.¹²² In the 2005/06 season five sperm, 100 sei, 50 bryde's and 101 minke whales were taken and in the coastal component 121 minke whales were killed. In the 2006/07 season six sperm, 101 sei, 51 bryde's and 100 minke whales were caught and 97 minke in the coastal component.¹²³ All permits which States propose to issue under Article VIII must be submitted by the State proposing to issue the permit to the IWC for a review of the proposal by the Scientific Committee of the IWC.¹²⁴ In terms of Article VIII however, the responsibility for issuing the permit to conduct scientific research rests with the State issuing the permit. The Scientific Committee agreed at its meeting in 2006 that the process used by it for reviewing scientific permit proposals should be improved and it recommended to the IWC that proponents of special permit proposals should submit information on the objectives of the proposal, methods to address the objectives, assessment of potential effects of catches on the stocks involved, and provisions for co-operative research, prior to the State issuing the permit.¹²⁵

Since the moratorium on commercial whaling came into force in 1985/86 the IWC has adopted over 30 resolutions on special permit whaling in which it has expressed its opinion that special permit whaling should be terminated and scientific research should be limited to non-lethal means.¹²⁶ In 2005 at the IWC's meeting in Ulsan, the commission strongly urged the Government of Japan to withdraw its JARPAII proposal or to revise it so that any information needed to meet the stated objectives of the proposal is obtained using non-lethal means.¹²⁷ At the IWC's meeting in Alaska in 2007 the IWC called upon the Government of Japan to suspend indefinitely the lethal aspects of its JARPAII programme conducted within the Southern Ocean Whale Sanctuary.¹²⁸ The Commission noted its concern that Fin whales in the southern hemisphere are classified as endangered and that humpback whales in the JARPAII research area may include individuals from depleted breeding

¹²² Ibid at 40.

¹²³ Ibid at 40.

¹²⁴ See paragraph 30 of the Schedule to the ICRW available at <http://www.iwcoffice.org> [Accessed 5 February 2008].

¹²⁵ 2006 Chairman's Report of the IWC's 58th Annual Meeting at 39.

¹²⁶ IWC Resolution 2005-1. Available at <http://www.iwcoffice.org/meetings/resolutions/resolution2005.htm> [Accessed 5 February 2008].

¹²⁷ Ibid.

¹²⁸ IWC Resolution 2007-1. Available at <http://www.iwcoffice.org/meetings/resolutions/resolution2007.htm> [Accessed 5 February 2008].

populations.¹²⁹ The Commission noted that the workshop convened to analyze the results of JARPAI agreed that none of the goals of JARPAI had been reached and that the results of the JARPAI programme are not required for management under the RMP.¹³⁰

2. Whaling under Article VIII of the ICRW

The language of Article VIII authorises contracting governments to issue special permits to its nationals to kill whales for the purposes of scientific research, and such killing of whales will be exempt from the provisions of the ICRW.¹³¹ Article VIII(2) states that any whales taken under special permit shall be processed and the proceeds dealt with in accordance with Government direction.¹³²

The commercial scale of the whale meat sales from the special permit catches creates a conflict of interest for the scientists involved in the setting of the research programmes and the evaluation of the research. Furthermore, the sale of products from the programme acts as a cover for illegal or unregulated take of other cetacean species.¹³³ Japan uses the profits from its special permit hunt to support the non-governmental Institute of Cetacean Research (ICR) which employs the scientists administering the Japanese research programmes. Almost 80% of the ICR's operating budget is provided from profits of special permit whaling. The balance is provided by the Government of Japan.¹³⁴

Information required for the management of whale populations can be obtained by non-lethal means such as biopsy sampling, faeces analysis, photo identification of natural markings, and satellite tracking.¹³⁵ The IWC has been unequivocal in its opposition to special permit whaling being carried out as

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Article VIII(1) of the ICRW.

¹³² Article VIII(2) of the ICRW.

¹³³ CS Baker and PJ Clapham, "The ethics of scientific whaling: issues and alternatives" presentation to the Anzcart Conference 18-19 August 2003 103-112 at 103 available at <http://pewwhales.org> [Accessed 7 February 2008].

¹³⁴ Ibid at 105.

¹³⁵ Ibid at 108.

commercial whaling. Special permit whaling should not be used to circumvent the moratorium and non-lethal techniques should be used for research.

The Japanese 2007/08 special permit programme has proved to be the most controversial in years and has placed this highly emotive issue in the international media spotlight. Graphic images of Japanese whaling in the Southern Ocean Sanctuary have caused international condemnation of this 'research', and placed intense political pressure on Japan. Coupled with the threat of legal action from Australia, this may cause the ICR to reconsider its programme. Significantly in December 2007 the ICR suspended the hunt of humpback whales from its 2007/08 JARPAII programme at the request of the IWC Chairman.

3. Whaling in the context of applicable international environmental law

3.1 United Nations Convention on the Law of the Sea (UNCLOS)

Should a State party to UNCLOS (which includes Japan, Norway and Iceland) conduct whaling under a special permit issued in terms of Article VIII(1) of the ICRW, such State party must comply with its rights and duties set out in UNCLOS. States have a duty to co-operate with the IWC, as the relevant international organization for the conservation management and study of cetaceans, and have a duty to co-operate with other States in the conservation and management of the marine living resources of the high seas.¹³⁶ Article 119 requires States to take into account the best scientific evidence available, and in this regard they should take into account the standards set by the IWC as the relevant international organization to maintain populations of harvested species (i.e. whales) at levels which can produce the maximum sustainable yield, taking into account the interdependence of stocks and international minimum standards.¹³⁷

Part 12 of UNCLOS deals with marine scientific research and Article 240 states that:

In the conduct of marine scientific research the following principles shall apply:

¹³⁶ See Article 117, 118 and 120 of UNCLOS.

¹³⁷ Article 119 of UNCLOS.

- (a) Marine scientific research shall be conducted exclusively for peaceful purposes;
- (b) Marine scientific research shall be conducted with appropriate scientific methods and means compatible with this Convention;
- (c) Marine scientific research shall not unjustifiably interfere with other legitimate uses of the sea compatible with this Convention and shall be duly respected in the course of such uses;
- (d) Marine scientific research shall be conducted in compliance with all relevant regulations adopted in conformity with this Convention including those for the protection and preservation of the marine environment.

Article 251 requires that: ‘States shall seek to promote, through competent international organizations, the establishment of general criteria and guidelines to assist States in ascertaining the nature and implications of marine scientific research’.

Any whaling under special permit for the purposes of scientific research must comply with the requirements of Articles 240, 241 and 251 and must therefore comply with the criteria established by the IWC in its resolutions and as set out in the ICRW and its Schedule.¹³⁸ Article 241 specifically states that marine scientific research activities may not be used by a State party to the Convention to constitute the legal basis for any claim to marine living resources. This provision underscores the view stated above that whales killed under a special permit shall only be taken for genuine scientific research and shall not be utilized as a means of conducting commercial whaling under the guise of scientific research.¹³⁹

3.2 Convention on Biological Diversity (CBD)¹⁴⁰

The objectives of the CBD are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources.¹⁴¹ The preamble affirms that the

¹³⁸ Article 251 of UNCLOS.

¹³⁹ Report of the International Panel of independent legal experts on: ‘Special Permit (scientific) whaling under international law’. Paris, May 2006 at 50. Available at <http://www.ifaw.org> [Accessed 7 February 2008].

¹⁴⁰ The Convention on Biological Diversity signed at Rio de Janeiro on 5 June 1992, entered into force on 29 December 1993, 31 ILM (1992) (CBD). Text available at <http://www.biodiv.org/doc/legal/cbd-en.pdf> [Accessed 5 February 2008].

and the secretariat website is available at <http://www.biodiv.org> [Accessed 5 February 2008].

¹⁴¹ Ibid Article 1.

conservation of biological diversity is a common concern of humankind.¹⁴² The precautionary principle is incorporated into the preamble, and where there is a threat of significant reduction or loss of biological diversity, the lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimise the threat.¹⁴³ Parties to the Convention have an obligation to co-operate with other States parties to the CBD (Norway¹⁴⁴, Iceland¹⁴⁵ and Japan¹⁴⁶ are all parties to the CBD). Article 5 requires

each Contracting Party shall, as far as possible and as appropriate, cooperate with other Contracting Parties, directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and *sustainable use* of biological diversity (emphasis added).¹⁴⁷

‘Sustainable use’ means the use of components of biological diversity in a way, and at a rate, that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.¹⁴⁸

Parties such as Norway, Japan and Iceland which are parties to the CBD and the ICRW, have a duty to cooperate with other parties to the CBD through the competent international organization which is clearly the IWC in respect of areas beyond national jurisdiction for the conservation and sustainable use of whales.¹⁴⁹

3.3 Convention on the Conservation of Migratory Species of Wild Animals (CMS)¹⁵⁰

CMS is administered by the United Nations Environment Programme (UNEP) and currently has 107 parties¹⁵¹ which includes Norway, but not Japan and Iceland.

¹⁴² Ibid Preamble.

¹⁴³ Ibid.

¹⁴⁴ Norway became a party on 9 July 1993.

¹⁴⁵ Iceland became a party on 12 September 1994.

¹⁴⁶ Japan became a party on 28 May 1993.

¹⁴⁷ CBD Article 5.

¹⁴⁸ Ibid Article 2.

¹⁴⁹ Independent Panel Report (note 139) at 52.

¹⁵⁰ Convention on the Conservation of Migratory Species of Wild Animals, signed in Bonn on 23 June 1979, entered into force on 1 November 1983, 19 ILM (1980) 15, text available at http://www.cms.int/documents/convtxt/cms_convtxt.htm [Accessed 5 February 2008].

¹⁵¹ List of parties available at http://www.cms.int/pdf/en/party_list/Partylist_eng.pdf [Accessed 5 February 2008].

CMS recognises in its Preambular provisions that wild animals are an irreplaceable part of the earth's natural system to be conserved for the good of mankind,¹⁵² and it acknowledges the importance of the conservation of migratory species and of Range States agreeing to take action to conserve migratory species.¹⁵³ Parties acknowledge the need to take action to avoid any migratory species becoming endangered.¹⁵⁴ The parties endeavour to provide protection for migratory species included in Appendix I, and endeavour to conclude Agreements for the conservation and management of migratory species listed in Appendix II.¹⁵⁵ In terms of Article II(3) CMS prohibits the taking of Appendix I species.¹⁵⁶ Appendix I covers 'endangered migratory species',¹⁵⁷ and Appendix II covers

migratory species which have an unfavourable conservation status ... as well as those which have a conservation status which would significantly benefit from the international cooperation that could be achieved by an international agreement.¹⁵⁸

Appendix I lists the blue, fin, sperm, humpback and bowhead whales¹⁵⁹ and Appendix II lists the Antarctic minke, bryde's and pygmy southern right, sei and sperm whales.¹⁶⁰ The seventh meeting of the Conference of the Parties (COP7) at Bonn in September 2002 called upon Parties that are range States for Antarctic minke, bryde's and pygmy right whales to take action to identify the status of the populations of these great whales to determine the nature and scope of threats to those species.¹⁶¹ Furthermore, it supported concerted action as well as international and regional cooperation to ensure the conservation and recovery of all great whales listed on the CMS Appendices and called upon international and regional organizations to enhance measures to ensure the conservation of these species of

¹⁵² Ibid Preamble.

¹⁵³ Ibid Article II(1).

¹⁵⁴ Ibid Article II(2).

¹⁵⁵ Ibid Article II(3).

¹⁵⁶ Ibid There are certain narrowly defined exceptions to these prohibitions stated in this Article.

¹⁵⁷ Ibid Article III.

¹⁵⁸ Ibid Article IV.

¹⁵⁹ Available at http://www.cms.int/pdf/en/CSM_Species_5Ing_Mar2004.pdf [Accessed 5 February 2008].

¹⁶⁰ Available at http://cms.int/bodies/COP.cop7/proceedings/pdf/en/part_I/annex_XI_species_added_en.pdf [Accessed 5 February 2008].

¹⁶¹ COP7 Resolution 7.15. Future Action on the Antarctic minke, bryde's and pygmy right whales under the Convention on Migratory Species (2002). Available at http://www.cms.int/bodies/COP/cop7/proceedings/pdf/en/part_I/Res_Rec/RES_7_15_Great_Whales.pdf [Accessed 5 February 2008].

great whales.¹⁶² At the eighth meeting of the Conference of Parties (COP-8) at Nairobi in November 2005 a resolution was adopted regarding the adverse human induced impacts on cetaceans.¹⁶³ The Resolution urged Parties and non-Parties who have jurisdiction over any part of the range of cetacean species listed in Appendix I and Appendix II of CMS, or over flag vessels outside national jurisdictional limits, to cooperate with relevant international organizations to promote the integration of cetacean conservation and co-ordinate the national positions among various Conventions, agreements and international fora.¹⁶⁴ The Resolution notes that the CBD has recognised the CMS as the lead partner in the conservation and sustainable use of migratory species over their entire range and notes the obligations of States Parties to UNCLOS to protect and preserve the marine environment; to co-operate on a global and regional basis to conserve marine mammals, paying special attention to highly migratory species, including cetaceans listed in Annex I of UNCLOS.¹⁶⁵ The Resolution requests the CMS Secretariat to co-operate with the IWC and to collaborate with the IWC programmes which address human induced impacts on cetaceans.¹⁶⁶

The IWC Secretariat and the CMS Secretariat signed a Memorandum of Understanding on 25 July 2000¹⁶⁷ emphasising their wish to achieve synergies in the conservation and management of cetaceans and agreeing to establish a framework of consultation between CMS and the IWC in the field of conserving migratory species.

¹⁶² Ibid.

¹⁶³ CMS Resolution 8.2. Available at http://www.cms.int/bodies/COP/cop8/documents/proceedings/html/en/cop8_res_rec_en.htm [Accessed 5 February 2008].

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ Memorandum of Understanding between the Secretariat of the International Whaling Commission (IWC Secretariat) and the Secretariat of the Convention on the Conservation of Migratory Species of Wild Animals (CMS) (UNEP/CMS/Secretariat), 25 July 2000. Available at http://www.cms.int/bodies/COP/cop7/list_of_docs/pdf/en/CP7CF7_11_Cooperation_Other_Bodies.pdf [Accessed 5 February 2008].

3.4 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)¹⁶⁸

There are currently 172 Parties to CITES, including Japan, Norway and Iceland.¹⁶⁹ The Preamble of CITES states that ‘international cooperation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade’. The Convention restricts international trade in endangered species.¹⁷⁰ Trade in Appendix I species is not allowed where such trade may be ‘detrimental to the survival of the species involved’.¹⁷¹ Appendix II includes species which may become threatened unless trade in them is regulated and other species which need to be subject to regulation to bring trade in those species under control. Appendix III includes species which are protected by one country which seeks to control trade in the species.¹⁷² The definition of trade includes introduction from the sea.¹⁷³ ‘Introduction from the sea’ means transportation into a State of specimens of any species which were taken in the marine environment not under the jurisdiction of any State.’¹⁷⁴ This definition would include cetaceans caught on the high seas and brought into port. Sperm, grey, humpback, sei, fin, bowhead, right, bryde’s, pygmy and the Antarctic minke whales are all listed on Appendix I.¹⁷⁵ At COP14 held at The Hague in June 2007 Resolution 14.6 agreed that ‘the marine environment not under the jurisdiction of any State’ means those marine areas beyond the areas subject to the sovereignty or sovereign rights of a State consistent with international law, as reflected in UNCLOS.¹⁷⁶

Article XV(2)(b) regulates amendments to Appendices I and II, and states that for marine species the Secretariat shall consult inter Governmental bodies having

¹⁶⁸ The Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed at Washington, D.C., 3 March 1973, entered into force on 1 July 1975, amended at Bonn on 22 June 1979, 993 UNTS 243. Copy as amended available at <http://www.cites.org/eng/disc/text.shtml> [Accessed 5 February 2008].

¹⁶⁹ List of Contracting Parties. Available at <http://www.cites.org/eng/disc/parties/alphabet.shtml> [Accessed 5 February 2008].

¹⁷⁰ Ibid Article 2.

¹⁷¹ Ibid Article 3(a).

¹⁷² Ibid Article 3.

¹⁷³ Ibid Article I(c).

¹⁷⁴ Ibid Article I(e).

¹⁷⁵ Japan, Iceland, Norway have entered reservations to various species. Available at http://www.cites.org/eng/app/reserve_index.shtml [Accessed 5 February 2008].

¹⁷⁶ Resolution Conf.14.6. Available at <http://www.cites.org/eng/res/14/index.shtml> [Accessed 5 February 2008].

a function in relation to those species to obtain scientific data and to ensure ‘*co-ordination with any conservation measures enforced by such bodies*’ (emphasis added).¹⁷⁷ This provision of CITES clearly refers to a body such as the IWC, and the conservation measures which it has enacted, such as the moratorium on commercial whaling.

At the 59th meeting of the IWC in Alaska in 2007 the IWC reaffirmed the important role of CITES in supporting the IWC’s management decisions with regard to the conservation of whale stocks.¹⁷⁸ The Resolution requested Contracting Governments to respect the relationship between the two Conventions and not to seek the transfer of cetacean species from CITES Appendix I while the moratorium remains in place.

There have been repeated attempts by Japan at several of the Conferences of the Parties to CITES to transfer cetacean species listed in Appendix I to Appendix II.¹⁷⁹ These attempts to down list cetacean species to Appendix II have failed, and the COP to CITES has deferred to the primacy of the IWC in deciding the conservation status of cetacean stocks regulated by it. At the 14th COP to CITES held in The Hague the week after the 59th meeting of the IWC Japan proposed a review of the status of all the 13 great whale species listed on CITES appendices and Iceland submitted a proposal for the review of the status of the Central North Atlantic population of the fin whale. These proposals by Japan and Iceland illustrate their desire to resume international trade in whale products, and were made in spite of the resolution passed one week earlier by the IWC. The Japanese and Icelandic proposals failed and it was decided by the 14th COP that no cetacean species should be removed from an appendix and that the status quo prohibiting the international trade in whale products should be maintained.¹⁸⁰

¹⁷⁷ CITES Article XV(2)(b).

¹⁷⁸ IWC Resolution 2007-4. Available at <http://www.iwcoffice.org> [Accessed 7 February 2008].

¹⁷⁹ See 12th meeting of the Conference of the Parties, Santiago 2002 and 13th meeting of the Conference of the Parties, Bangkok 2004. Available at <http://www.cites.org/eng/cop/index.shtml> [Accessed 5 February 2008].

¹⁸⁰ The 14th meeting of the Conference of the Parties, The Hague (2007). Available at <http://www.cites.org/eng/cop/cop/index.shtml> [Accessed 5 February 2008].

4. Whaling under special permit as commercial whaling

At the 59th meeting of the IWC catch limits for the 2007 coastal and the 2007/08 pelagic seasons were again set at zero.¹⁸¹ Japan, having withdrawn its reservations to the 1982 Schedule amendment setting zero catch limits, is bound by the Schedule provision setting zero catch limits for commercial whaling.

The language of Article VIII of the ICRW exempts Contracting Governments from the operation of the provisions of the Convention, subject to the specific conditions set out in Article VIII for the grant of special permits. Whaling under a special permit must be '*for the purposes of scientific research*' (emphasis added).¹⁸² The ordinary meaning of the phrase 'for the purposes of' means that the whaling conducted under the special permit is done exclusively for scientific research, and should not be commercial whaling conducted under the guise of scientific research.¹⁸³ No special permit should be granted by a contracting Government until it has been reviewed and commented on by the Scientific Committee in terms of paragraph 30 of the Schedule.¹⁸⁴ The IWC has resolved that whaling conducted under special permits issued in terms of Article VIII should only be permitted in exceptional circumstances,¹⁸⁵ meet critically important research needs,¹⁸⁶ satisfy criteria set by the Scientific Committee, be consistent with the Commission's conservation policy,¹⁸⁷ be conducted using non-lethal research techniques¹⁸⁸ ensure the conservation of whales in sanctuaries,¹⁸⁹ and ensure that whaling for scientific purposes should not assume the characteristics of commercial whaling.¹⁹⁰

It is clear from the practice of the IWC and from the literal meaning of Article VIII of the ICRW that whaling under Special Permit must only be undertaken for scientific research to meet research needs and lethal research should only be

¹⁸¹ See Schedule to ICRW available at <http://www.iwcoffice.org> [Accessed 5 February 2008]

¹⁸² Article VIII(1) of the ICRW.

¹⁸³ Independent Panel Report (note 139) at 50.

¹⁸⁴ Paragraph 30 of the Schedule to the ICRW.

¹⁸⁵ IWC Resolutions 1995-8 and 9.

¹⁸⁶ IWC Resolution 1987 Appendix 1.

¹⁸⁷ Ibid.

¹⁸⁸ IWC Resolution 1995-9.

¹⁸⁹ IWC Resolution 1995-8.

¹⁹⁰ IWC Resolution 1985 Appendix 2.

conducted where non-lethal techniques are not available. Whether the scale of whaling under a special permit constitutes commercial whaling in breach of the prohibition on commercial whaling contained in paragraph 10(e) of the Schedule to the ICRW is a factual issue, which in the case of the Government of Japan, warrants further examination.

CHAPTER VII

SMALL CETACEANS

1. Introduction

Cetaceans include whales, dolphins and porpoises and consist of more than 78 different species, collectively known as whales.¹⁹¹ Cetaceans can be divided into two sub-orders, the Mysticetes or baleen whales and the Odontocetes or toothed whales. The Mysticeti have plates of baleen instead of teeth and a symmetrical skull, and the Odontoceti have teeth and a symmetrical skull.¹⁹²

The question over which whales the IWC has regulatory competence revolves around the interpretation of the ICRW, its schedule and the document annexed to the International Agreements for the Regulation of Whaling titled 'Nomenclature of Whales' (the Nomenclature).¹⁹³ The Nomenclature lists the scientific names for seventeen different species of whales and the names of these whales in English, French, Dutch, Russian, Spanish and Scandinavian.

The language of the ICRW does not differentiate between large cetaceans and small cetaceans or between toothed and baleen whales and uses the generic 'whales' and 'whale stocks'. The Preamble stipulates that 'it is essential to protect *all species of whales* from further over-fishing' (emphasis added). This stipulation to protect all species of whales is indicative that the ordinary meaning of the Convention is to protect both small and large cetaceans.

The view has been put forth (by Japan and Denmark) that the IWC only has jurisdiction to regulate the specific species listed in the Nomenclature and that the extension of the IWC's jurisdiction to regulate additional species can only be accomplished by the unanimous agreement of all the parties to the ICRW.¹⁹⁴ This

¹⁹¹ Alexander Gillespie *Whaling diplomacy* 2005 at 277.

¹⁹² *Ibid.*

¹⁹³ Nomenclature of whales, reprinted in Patricia Birnie *The International Regulation of Whaling* (1985) II at 701.

¹⁹⁴ 1985 Chairman's Report of the IWC's 37th Meeting at 13.

proposition is predicated on the view that the Nomenclature forms an integral part of the ICRW and that to add species to this list would effectively be an amendment of the Convention requiring unanimous support. In Article IV of the Final Act of the International Agreement for the Regulation of Whaling¹⁹⁵ the International Whaling Conference recommended that the chart of Nomenclature of Whales annexed to the Final Act be accepted as a *guide* by the governments represented at the Conference (emphasis added).¹⁹⁶ Taking into account the ordinary meaning of the word ‘guide’ as well as the explicit language of the Convention that the *Schedule* forms an integral part of the ICRW (emphasis added), clearly supports the view that the IWC has the competence to regulate those species of cetaceans listed in the Schedule, and is clearly not limited in jurisdiction to only those species listed in the Nomenclature.¹⁹⁷

Small cetacean species face the same multiple threats as those facing the great whales, namely direct take, bycatch, habitat degradation, marine pollution and climate change. The IWC has passed numerous Resolutions on small cetaceans calling on parties to conduct research on threats to cetaceans;¹⁹⁸ to provide information on direct and incidental catches;¹⁹⁹ and to reduce catches of threatened species.²⁰⁰ Japan’s position on its annual hunt for Dall’s porpoises is that as the hunt takes place in Japan’s EEZ, it does not have to provide the IWC with information on the number of animals killed. Furthermore Japan contends that the IWC does not have jurisdiction over small cetaceans.²⁰¹

The IWC’s Scientific Committee sub-committee on small cetaceans has conducted research on the conservation status of small cetaceans since 1974, and it has supported numerous national conservation initiatives, such as the International Committee for the Recovery of the Vaquita.²⁰² The highly politicised debate over cetacean conservation in the IWC has led to small developing countries supporting

¹⁹⁵ Final Act of the International Agreement for the Regulation of Whaling. 1946. Article IV. Reprinted in Birnie (note 1) at 695.

¹⁹⁶ Gillespie (note 183) at 288.

¹⁹⁷ Ibid.

¹⁹⁸ IWC Resolution 1997-8.

¹⁹⁹ IWC Resolution 2000-9.

²⁰⁰ IWC Resolution 1999-9.

²⁰¹ W Burns and G Wandesforde-Smith ‘The International Whaling Commission and the future of cetaceans in a changing world’ (2002) 11(2) *RECIEL* 199 at 206.

²⁰² IWC Resolution 2007-5.

Japanese sponsored resolutions against cetacean conservation efforts at the IWC, but supporting small cetacean conservation initiatives in the more politically benign environment of the CMS and its regional agreements and memoranda of understanding.

2. The management of cetaceans by coastal States under UNCLOS

In the exclusive economic zone (EEZ) which may not extend beyond 200 nautical miles from the baselines²⁰³ the coastal State has ‘sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources whether living or non-living of the waters superjacent to the seabed’.²⁰⁴

Furthermore the coastal State must determine the allowable catch of the living resources in its EEZ and taking into account the best scientific advice shall ensure, through proper conservation and management measures, that the maintenance of the living resources in the EEZ are not endangered by over exploitation.²⁰⁵

The rights of coastal States under Article 56 of UNCLOS as set out above are restricted by Article 64 relating to highly migratory species and Article 65 relating to marine mammals. Article 64 states:

The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex 1 shall co-operate directly or through appropriate international organizations with a view to ensuring conservation and promoting the optimum utilization of such species throughout the region ... [I]n regions for which no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region shall co-operate to establish such an organization and participate in its work....²⁰⁶

Annex I of UNCLOS lists both large cetaceans as well as families of small cetaceans and makes no distinction between them. Article 64 requires coastal States to co-operate ‘directly or through appropriate international organizations’ for the conservation of the species. Article 65 states: ‘States shall co-operate with a view to

²⁰³ Article 57 of UNCLOS.

²⁰⁴ Article 56(1)(a) of UNCLOS.

²⁰⁵ Article 61(1)(2) of UNCLOS.

²⁰⁶ Article 64 of UNCLOS.

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'.²⁰⁷ Article 120 states that Article 65 also applies to the conservation and management of marine mammals in the high seas.

The UNCED report states in Section 17.61 of Agenda 21 that:²⁰⁸

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.
- (c) The work of other organizations, such as the Inter-American Tropical Tuna Commission and the Agreement on Small Cetaceans in the Baltic and North Sea under the Bonn Convention, in the conservation, management and study of cetaceans and other marine mammals....²⁰⁹

Agenda 21 recognises the IWC as the appropriate international body for the regulation of large whales²¹⁰ as well as other cetaceans. It is therefore clear that States shall co-operate through the IWC for the conservation, management and study of *all* cetaceans, as required by Article 65 of UNCLOS (emphasis added).²¹¹

The coastal State's discretion to manage its marine resources is clearly subject to the proviso that any exploitation of such resources shall always be sustainable and that no species may be endangered by over-exploitation of the species itself or of dependent species.²¹² These provisions govern the exploitation of all cetaceans in the EEZs of coastal States and States are mandated to co-operate with the competent international organizations, clearly the IWC in the case of cetaceans to restore over-exploited populations of cetaceans. Refusal by coastal States to co-operate with the IWC in relation to the management of endangered or

²⁰⁷ Article 65 of UNCLOS.

²⁰⁸ Report on the United Nations Conference on Environment and Development, Rio de Janeiro, 3 to 14 June 1992 (Rio Declaration), UN Doc. A/CONF.151/26/Rev.1. Available at <http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=78&ArticleID=1163> [Accessed 7 February 2008].

²⁰⁹ Ibid Section 17.61.

²¹⁰ Gillespie (note 191) at 292.

²¹¹ Ibid at 293 and 294.

²¹² Article 61 UNCLOS. See Gillespie (note 191) at 295 and 296.

over-exploited cetaceans occurring in the waters of coastal States would clearly be a breach of such coastal States' obligations under UNCLOS.

In 2007, 20 888 small toothed whales of different species were killed in Japan's EEZ.²¹³ This lethal hunt of small toothed whales is unregulated by quotas or inspection procedures. The indiscriminate method of capture, largely by drive fisheries, harms the social structure of these whales and raises questions of compliance by Japan with its obligations under UNCLOS insofar as they relate to the conservation of cetaceans.²¹⁴

3. CMS and the conservation of small cetaceans

3.1 Introduction

There are three regional agreements in force providing for the conservation of cetaceans concluded under the auspices of CMS. The first is the Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas (ASCOBANS). The second is the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and contiguous Atlantic Area (ACCOBAMS). Thirdly, the Memorandum of Understanding for the Conservation of Cetaceans and their Habitats in the Pacific Islands Region²¹⁵ which came into force on 15 December 2006 was concluded under the auspices of CMS in partnership with the Secretariat of the Pacific Regional Environment Programme (SPREP) and covers all populations of cetaceans in the Pacific Islands Region.

Negotiations on a fourth regional agreement in the Eastern Atlantic in respect of marine mammals opened at a meeting held from 16 to 20 October 2007 in the Canary Islands.²¹⁶ The Western African talks on Cetaceans and their Habitats (WATCH) were attended by delegates from 23 Western African range States to

²¹³ 'View of a Japanese scientist' by Toshio Kasuya. Presentation to Tokyo Whale Symposium 31 January 2008, available at <http://www.pewwhales.org> [Accessed 7 February 2008].

²¹⁴ Ibid.

²¹⁵ Memorandum of Understanding for the Conservation of Cetaceans and their Habitats in the Pacific Islands Region. Available at http://www.cms.int/pdf/en/summary_sheets/paccet.pdf [Accessed 5 February 2008].

²¹⁶ Report available at <http://www.cms.int/species/index.htm> [Accessed 5 February 2008].

determine the form of a new CMS agreement for the conservation of small cetaceans and manatees in the Eastern Atlantic and the waters surrounding the Macaronesia archipelagos of the Canary Islands, Madeira, Azores and Cape Verde.²¹⁷

3.2 Agreement on Small Cetaceans of the Baltic and North Seas (ASCOBANS)²¹⁸

ASCOBANS was concluded in 1991 and entered into force on 29 March 1994.²¹⁹ ASCOBANS covers all small cetaceans (any species, sub-species or population of toothed whale, Odontoceti, except the Sperm whale) in the Baltic and North Seas.²²⁰ At the Fourth Meeting of the Parties the Parties agreed to extend the area further west to cover parts of the north Atlantic and to incorporate waters adjacent to Ireland, Portugal and Spain. Once this Amendment to the Agreement enters into force the area covered by ASCOBANS will link effectively to the Agreement Areas of ACCOBAMS.²²¹ The ASCOBANS Agreement includes a Conservation and Management Plan that describes the conservation research and management measures which should be applied by the Parties. The Plan addresses measures to mitigate marine pollution and to reduce incidental bycatch, and calls for Parties to adopt national laws to prohibit the intentional taking and killing of small cetaceans.²²² Parties to ASCOBANS are Sweden, Netherlands, Belgium, United Kingdom, Germany, Denmark, Poland, Finland, Lithuania and France.²²³ Significantly Norway is not a party to ASCOBANS. Norway continues to whale under a reservation to the moratorium, and has in the past engaged in lethal scientific research under special permit.

²¹⁷ Report available at http://www.cms.int/news/press/nwPR2007/10_Oct/Watch.htm [Accessed 5 February 2008].

²¹⁸ The agreement was concluded in September 1991 and entered into force on 29 March 1994. Text available at <http://www.ascobans.org> [Accessed 5 February 2008].

²¹⁹ Ibid.

²²⁰ Ibid.

²²¹ Text available at http://www.cms.int/species/ascobans/asc_bkrd.htm [Accessed 5 February 2008].

²²² Text available at http://www.cms.int/species/ascobans/asc_text.htm [Accessed 5 February 2008].

²²³ List of parties available at http://www.cms.int/pdf/en/summary_sheets/ascobans.pdf [Accessed 5 February 2008].

3.3 Agreement on the Conservation of Cetaceans in the Black Sea, Mediterranean Sea and Continuous Atlantic Area (ACCOBAMS)²²⁴

ACCOBAMS applies to all the maritime waters and internal waters of the Black Sea and the Mediterranean and their gulfs and seas, and of the Atlantic area contiguous to the Mediterranean Sea west to the straits of Gibraltar.²²⁵ The agreement applies to all cetaceans that have a range within the agreement area. For the purposes of this regional agreement, ‘cetacean’ means ‘species, sub-species or populations of Odontoceti or Mysticeti’ and cover both large and small cetaceans.²²⁶ Parties to the Agreement shall take co-ordinated measures to achieve and maintain a favourable conservation status for cetaceans, prohibit any deliberate taking of cetaceans and co-operate to create a network of specially protected areas to conserve cetaceans.²²⁷ Parties shall apply the conservation and management measures set out in Annexure II to the Agreement²²⁸ and in applying these conservation measures the Parties shall apply the precautionary principle.²²⁹ ACCOBAMS entered into force on 1 June 2001. There are nineteen parties to ACCOBAMS,²³⁰ which do not include the important range States of Russia, Turkey, Israel, Egypt and Algeria.²³¹

3.4 Memorandum of Understanding for the Conservation of Cetaceans and their habitats in the Pacific Islands Region (MoU)

The first meeting of the signatories to the Memorandum of Understanding (MoU) was held in Samoa in March 2007. It was opened for signature in Noumea on 15 September 2006, and eleven countries are signatories.²³² The meeting of the signatories decided that the Whale and Dolphin Action Plan (WDAP) of SPREP

²²⁴ The Agreement on the Conservation of Cetaceans in the Black Sea, Mediterranean Sea and Continuous Atlantic Area (ACCOBAMS). Available at <http://www.accobams.org/> [Accessed 5 February 2008] and agreement available at <http://www.accobams.org/file.php/147/Text%20of%20the%20agreement.doc> [Accessed 5 February 2008].

²²⁵ Article I(1)(a) ACCOBAMS.

²²⁶ Ibid Article I(2).

²²⁷ Ibid Article II(1).

²²⁸ Ibid Article II(3).

²²⁹ Ibid Article II(4).

²³⁰ List of parties available at <http://www.accobams.org/2006.php/pages/show/14> [Accessed 5 February 2008].

²³¹ Ibid.

²³² MoU available at http://www.cms.int/species/pacific_cet/mtg1_rpt/Report_PIC/1st_Mtg_minus_annex.pdf [Accessed 5 February 2008].

would become the MoU Action Plan and that there would be one WDAP applying to all cetaceans for the region. The MoU was negotiated under the auspices of the CMS in collaboration with SPREP, and it addresses threats to cetaceans in the Pacific Island Regions, and provides an inter-government framework to co-ordinate cetacean conservation efforts. It aims to ensure co-ordinated region-wide conservation for cetaceans and their habitats.²³³ The signatories agree to:

- Take steps to conserve all cetaceans and fully protect species listed in CMS Appendix I that occur in the Pacific Island Region;²³⁴
- Consider ratifying or acceding to biodiversity-related international instruments including CMS;²³⁵
- Review, enact or update legislation to conserve cetaceans;²³⁶
- Implement an Action Plan that would address matters such as threat reduction, habitat protection, including migratory corridors, research and monitoring and education;²³⁷ and
- Facilitate the exchange of scientific, technical and legal information.²³⁸

3.5 Cooperation between CMS, ASCOBANS, ACCOBAMS and the IWC

The Progress Report on relevant activities undertaken within the framework of CMS, ASCOBANS and ACCOBAMS was presented to the 57th Meeting of the IWC.²³⁹

The Report stated that:

CMS and its specialized regional Agreements, ACCOBAMS and ASCOBANS, view the Conservation Committee as a potentially useful additional vehicle for promoting cetacean conservation provided that it interfaces effectively with the global biodiversity and conservation work of other international Conventions and Agreements which are already active in delivering inter-governmentally agreed programmes for cetacean conservation, which in turn contribute to the 2010 targets for biodiversity agreed by CBD and the World Summit on Sustainable Development. It appears self-evident that in order to realize its full potential, the Committee, in addition to focusing on issues and species, which fall into the remit of the IWC, will need to avoid duplication of effort by co-operating with specialized

²³³ Ibid.

²³⁴ Pacific Cetacean MoU, para. 1.

²³⁵ Ibid para 2.

²³⁶ Ibid para 3.

²³⁷ Ibid para 4.

²³⁸ Ibid para 5.

²³⁹ Report available at http://www.cms.int/pdf/en/CMS_ProgRep_IWC57_final.pdf [Accessed 5 February 2008].

international conservation instruments and drawing on the experience and expertise these instruments can provide. In this context, it is worthy of notice that most of the issues on the Committee's ambitious draft agenda are currently being addressed by UNEP/CMS itself and/or the relevant members of the UNEP/CMS family of agreements....²⁴⁰

The Conservation Committee of the IWC has not as yet finalised its terms of reference and this should be done at the 60th meeting of the IWC in Santiago, Chile, in 2008.

3.6 West African Talks on Cetaceans and their Habitats (WATCH)

At the October 2007 meeting of 23 range States consensus was reached that the CMS Agreement to be concluded should initially focus on small cetaceans, but be in a form which allows later extension to large whales. The proposed area governed by the agreement would extend from Morocco to South Africa, and cover the waters around the Macaronesia Islands in the Eastern Atlantic, namely the Canary Islands, Madeira, Azores and Cape Verde. A preliminary text of the agreement and two draft action plans were discussed during the meeting and a follow up meeting will be held in 2008 under the auspices of the CMS, to finalise the Memorandum of Understanding on the Conservation of Small Cetaceans and Manatees of Western Africa and Macaronesia.²⁴¹

4. Conclusion

The IWC practice over the last thirty years has focused on conservation of small cetaceans. Whaling countries have continually voiced their objection to the IWC's jurisdictional claim over small cetaceans and reasserted their claim of exclusive jurisdiction over small cetaceans in their EEZs. This view does not take into account the provisions of UNCLOS relating to migratory species, endangered species and cetaceans, which afford coastal states limited sovereignty over these species subject to their obligations under UNCLOS.²⁴² The CMS does have undisputed jurisdiction

²⁴⁰ Ibid.

²⁴¹ Report available at http://www.cms.int/species/waam/watch_docs.htm [Accessed 5 February 2008].

²⁴² Gillespie (note 191) at 482.

over small cetaceans and it has concluded several successful regional cetacean conservation agreements. CMS has proved to be a successful forum for coastal states to take stricter conservation measures in their EEZ's than those required by UNCLOS. The IWC is, however, the international body which should regulate the global conservation of all cetaceans.

CHAPTER VIII

SANCTUARIES

1. Introduction

The IWC has created two whale sanctuaries known as the Indian Ocean Sanctuary (IOS) and the Southern Ocean Sanctuary (SOS) which together cover an area of approximately 100 million square kilometres corresponding roughly to 30 per cent of the world's oceans.²⁴³ Article V of the ICRW provides that the Commission may amend, from time to time, the provisions of the Schedule by adopting regulations with respect to the conservation and utilization of whale resources, fixing:

- (a) protected and unprotected species;
- (b) open and closed seasons; and
- (c) open and closed waters, including the *designation of sanctuary areas* (emphasis added).²⁴⁴

Article V(2) requires that amendments of the Schedule shall:

- (a) be such as are necessary to carry out the objectives and purposes of this Convention and to provide for the conservation, development, and optimum utilization of the whale resources;
- (b) shall be based on scientific findings;²⁴⁵ and
- (c) shall take into consideration the interests of the consumers of whale products and the whaling industry.²⁴⁶

2. The Indian Ocean Sanctuary (IOS)

The Seychelles submitted the first proposal for a whale sanctuary to the IWC in 1979.²⁴⁷ The Sanctuary was created by an amendment to the Schedule passed by the requisite three quarters majority²⁴⁸ and a new paragraph 7(a) was added to the Schedule under Title III, the current version of which states:

²⁴³ Morgera (note 85) at 333.

²⁴⁴ ICRW, Article V(2)(a), (b) and (c).

²⁴⁵ Ibid Article V(2)(a) and (b).

²⁴⁶ Ibid Article V(2)(d).

²⁴⁷ 1979 Chairman's Report of the IWC's 31st Meeting.

²⁴⁸ Ibid.

In accordance with Article V(1)(c) of the Convention, commercial whaling, whether by pelagic operations or from land stations, is prohibited in a region designated as the Indian Ocean Sanctuary [T]his prohibition applies irrespective of such catch limits for baleen or toothed whales as may from time to time be determined by the Commission. This prohibition shall be reviewed by the Commission at its Annual Meeting in 2002.²⁴⁹

The original provision creating the Sanctuary became effective on 24 October 1979 and applied for ten years. The Indian Ocean Sanctuary was renewed in 1989 for a further three years²⁵⁰ and was established as a permanent sanctuary in 1992²⁵¹ subject to review in 2002. The IWC at its 54th Meeting reviewed and reaffirmed the designation of the Indian Ocean Sanctuary²⁵² and the Sanctuary therefore remains in force for an indefinite period of time. Commercial whaling is prohibited in the Indian Ocean Sanctuary irrespective of whether catch limits may be set by the IWC in the future for baleen or toothed whales.

3. The Southern Ocean Sanctuary (SOS)

At the 44th meeting of the IWC in 1992 the French government proposed a whale sanctuary encompassing the waters of the Antarctic Ocean south to the Antarctic Convergence.²⁵³ The proposed boundaries of the Sanctuary were based on ecological considerations and encompassed a circumpolar area south of the 40°S parallel. The Southern Ocean Sanctuary was approved in 1994²⁵⁴ and the Schedule was amended by adding paragraph 7(b) as follows:

In accordance with Article V(1)(c) of the Convention, commercial whaling, whether by pelagic operations or from land stations, is prohibited in a region designated as the Southern Ocean Sanctuary [T]his prohibition applies irrespective of the conservation status of baleen and toothed whale stocks in this Sanctuary, as may from time to time be determined by the Commission.²⁵⁵

The SOS encompasses an area of more than 28 million square kilometres around Antarctica which are the feeding grounds for 90 per cent of the world's great

²⁴⁹ Para 7(a) of the Schedule to the ICRW.

²⁵⁰ 1989 Chairman's Report of the IWC's 41st Meeting.

²⁵¹ 1992 Chairman's Report of the IWC's 44th Meeting.

²⁵² 2002 Chairman's Report of the IWC's 54th Meeting.

²⁵³ 1992 Chairman's Report of the IWC's 44th Meeting.

²⁵⁴ 1994 Chairman's Report of the IWC's 46th Meeting.

²⁵⁵ Article 7(b) of the Schedule to the ICRW.

whales.²⁵⁶ Article 7(b) came into force on 6 December 1994 and the Government of Japan lodged an objection within the prescribed period to the extent that it applies to the Antarctic minke whale stocks.²⁵⁷

At the 50th meeting of the IWC in 1998 in Oman, Japan tabled a ‘Resolution concerning the Southern Ocean Sanctuary’.²⁵⁸ Japan’s Resolution argued for the immediate abolition of the Southern Ocean Sanctuary on the basis that the Sanctuary was without scientific justification and that it was against the objectives and purposes of the ICRW.

Japan relied upon a legal opinion of Professor Burke²⁵⁹ as its basis for the attack on the legality of the Southern Ocean Sanctuary. Burke’s opinion was based upon a strict interpretation of Article V(2)(a) and (b) and he contended that the Schedule amendment creating the Southern Ocean Sanctuary did not meet the requirements of being necessary to carry out the objectives and the purposes of the ICRW, and was not based upon scientific findings. The definitive answer to the Japanese challenge to the Sanctuary is perhaps best formulated by Professor Birnie who notes that in the absence of an independent body for dispute settlement ‘the Commission’s decision on the Sanctuary taken through use of the normal voting procedures laid down in Article V, is determinative and must be regarded as having taken into account all the relevant factors, guidelines and its own relevant practice in this field’.²⁶⁰

Japan continues to oppose the SOS and has repeatedly proposed draft resolutions calling for its abolition which have not as yet been approved by a simple majority nor the requisite three quarters majority needed to amend the Schedule. The most recent proposal by Japan to amend the Schedule to abolish the SOS was defeated at the 58th meeting of the IWC in 2006.²⁶¹

²⁵⁶ WCG Burns and G Wandesforde-Smith ‘The International Whaling Common and the future of cetaceans in a changing world’ 11 (2002) *RECIEL* 199 at 207.

²⁵⁷ See footnotes to paragraph 7(b) to the Schedule of the ICRW.

²⁵⁸ 1988 Chairman’s Report of the IWCs 50th Meeting.

²⁵⁹ William T Burke ‘Memorandum of opinion on the legality of the designation of the Southern Ocean Sanctuary by the IWC’ (1996) *Ocean Development and International Law* at 315.

²⁶⁰ 1995 Chairman’s Report of the IWC’s 47th Meeting, Agenda Item 13, ‘Opinion on the Legality of the Designation of the Southern Ocean Whale Sanctuary by the International Commission’ by Patricia Birnie.

²⁶¹ 2006 Chairman’s Report of the IWC’s 58th Meeting.

At the 54th meeting of the IWC in Shimonoseki, Japan, in 2002, the IWC passed a resolution giving guidance to the Scientific Committee on the sanctuary review process. The IWC resolved that the establishment of sanctuaries is an integral part of best management practice of wildlife and that, where consensus cannot be achieved on the scientific validity of a sanctuary, the precautionary approach should be applied. A sanctuary may be seen as an application of the precautionary approach in accordance with principle 15 of the 1992 Rio Declaration. The fact that a sanctuary overlaps with other management measures such as the current moratorium on commercial whaling cannot 'be used to invalidate any long-term scientific and conservation value of a given sanctuary'.²⁶²

4. New sanctuary proposals

4.1 South Pacific Whale Sanctuary (SPWS)

For five consecutive years (1999 to 2004)²⁶³ Australia and New Zealand have proposed the establishment of a South Pacific Whale Sanctuary (SPWS). In 2004 New Zealand pointed out that at a regional level, States and territories of the South Pacific have supported marine mammal conservation and the creation of national sanctuaries within the EEZ's of Coastal States. A Memorandum of Understanding was opened for signature in September 2006 and there are currently eleven countries which are parties to this Memorandum of Understanding (MoU).²⁶⁴ Approximately 50 per cent of the area of the proposed South Pacific Whale Sanctuary (SPWS) is covered by this Regional Plan concluded under the auspices of CMS. The proposed SPWS would provide protection to cetaceans in their breeding grounds and their migration routes to feeding grounds in the Southern Ocean. Currently over 11 million kilometres of the South Pacific are protected by whale sanctuaries in countries' exclusive economic zones.²⁶⁵ The proposal to create the SPWS by way of

²⁶² IWC Resolution 2002-1. Available at <http://www.iwcoffice.org/meetings/resolutions/resolution2002.htm> [Accessed 5 February 2008].

²⁶³ 2004 Chairman's Report of the IWC's 56th Meeting at 48. Available at <http://www.iwcoffice.org/documents/meetings/ChairReport?IWC56final.pdf> [Accessed 5 February 2008].

²⁶⁴ See page 42 supra.

²⁶⁵ 2006 Chairman's Report of the IWC's 58th Meeting at 58.

a Schedule amendment has not attracted the requisite three-quarter majority when put to a vote.²⁶⁶

At the 58th Meeting of the IWC in 2006, Australia introduced a paper providing a summary of findings of the economic value of whale watching in the Pacific Islands. These findings show an estimated average annual growth rate of forty five per cent for whalewatching in the region for the period 1998 to 2005, and an increase in numbers of people whalewatching from 10 309 in 1998 to 109 540 in 2005.²⁶⁷ At the 58th Meeting of the IWC,²⁶⁸ Australia and New Zealand submitted a paper which noted that the proposed SPWS would:

(i) protect whale populations in the region which remain seriously depleted, and facilitate their recovery; (ii) protect critical great whale breeding grounds and migratory routes; (iii) allow stocks to reach their carrying capacity and fluctuate according to natural determinants; (iv) provide a management tool that reinforces the effects of other mechanisms to prevent species from becoming threatened with extinction; and (v) provide economic benefits through non-consumptive use of whales.²⁶⁹

4.2 South Atlantic Whale Sanctuary (SAWS)

At all of the meetings of the IWC from 2001 to 2007²⁷⁰ a Schedule amendment has been proposed by inter alia Brazil (the 2007 proposed Schedule amendment was submitted by Brazil, Argentina and South Africa) but has not received the required three-quarter majority support to be adopted. The most recent proposal at the 59th Meeting of the IWC in Alaska received thirty nine votes in favour of the proposed Schedule amendment and twenty nine against, with three abstentions.²⁷¹ Brazil noted that it had consulted with all Range States of the proposed SAWS, including non IWC members, and all Range States were in favour of the proposed sanctuary.²⁷² Argentina noted that the SAWS would provide protection for whales during their migration to breeding grounds in the South Atlantic. The SAWS would link the

²⁶⁶ 2004 Chairman's Report of the IWC's 56th Meeting at 49.

²⁶⁷ 2006 Chairman's Report of the IWC's 58th Meeting at 48.

²⁶⁸ Ibid at 57.

²⁶⁹ Ibid.

²⁷⁰ 2007 Chairman's Summary Report of the IWC's 59th Meeting.

²⁷¹ Ibid.

²⁷² 2006 Chairman's Report of the IWC's 58th Meeting at 34.

Southern Ocean Sanctuary to breeding grounds in the South Atlantic.²⁷³ South Africa pointed out that, as a developing country, it regards the non-consumptive sustainable use of whale resources as the most appropriate way to bring economic relief to coastal communities. The proposed SAWS would give protection to whale stocks to ensure that for non-consumptive use there would be whales in sufficient numbers to ensure the industry's sustainability.²⁷⁴

There are currently more than thirty marine protected areas for cetaceans in areas of national jurisdiction which fall within the proposed SAWS.²⁷⁵ The SAWS intends to promote co-operation for cetacean conservation beyond the normal restrictive interpretation of a sanctuary declared in terms of a Schedule amendment to the ICRW which prohibits commercial whaling irrespective of the conservation status of whale stocks in the sanctuary area.²⁷⁶ The SAWS intends to promote the co-ordination of marine protected areas (MPAs) established at national levels and high seas areas such as the proposed SAWS. The creation of high seas marine protected areas such as the SAWS is consistent with Article 194(5) of UNCLOS which stipulates that the parties shall take measures which include 'those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life'.²⁷⁷ The proposed sanctuary encompasses breeding grounds for all of the large whale species in the South Atlantic Ocean and takes into account migratory paths such whales use to their feeding grounds in the Southern Ocean. The proposal for the SAWS²⁷⁸ notes that, since the Schedule amendment setting zero catch limits in 1986, all of the Range States of the SAWS have exclusively utilized whales in a non-lethal and non-consumptive way. The Preamble to the ICRW notes that 'it is in the common interest to achieve the optimum level of whale stocks as rapidly as possible'.²⁷⁹ For non-consumptive use the optimum level of whale stocks is the unexploited level which provides for the highest sustainable abundance of whales.

²⁷³ Ibid at 35.

²⁷⁴ Ibid.

²⁷⁵ Erich Hoyt 'Marine protected areas for whales, dolphins and porpoises: A world handbook for cetacean habitat conservation' (2004) Earthscan Publications at 492.

²⁷⁶ Article 7(a) and (b) of the Schedule to the ICRW.

²⁷⁷ UNCLOS Article 194(5).

²⁷⁸ 2005 Chairman's Report of the IWC's 57th Meeting.

²⁷⁹ Preamble to the ICRW.

5. Conclusion

The creation of whale sanctuaries where commercial lethal exploitation of whales is prohibited, irrespective of catch limits for commercial whaling set by the IWC, is an effective application of the precautionary principle of international environmental governance. The establishment of the SAWS and the SPWS would, in conjunction with the IOS and SOS, create a Southern Hemisphere cetacean sanctuary. This area would encompass the breeding and feeding grounds of cetacean populations and their migratory paths. In the face of the uncertainty created by the numerous anthropogenic threats facing cetacean populations this protected area could be vital in preventing extinction of endangered and threatened cetacean populations. Unfortunately, the ever increasing special permit whaling in sanctuaries such as the SOS, undermines these conservation efforts and underscores the urgent need to rein in this activity.

The IWC, through the interpretation of the provisions of its constituent convention, is slowly evolving into a conservation orientated body. Language such as 'optimum use' and 'interests of the whaling industry' have been interpreted by the IWC to include 'non-consumptive use' and 'whale watching' industry. The creation of the IOS and the SOS are examples of conservatory practice. The creation of new sanctuaries such as the SPWS and the SAWS would be a natural evolution of this conservation agenda, and an exercise in precautionary management, particularly in the light of the multiple threats facing cetaceans in the 21st century.

CHAPTER IX

THREATS TO CETACEANS

1. Introduction

The unsustainable industrial whaling effort of the 20th century has left most of the populations of great whales endangered or threatened.²⁸⁰ At the time of negotiation of the ICRW the only real threat facing the great whale populations was commercial whaling. The last 60 years has brought profound change to the marine environment and to the habitat of cetaceans and the ecosystems upon which they depend. Climate change is now expected to disrupt whale breeding, migration and food supplies. Marine pollution, particularly from land based sources, is an ever increasing threat to the marine environment. Underwater noise, specifically from sonar, poses increased risks to cetaceans and collision with marine traffic is increasing. The ever present problem of incidental capture, although being addressed in several fora, remains one of the greatest threats, particularly to small cetaceans. All of these threats to cetaceans complicate scientific whale population modelling and the determination of whether lethal whaling is sustainable.

2. Incidental capture

2.1 Introduction

Cetaceans, both large and small, may be affected by either entanglement in fishing gear, or may be caught and landed in fishing operations for other targeted species. The Report of the Scientific Committee of the IWC in 2003 states that cetacean bycatches off the United States coast in gillnet, trawl and other fisheries are between sixty and three hundred thousand cetaceans annually.²⁸¹

²⁸⁰ 14 cetacean species are critically endangered, endangered or vulnerable, 28 are at lower risk and 39 species are data deficient. See IUCN red list available at <http://www.iucn.org> [Accessed 7 February 2008].

²⁸¹ Report of the Scientific Committee, IWC/55/Rep 1-18.

UNCLOS Article 61(4) requires States to apply conservation measures as follows:

In taking such measures the Coastal States shall take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.²⁸²

The requirements of UNCLOS were followed by the adoption of the ‘Straddling Stocks Agreement’,²⁸³ which requires in Article 18(e) and (f) the reporting of the catch of target and non-target species,²⁸⁴ and requires compliance with the specific measures of RFMO’s designed to minimise ‘catches of non-target species’.²⁸⁵

2.2 Incidental capture and IWC practice

The IWC has addressed the problem of bycatch through numerous resolutions,²⁸⁶ and has established working groups to address this problem.²⁸⁷ The IWC currently requires the reporting by States Parties to the ICRW of the number of small and large cetaceans which are incidentally caught.²⁸⁸ Japan does not supply this data to the IWC and maintains the position that small cetaceans do not fall within the jurisdiction of the IWC.²⁸⁹

In 2001 the IWC adopted Resolution 2001-4 on the Incidental Capture of Cetaceans, and Resolution 2001-13 on small cetaceans.²⁹⁰ The Resolutions recognize that the problem of bycatch of cetaceans has been the subject of IWC discussion for over 20 years, and that this problem may prove to be critical for the survival of endangered species of cetaceans. The Resolution requests the Scientific

²⁸² UNCLOS Article 61(4).

²⁸³ 1995 Agreement for the Implementation of the Provisions of the United Nations Convention in the Law of the Seas of 10 December 1987 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (1995) 6 Yearbook of International Environmental Law 841.

²⁸⁴ Ibid Article 18(e) and (f).

²⁸⁵ Ibid Article 18(i) and Gillespie (note 188) at 86.

²⁸⁶ IWC Resolution 1998-2.

²⁸⁷ Report of the Scientific Committee, IWC/53/4 15-20.

²⁸⁸ IWC Resolution 1997-4.

²⁸⁹ See page 40 supra.

²⁹⁰ IWC Resolution 2001-4 and IWC Resolution 2001-13.

Committee to provide a report on the most feasible methods to mitigate the incidental capture of large cetaceans in fishing gear. Large cetaceans entangled in fishing gear should be released alive, and where this is not possible, there should be no commercial exchange of incidentally captured whales.²⁹¹

Resolution 2001-13 urges Contracting Parties to take appropriate measures to prevent bycatch of small cetaceans in fisheries operations and urges the IWC to pursue complimentary actions with the CMS in respect of small cetaceans.²⁹² Should the incidentally captured whale be subject to a catch limit awarded under the RMP, the whale incidentally captured must be counted against the overall quota for that species or stock.²⁹³

The IWC has dealt with the issue of bycatch, particularly of small cetaceans, for more than 20 years. It remains a serious problem and, particularly in the case of small cetaceans, may lead to the extinction of certain species.²⁹⁴

2.3 Bycatch under the CMS

In 1999 the COP6 of CMS passed a resolution requesting that the parties ‘strengthen the measures taken to protect migratory species against bycatch by fisheries’.²⁹⁵ At COP7 in 2002, the CMS urged parties to ‘implement appropriate schemes to determine the impact of fisheries bycatch on migratory species’.²⁹⁶

2.4 Bycatch mitigation measures

The modification of purse-seine nets, by the placement in the nets of dolphin safety panels through which caught dolphins can escape, has been effective.²⁹⁷ The other technological device which has been employed is the placement of acoustic sounding devices on nets which warn cetaceans of the presence of the net. The use of this

²⁹¹ IWC Resolution 2001-4.

²⁹² IWC Resolution 2001-13.

²⁹³ IWC Resolution 2001-4.

²⁹⁴ IWC Resolution 2007-4.

²⁹⁵ COP6, Resolution 6.2. Available at <http://www.cms.int> [Accessed 5 February 2008].

²⁹⁶ COP7, Resolution 7.15. Available at <http://www.cms.int> [Accessed 5 February 2008].

²⁹⁷ IWC/SC/54/SM 30.

device appears to be an effective means to reduce incidental capture of certain cetaceans, primarily small cetaceans.²⁹⁸ The United Nations General Assembly passed resolutions²⁹⁹ which have imposed a global moratorium on large scale drift-net fishing on the high seas.³⁰⁰ In 1991 the IWC unanimously passed a resolution in support of the United Nations initiative regarding large scale pelagic drift-netting.³⁰¹ The use of large scale drift-nets has been restricted in the South Pacific, Antarctica and the Mediterranean, and this has led to the substantial decline in bycatch of particularly small cetaceans

2.5 Release alive

In 2001 the IWC resolved that ‘all Contracting Parties make reasonable attempts to release alive, with minimum harm possible, whales that have been incidentally captured’.³⁰² The CMS ASCOBANS³⁰³ and ACCOBAMS³⁰⁴ regional agreements have provisions providing for the immediate release of cetaceans caught incidentally in fishing gear.

3. Environmental threats to whales

3.1 Introduction

History has shown that overharvesting of whales has led to many of the species of great whales being taken to the brink of extinction. These depleted populations now face additional environmental threats such as marine traffic (both from collision and acoustic interference), marine pollution and climate change.

²⁹⁸ 2000 Chairman’s Report of the IWC’s 52nd Meeting at 52.

²⁹⁹ UNGA Res 46/215.

³⁰⁰ UNGA Res 4/Res/53/33.

³⁰¹ IWC Regulation 1991 Appendix 5.

³⁰² IWC Resolution 2001-4.

³⁰³ ASCOBANS Action Plan Part 4. Available at <http://www.cms.int/> [Accessed 5 February 2008].

³⁰⁴ ACCOBAMS Conservation Plan 1.a. Available at <http://www.cms.int/> [Accessed 5 February 2008].

3.2 IWC practice in respect of environmental threats to cetaceans

As early as 1973 the Scientific Committee asked the Commission to express its concern to member States on the effects of pollution on whale stocks.³⁰⁵ In 1980 the IWC passed a Resolution urging:

Responsible member Governments of the IWC should take every possible measure to ensure that degradation of the marine environment, resulting in damage to whale populations ... does not occur... and noted that the survival and health of whale populations is dependent upon the maintenance of a healthy marine and coastal environment.³⁰⁶

In 1993 the IWC passed a resolution calling on Contracting Governments to take measures to adopt policies to eliminate the discharge of organohalogen compounds which accumulate to dangerous levels in the marine environment.³⁰⁷ In 1994 the IWC endorsed the recommendations of the Scientific Committee to pursue studies on environmental change and their impacts on cetaceans.³⁰⁸ The Scientific Committee focused on the effects of global warming, ozone depletion, marine pollution, direct and indirect effects of noise as environmental factors affecting cetaceans.³⁰⁹ Workshops under the auspices of the Scientific Committee were held on chemical pollution of the marine environment and the effects of climate change on cetacean populations.

At the 50th Meeting of the IWC in 1998, the Commission adopted a resolution endorsing the establishment by the Scientific Committee of a Standing Working Group on Environmental Concerns (SWGEC).³¹⁰ At the 52nd Meeting of the IWC in 2000 the Commission endorsed the SONAR2000 and Pollution 2000+ research programmes, the former being a research collaboration between the IWC and CCAMLR, and provided funding for these projects.³¹¹

³⁰⁵ 1973 Chairman's Report of the IWC's 25th Meeting. Birnie (note 1) at 437.

³⁰⁶ 1980 Chairman's Report of the IWC's 30th Meeting. Resolution on Preservation of the Habitat of Whales and the Marine Environment. Available at <http://www.iwcoffice.org> [Accessed 5 February 2008].

³⁰⁷ 1993 Appendix 13. Available at <http://www.iwcoffice.org> [Accessed 5 February 2008].

³⁰⁸ IWC Resolution 1994-13. Resolution on Research on the Environment and Whale Stocks.

³⁰⁹ Ibid.

³¹⁰ IWC Resolution 1998-5.

³¹¹ IWC Resolution 2000-7.

The Southern Ocean Whale and Ecosystem Research Programme (SOWER) places increased emphasis on integrated environmental research linking ecological factors and whale stock statistics.³¹² The last SOWER cruise took place from December 2005 to February 2006 and non-lethal research was carried out on minke, blue and humpback whales.³¹³ The SOWER programme involves co-operation with the CCAMLR research programme and the Southern Ocean GLOBEC programme.

Pursuant to IWC Resolution 2000-7,³¹⁴ the Scientific Committee of the IWC submits an annual report on the State of the Cetacean Environment Report (SOCER). SOCER reports have been produced for the Atlantic Ocean, Black Sea and Mediterranean (2003), North and South Pacific (2004), Arctic and Southern Ocean (2005), Indian Ocean (2006) and Black Sea and Mediterranean (2007).³¹⁵ Each SOCER report includes a Global Section with general information on cetacean environments.

The first workshop on chemical pollutants and cetaceans was held in March 1995 and it produced a list of recommendations for further research.³¹⁶ A workshop held in 1999 proposed the development of the Pollution 2000+ programme, which has two aims, to determine whether there are quantitative relationships between biomarkers and PCB levels in tissues of cetaceans, and to validate the analytical techniques.³¹⁷

At the IWC's 55th meeting in Berlin the Commission passed the Berlin Initiative, which decided to establish a Conservation Committee of the Commission³¹⁸ in terms of Article III(4) of the ICRW. The Commission called upon the Scientific Committee to advise the Conservation Committee and to ensure that

³¹² SOWER programme reports available at <http://www.iwcoffice.org/conservation/environment.htm#sower> [Accessed 5 February 2008].

³¹³ Ibid.

³¹⁴ IWC Resolution 2000-7. Available at <http://www.iwcoffice.org> [Accessed 5 February 2008].

³¹⁵ Available at http://www.iwcoffice.org/documents/sci_com/SCRepFiles2007/SOCER2003-2007 [Accessed 5 February 2008].

³¹⁶ Available at <http://www.iwcoffice.org/publications/journalspec01.htm#workshop1> [Accessed 5 February 2008].

³¹⁷ Available at <http://www.iwcoffice.org/conservation/environment.htm> [Accessed 5 February 2008].

³¹⁸ IWC Resolution 2003-1. Available at <http://www.iwcoffice.org/meetings/resolutions/resolution2003.htm> [Accessed 5 February 2008].

inter alia, the environmental issues relating to cetaceans are incorporated into the Conservation Committee's agenda.³¹⁹

The practice of the IWC over the past three decades has shown that the Commission has recognized the seriousness of the environmental threats facing cetaceans. These threats could prove to be critical to stocks of cetacean species which are seriously depleted from the large scale commercial harvesting operations of the last century. The research undertaken by the scientific committee research programmes highlights the necessity of precautionary management, adopting an ecosystem approach, to all cetacean conservation decisions.

3.3 Marine pollution

There are many specific sources of pollution of the marine environment, the most serious of which is pollution from land based sources. Regulation of this form of marine pollution is left largely to sovereign national governments which has resulted in ineffectual control and ever increasing pollution. Other forms of pollution of the marine environment from dumping, ships, atmospheric pollution or sea-bed activities are regulated in fora outside of the IWC with varying degrees of success. The threat of marine pollution and the resultant degradation of cetacean habitat poses an ever increasing threat to the survival of many endangered cetacean species.

3.4 Noise pollution

The use of low and mid frequency active sonar by naval vessels generates noise which can significantly disrupt whale behaviour over large distances. Loud blasts produced during naval sonar exercises have been shown to disorient whales and have led to strandings.³²⁰ The effects of this relatively new threat to cetaceans may have serious implications due to the large distances (of several hundred kilometres) which the sonar travels before dissipating. Environmental groups in the United States have

³¹⁹ Ibid.

³²⁰ M Kaufman, Washington Post, 5 February 2008. Available at <http://www.washingtonpost.com> [Accessed 7 February 2008].

recently successfully challenged the United States Navy's use of sonar in training exercises off the California coast.³²¹

3.5 Conclusion

The environmental threats to whales in the 21st century cannot be underestimated and may prove to be decisive to the survival of endangered species. In exercising precautionary management, the IWC will have to factor in the serious threats posed by marine traffic, marine pollution and climate change. The as yet unknown effects of climate change may prove to be disastrous to species with a limited habitat range, through disruption of prey distribution and abundance.³²²

³²¹ See report at <http://www.ens-newswire.com> [Accessed 7 February 2008] and Kaufman (note 320).

³²² CG Burns 'From the harpoon to the heat: Climate change and the International Whaling Commission in the 21st century' *13 Georgetown International Environmental Law Review*, 2001, 335-362 at 335.

CHAPTER X

THE INTERNATIONAL REGULATION OF WHALING AND CONSERVATION OF WHALES: THE WAY FORWARD

1. Introduction

The decision by the IWC in 1982 to set zero quotas for the commercial lethal exploitation of all whale stocks from the 1986 season (the so-called moratorium) has been renewed annually and remains in place.³²³ This ‘moratorium’ on commercial whaling has not meant the cessation of lethal whaling operations. The known annual lethal take of whales is in the region of 3 000 animals,³²⁴ of which the IWC controls approximately ten per cent taken under Aboriginal Subsistence Whaling (ASW) permits.³²⁵ The Japanese special permit take is approximately 1 700 whales and Norway and Iceland capture approximately 750 whales, either through commercial whaling, under reservations entered to the moratorium, or under special permit whaling.³²⁶ The three traditional pro-whaling states, Japan, Norway and Iceland are therefore currently whaling without restriction either under special permit which frees the country issuing the permit from any Schedule prohibitions, or under reservation to the moratorium, which, without an effective, functional Revised Management Procedure, is unregulated. The so-called ‘whaling States’ are conducting lethal whaling operations, which are not restricted by permit or quota requirements and at levels close to pre-moratorium exploitation levels.³²⁷ ASW, which is sanctioned by the IWC, results in the killing of some three hundred whales annually, often in inhumane ways, some of which are from endangered populations.³²⁸ The moratorium on commercial whaling is being maintained by the anti-whaling majority of States within the IWC, in spite of its circumvention by whaling states.

³²³ See current Schedule amendment setting zero quotas for the 2007 and 2007-2008 seasons. Available at <http://www.iwcoffice.org> [Accessed 5 February 2008].

³²⁴ M Iliff ‘Normalization of the IWC’ *Marine Policy*. Available online 4 September 2007. Article in Press. Available at <http://www.sciencedirect.com> [Accessed 5 February 2008].

³²⁵ Ibid.

³²⁶ Ibid.

³²⁷ Catches by Japan in 1985/86 were 1 941 and by Norway 379. See <http://www.iwcoffice.org> [Accessed 7 February 2008]

³²⁸ See http://www.iwcoffice.org/documents/table_aboriginal.htm. Aboriginal Subsistence Whaling has resulted in 7 164 whales being caught since 1985.

The IWC remains split into two distinct camps. A pro-whaling faction wanting to sustainably harvest whales as a marine living resource and who believe that there is scientific opinion available which would allow lethal whaling of certain abundant whale stocks. The anti-whaling group support the view that the sixty year old ICRW does not contain provisions common to modern environmental agreements and does not reflect the principles of modern environmental governance, such as the precautionary approach, ecosystem management and effective compliance and enforcement measures.

As Sidney Holt, who represented the Seychelles at the historic 1982 meeting of the IWC,³²⁹ points out:

The International Whaling Commission (IWC) is uniquely charged under the United Nations Convention on the Law of the Sea, together with Agenda 21 (the basic document from the United Nations Conference on Environmental and Development held in Rio 1992) (UNCED) with the conservation of the Highly Migratory Whales – in all the waters they inhabit – and the management of all whaling. Controversy circles around differences of opinion about the practices of watching, studying, and protecting whales in contrast with the enjoyment of the profits from killing and selling them....³³⁰
and

[F]or ocean fisheries to be sustainable, there must be effective compliance regimes in place in international agreements (such as the ICRW) which would preclude the abuse of special provisions for bona fide scientific research, use of objection provisions, or blatant disregard of a convention's provisions.³³¹

The current institutional deadlock among members of the IWC can be traced back to the fact that whales represent different values to different people. Whaling nations support consumptive use and exploitation of the resource while the non-whaling nations favour the non-consumptive use of the whale resource, such as whale watching, or the existence value of the whales, and the preservation of the species per se.³³² The fundamental problem underlying the deadlock at the IWC is

³²⁹ See page 11 supra.

³³⁰ S Holt 'Is the IWC finished as an instrument for the conservation of whales and the regulation of whaling?' *Marine Pollution Bulletin*, Vol 46 Issue 7 July (2003) 924-926 at 924.

³³¹ S Holt 'Whaling and International Law and Order' *Marine Pollution Bulletin*, Vol 38 Issue 7 July (1999) 531-534 at 533.

³³² M Mazzanti 'The role of economics in global management of whales re-forming or re-founding IWC' *Ecological Economics*, Vol 36 Issue 2 Feb 2001 205-221 at 207.

the tension between whaling nations seeking to exploit a marine resource, and those members of the IWC wanting to conserve whales for their intrinsic value and non-consumptive use.

The implementation by the majority of IWC members of the ICRW since the imposition of the moratorium has resulted in IWC practice aimed at conservation of whale stocks, recognition of non-consumptive use as part of the whaling industry, and application of modern environmental law principles such as the precautionary approach and ecosystem based management of biodiversity resources.

2. IWC practice: Challenges in the new millennium

2.1 The Revised Management Procedure (RMP)

At the 41st meeting of the IWC in 1989 the Commission determined that the objectives for a Revised Management Procedure (RMP) are:

1. Stability of catch limits which would be desirable for the orderly development of the whaling industry.
2. Acceptable risk that a stock should not be depleted below some chosen level so that the risk of extinction is not seriously increased by exploitation.
3. Making possible the highest possible continuing yield from the stock.³³³

The IWC resolved at its 43rd meeting in 1991 that the RMP should incorporate the following elements:

1. Commercial whaling should only be permitted for populations in areas and seasons for which catch limits are in force.
2. Catches reach the maximum permitted level at 72 per cent of the initial population abundance.
3. To permit stocks below 54 per cent of the unexploited level to recover, catch limits under the RMP should only be greater than zero when the stock is determined to be above 54 per cent of its unexploited level.³³⁴

³³³ 1989 Chairman's Report of the IWC's 41st Meeting.

³³⁴ IWC 1991 Appendix 4 Resolution on the Revised Management Procedure.

At the IWC's 44th meeting in 1992 the Commission accepted the Scientific Committees advice for the core single stock management procedure for baleen whales, incorporating the abovementioned elements, and it accepted that the main scientific component of the development of a Revised Management Scheme (RMS) for commercial baleen whaling had been completed.³³⁵ The Commission noted that the additional steps required to complete the RMS include agreement upon a fully effective inspection and observation scheme, and to ensure that the total catches over time are within the limits set under the RMS. Until there is agreement on all aspects of the RMS, the abovementioned Catch Limit Algorithm should not be implemented.³³⁶

The process to complete the RMS and implement the RMP has been pursued within the IWC for the last fifteen years and finally reached an impasse in 2006. The meeting of the RMS Working Group took place on 10 June 2006 prior to the 58th meeting of the IWC, and delegates from thirty two Contracting Governments participated.

At the Working Group meeting at Cambridge from 28 February 2006 to 2 March 2006 it had been agreed that an impasse had been reached and that further collective work should be postponed. At the June 2006 meeting the RMS Working Group was unable to recommend any further collective work to develop a RMS and confirmed that discussions remained deadlocked.³³⁷ At the Plenary discussions, Japan called for the 'normalization' of the IWC to refocus the organization back to its fundamental purpose, namely that of a convention managing whaling. It believed that 'normalisation' would need to take place before a RMS could be agreed. Japan stated that it had never denied the rights of coastal States to use whale resources non-consumptively and noted that whaling and whale watching activities do co-exist, including in Japan. It re-iterated its view that the IWC should be a management organization.³³⁸

³³⁵ IWC 1992 Appendix 3 Resolution on the Revised Management Scheme.

³³⁶ Ibid. This Resolution was reaffirmed at the 46th Meeting of the IWC in 1994. See IWC Resolution 1994-5.

³³⁷ 2000 Chairman's Report of the IWC's 58th Meeting at 32.

³³⁸ Ibid at 34.

New Zealand stated that the RMS should include provision for international observers on all vessels, tracking of products through the market, vessel monitoring, reporting of animal welfare information, a strong compliance mechanism and costs borne by those profiting from commercial whaling.³³⁹ The Commission accepted that an impasse had been reached at the Commission level, and there would be no activity on the RMS for the coming year. At the 59th meeting of the IWC the Commission reiterated that an impasse had been reached at the Commission level on RMS discussions, but noted that individual governments could work towards the development of an RMS.³⁴⁰

2.2 The 55th meeting of the IWC in 2003 (Berlin)

At the 55th meeting of the IWC, Mexico proposed a resolution known as the ‘Berlin Initiative’ which assessed the work of the IWC in pursuit of its conservation objectives. The resolution organized, on the basis of that assessment, the future Conservation Agenda of the IWC, and decided to establish a Conservation Committee in conformity with Article III(4) of the ICRW.³⁴¹ The Resolution calls on the Conservation Committee to prepare a conservation agenda for adoption by the IWC, and to co-ordinate this conservation agenda through collaboration with CMS, CCAMLR, International Maritime Organization (IMO), IUCN and UNEP. The Resolution calls upon the Scientific Committee to ensure that the issues of whale watching, environmental threats and behavioural research are incorporated into the Conservation Agenda.

The Resolution was controversial, and was passed by twenty five parties in favour, twenty parties against and with one party abstention.³⁴² A statement by seventeen of the IWC members after the 55th meeting expressed concern that ‘the adoption of the Berlin Initiative which establishes a Conservation Committee will essentially destroy the already polarized and dysfunctional IWC’ and consider the

³³⁹ Ibid at 33.

³⁴⁰ 2007 Chairman’s Summary Report of the IWC’s 59th Meeting at 4.

³⁴¹ IWC Resolution 2003-1. Available at

<http://www.iwcoffice.org/Resolutions2003/Resolution%202003.htm> [Accessed 5 February 2008].

³⁴² 2003 Chairman’s Report of the IWC’s 55th Meeting Annex C. Available at <http://www.iwcoffice.org> [Accessed 5 February 2008].

Resolution ‘an attempt to change the fundamental objectives and an attempt to subvert the purpose’ of the IWC.³⁴³

Two annexes to the Berlin Initiative IWC Resolution 2003-1 provide an overview of the work and practice of the IWC over the last three decades. Annex I lists over 100 conservation orientated Resolutions passed by the IWC since 1976, and Annex II provides an annotated compilation of the IWC conservation work from 1976 to 2001.³⁴⁴ The Berlin Initiative summarises eleven major areas in which the IWC has pursued conservation activities; scientific research, small cetaceans, incidental take of cetaceans, non-consumptive utilization of cetaceans, highly endangered species and populations, whales and their environment, ecosystem approaches and interaction with their marine living resources, sanctuaries, management of lethal scientific research, collaboration with other organizations, enforcement of conservation measures, and monitoring of compliance.³⁴⁵

The concluding remarks of Resolution 2003-1 Annex II summarise the aim of the IWC’s Conservation Committee:

An increasingly important role of the IWC is not only to take actions itself, but to ensure that cetacean conservation needs are taken into account in decisions by other bodies that impact cetaceans and their environment. With its strong scientific profile the IWC, together with its new proposed Conservation Committee, is well-placed to fulfil this role, provided that it is successful in developing its standing as a world scientific, technical and management authority for cetaceans....³⁴⁶

The establishment of a Conservation Committee by the IWC recognises that the protection of cetacean populations goes beyond regulation of the lethal whaling industry. The large scale commercial slaughter of whales in the 20th century brought about the current parlous state of many species of cetaceans. With the establishment of the Conservation Committee, the IWC recognises that cetacean populations are also vulnerable to various anthropogenic threats inter alia incidental capture, marine pollution and habitat loss. The effects of climate change and oceans acidification on

³⁴³ Statement issued by High North Alliance, ‘End in Sight’ for IWC. Available at <http://www.highnorth.no/news/nedit.asp?which=309> [Accessed 5 February 2008].

³⁴⁴ IWC Resolution 2003-1 Annex I Annex II. Available at <http://www.iwcoffice.org> [Accessed 5 February 2008].

³⁴⁵ Ibid.

³⁴⁶ Ibid.

cetaceans are presently unknown, but may be catastrophic. The IWC's recognition of the need to address environmental change issues, including the possible impacts of climate change on cetaceans, is laudable. However, its limited research resources means that cetaceans will face increasing threats from climate change.³⁴⁷

It seems clear that the adoption of Resolution 2003-1 by a slender majority and the statement by 17 IWC members after the 55th meeting, indicates that the Berlin Initiative may further polarise the divided IWC and entrench opposing positions within the Commission.³⁴⁸

2.3 The 58th meeting of the IWC in 2006 (St Kitts and Nevis)

Japan had since the 55th meeting of the IWC in Berlin in 2003 undertaken an active campaign to recruit new members to the IWC which would support its pro whaling stance. Its twin strategies of offering Overseas Development Assistance (ODA) to nations supportive of its stance,³⁴⁹ and its argument that cetaceans are responsible for the collapse of fish stocks, finally provided Japan with a simple majority to approve the resolution known as the 'St Kitts and Nevis Declaration'.

The Commission considered papers from Japan and the Netherlands on the normalization of the IWC. Japan noted that at the RMS Working Group intersessional meeting in Cambridge in February 2006, the Group had agreed that discussions on the RMS had reached an impasse. Japan regarded this as an admission that the IWC had failed as a resource management agency, which should function as a body regulating the 'proper conservation of whale stocks and thus make possible the orderly development of the whaling industry'.³⁵⁰ Japan highlighted the fundamental differences in the positions of IWC members. Whaling countries have tried to establish a management system that would allow the sustainable (lethal) use of abundant whale stocks while protecting endangered and depleted stocks.

³⁴⁷ Burns (note 322) at 335.

³⁴⁸ Burns (note 4) at 83.

³⁴⁹ See Third Millennium Foundation report 'Japan's "Vote Consolidation" Operation in the IWC'. Available at

http://www.ifaw.org/ifaw/images/custom/2_Publications/Whales/IWC/VB%20REPORT%202007b%20REVISED%20VERSION%20FINAL.pdf [Accessed 5 February 2008].

³⁵⁰ Preamble ICRW.

Conservation minded countries are opposed to the resumption of commercial whaling irrespective of the status of whale stocks.³⁵¹ Japan considers whales to be a marine living resource, available for harvesting subject to conservation and science based management.³⁵²

New Zealand pointed out that the majority of the members which supported the Japanese view had adhered to the ICRW after the Schedule amendment setting zero quotas. These members had adhered to a Convention which had suspended commercial whaling. New Zealand did not agree that a focus on conservation is contrary to the purpose of the ICRW, and noted that there is far greater value in the whale watching industry than the whaling industry. Brazil and Australia stated that they did not accept the IWC as a failed organization, and noted that the developments in the conservation and management of marine living resources over the past sixty years should be taken into account in the management of whales.³⁵³

The ‘St Kitts and Nevis Declaration’ was adopted by 33 votes in favour and 32 against with one abstention. St Kitts and Nevis noted that the sponsors of the Declaration believed that the ‘IWC has failed to meet its objectives under the terms of the Convention’. It believed that while endangered species should be protected, the IWC should regulate ‘the harvest of abundant species in a sustainable way’. After the vote was announced a number of Governments formally disassociated themselves from the Declaration; Brazil challenged the validity of the vote, as did New Zealand, who noted that it did not accept that Iceland is properly a member of the Commission and that the Resolution did not attract the support of a simple majority of the Commission.³⁵⁴

The Declaration commits the parties to:

normalizing the functions of the IWC based on the terms of the ICRW and other relevant international law ... and the fundamental principles of sustainable use of resources and the need for science-based policy and rulemaking that are accepted as the world standard for the management of marine resources.

³⁵¹ 2006 Chairman’s Report of the IWC’s 58th Meeting at 61.

³⁵² Ibid at 62.

³⁵³ Ibid at 63.

³⁵⁴ Ibid at 65.

and further:

Accepting that scientific research has shown that whales consume huge quantities of fish making the issue a matter of food security for coastal nations and requiring that the issue of management of whale stocks must be considered in a broader context of ecosystem management since ecosystem management has now become an international standard.³⁵⁵

The resolution co-sponsored by inter alia the Governments of Japan, Norway and Iceland, was an incorrect representation of the term 'ecosystem management'³⁵⁶ and seems to be more politically motivated than based on scientific opinion. The IWC sponsored Scientific Workshop on the Impact of Cetaceans on Fisheries, held in June 2002, concluded that 'there is currently no system for which we have suitable data or modelling approaches to be able to provide reliable quantitative management advice on the impact of cetaceans on fisheries or of fisheries on cetaceans'.³⁵⁷

2.4 Conferences after the 58th meeting of the IWC

2.4.1 First Latin American Meeting on Cetacean Conservation

In December 2006 the First Latin American Meeting on Cetacean Conservation was held in Buenos Aires. This meeting was a continuation of the consolidation of the Latin American position on non-lethal use of cetaceans which began with the Buenos Aires Declaration in November 2005.³⁵⁸ The Declaration signed by thirteen Latin American and Southern Hemisphere countries plus Spain,³⁵⁹ supported the continuation of the moratorium on commercial whaling, and reaffirmed these countries' support for non-lethal use and conservation of whales.

The December 2006 meeting emphasised the need to strengthen the activities of the IWC regarding the non-lethal use and conservation of whales. The IWC

³⁵⁵ IWC Resolution 2006-1 St Kitts and Nevis Declaration. Available at <http://www.iwcoffice.org/meetings/resolutions/resolution2006.htm> [Accessed 5 February 2008].

³⁵⁶ Currie (note 115). See the discussion at page 23 supra.

³⁵⁷ Holt (note 114) at 4.

³⁵⁸ Buenos Aires Declaration available at <http://www.iwcoffice.org/documents/commission/IWC59docs/59cc13.pdf> [Accessed 5 February 2008].

³⁵⁹ Argentina, Brazil, Chile, Mexico, Australia, New Zealand, Spain, Costa Rica, Colombia, Ecuador, Panama, Peru, South Africa and Uruguay.

member States in the Latin American region agreed that their permanent commitment was to the non-lethal use of cetaceans; the development of whale watching tourism; non-lethal scientific research; the promotion within the IWC of the creation of Sanctuaries in the Southern Atlantic and Southern Pacific Oceans; and their commitment to the maintenance of the moratorium on commercial whaling.³⁶⁰

All of the governments present agreed that whale watching should be supported in Latin America as it promoted economic growth and social and cultural development in local communities. It furthermore contributed to the conservation of cetaceans and offers educational and scientific benefits. The meeting initiated discussions toward the signing of a Regional Latin American Agreement on Cetacean Conservation.³⁶¹

2.4.2 Conference for the Normalization of the International Whaling Commission

A Conference for the Normalization of the IWC was held in Japan in February 2007, with the aim to ‘restore the IWC as an effective resource management organization in accordance with its mandate prescribed by the 1946 ICRW’.³⁶² The view stated by Dan Goodman of the Institute of Cetacean Research (ICR) was that normalization of the IWC meant bringing the IWC

back to its fundamental purpose as mandated by the ICRW so that current and future whaling would operate within a science-based, regulated, controlled and transparent management regime ... such that whales are treated as any other marine living resource[s] available for harvesting subject to the needs of conservation and science-based management.³⁶³

and that:

“normalization of the IWC” meant recognizing that the IWC has lost its relevance as an organization responsible for the conservation and

³⁶⁰ Latin American Meeting on Cetacean Conservation (Buenos Aires 2006). Available at <http://www.iwcoffice.org/documents/commission/IWC59docs/59-28.pdf> [Accessed 5 February 2008]. Commissioners to the IWC from Argentina, Brazil, Mexico, Peru, Chile and Panama. Representatives of the governments of Ecuador, Guatemala, the Dominican Republic, Colombia, Uruguay and Venezuela participated.

³⁶¹ Ibid.

³⁶² 2007 Chairman’s Summary Report of the IWC’s 59th Meeting, Agenda item 7, IWC/59/7, Conference for Normalization of the IWC. Available at <http://www.iwcoffice.org/documents/commission/IWC59docs/59-7.pdf> [Accessed 7 February 2008].

³⁶³ D Goodman ‘Analysis of the IWC’s dysfunctional character and the meaning of normalization’. Presentation to the Conference for the Normalization of the IWC. Available at <http://www.iwcoffice.org/IWC59/59-7.doc> [Accessed 5 February 2008].

management of whales despite the fact that *whaling still continues and is expected to continue in the future* and that a lack of a comprehensive management regime to regulate whaling is an undesirable situation for those States that support sustainable commercial whaling and those that do not (emphasis added).³⁶⁴

The view of the conference was that responsible management of whaling means the sustainable utilization of abundant species, without commercial whaling allowed from depleted and endangered stocks.³⁶⁵ This does not seem to rule out whaling under special permit for such species.

2.4.3 Symposium on the State of the Conservation of Whales in the 21st Century

The Pew Charitable Trusts, with the support of UNEP, sponsored a meeting entitled ‘Symposium on the State of the Conservation of Whales in the 21st Century’, which was held at the United Nations in New York in April 2007. Its aim was to analyse options for the conservation of whales, and policies to resolve the impasse over commercial and special permit whaling at the IWC.³⁶⁶ The Symposium found that the IWC had been deadlocked for a long time and that substantial resources were being invested in maintaining the status quo.³⁶⁷ Furthermore, the Scientific Committee is considered deadlocked because of special permit ‘scientific whaling’. It was suggested that to make the IWC functional, a management regime regulating commercial whaling should be put in place by the IWC through a Schedule amendment. A management regime which prohibited special permit whaling, prohibited whaling in sanctuaries, maintains the prohibition on international trade of whale meat, and lifted the moratorium on commercial whaling,³⁶⁸ would result in fewer whales being killed than under the present regime of whaling under special permit or reservation to the moratorium.³⁶⁹

³⁶⁴ Ibid at 8.

³⁶⁵ Ibid at 9.

³⁶⁶ Chairman’s Summary ‘Symposium on the State of the Conservation of Whales in the 21st Century’. Available at <http://www.iwcoffice.org/IWC/59/59-11> [Accessed 5 February 2008].

³⁶⁷ Ibid at 4.

³⁶⁸ Ibid at 5.

³⁶⁹ The IWC statistics show that approximately 20 000 whales have been killed since the imposition of the moratorium. See <http://www.iwcoffice.org> [Accessed 5 February 2008].

At the symposium Juanita Castano, Director of UNEP noted the important role played by United Nations administered conventions such as UNCLOS, CBD, CITES, CMS in the conservation of whales.³⁷⁰ The symposium highlighted deficiencies in the ICRW including outdated objectives, unclear scope, lack of amendment provisions and an effective compliance and dispute resolution mechanism. The objective of future action should be co-operation to conserve, protect and restore the integrity of the whale populations as part of the marine ecosystem. The IWC should embrace an ecosystem approach aimed at all aspects of sustainability, a precautionary approach and a regime that takes into account all environmental factors. The symposium heard that Japan's primary objective is not to overturn the moratorium but to continue scientific whaling. A proposal was put forward to the symposium to allow coastal whaling in EEZ's, create a global whale sanctuary elsewhere, revise and agree the RMS, and abolish special permit whaling.³⁷¹

2.5 The 59th meeting of the IWC in 2007 (Anchorage)

At the 59th meeting of the IWC in Anchorage in May 2007 the agenda item 'The IWC in the Future' was presented.³⁷² Presentations were made by the Commissioner for Palau as the Chairman of the Normalization Conference, by the Commissioner from New Zealand as the Chairman of the Symposium on the State of Conservation of Whales in the 21st Century, and by the Commissioner for Brazil on behalf of Latin American Meeting on Cetacean Conservation. The Chairman of the IWC noted that there was positive overlap in the views of the three meetings and the suggestion that an intersessional meeting be held to pursue discussions of commonality, was adopted.³⁷³

³⁷⁰ Statement by Juanita Castano, Chief UNEP New York office 12 April 2007 available at <http://www.pewwhales.org/documents/speeches/juanitacastano.pdf> [Accessed 5 February 2008].

³⁷¹ Summary of the Symposium on the State of Conservation of Whales in the 21st Century at 9. Available at <http://www.iisd.ca/ymb/whales> [Accessed 5 February 2008].

³⁷² 2007 Chairman's Summary Report of the IWC's 59th Meeting. Available at http://www.iwcoffice.org/documents/meetings/ChairsummaryReport_IWC59rev.pdf [Accessed 5 February 2008].

³⁷³ Ibid.

A working group consisting of the IWC Chairman and the Commissioners of New Zealand, Palau and Chile will present an agenda item for discussion on ‘The IWC in the Future’ to the 60th meeting of the IWC in Chile in June 2008. A special intersessional meeting of the IWC will be held in the United Kingdom in March 2008.³⁷⁴

2.6 Conferences after the 59th meeting of the IWC

2.6.1 First Santiago Declaration by the Latin American Non-Governmental Organization for Whale Conservation

In October 2007 in Santiago de Chile the First Santiago Declaration by the Latin American Non-Governmental Organization for Whale Conservation was published.³⁷⁵ This Coalition of NGOs, engaged in cetacean conservation in ten Latin American countries, declared their support for the bloc of Latin American countries known as the Buenos Aires Group. The Declaration called for countries in the Latin American region to continue to promote development of the whale watching tourism industry, the creation of a South Atlantic Whale Sanctuary, and called upon Caribbean island countries to reconsider their support of lethal whaling in the light of the benefits of the non-lethal whale watching industry.

2.6.2 Latin American Meeting for the Conservation of Cetaceans

On 4th and 5th December 2007 representatives from 15 Latin American countries³⁷⁶ known as the ‘Buenos Aires Group’ met in Buenos Aires and agreed the ‘The Latin American Cooperative Strategy for the Conservation of Cetaceans’ (the Latin American Strategy), which defines guidelines for regional cooperation and promotes coordination of the positions of the countries in the region at the IWC, and other international fora. This strategy supports the non-lethal use of cetaceans, the

³⁷⁴ Draft Agenda, Intersessional meeting on the Future of the IWC. Available at <http://www.iwcoffice.org> [Accessed 7 February 2008].

³⁷⁵ First Santiago Declaration available at http://en.mardecetaccos.net/media_files/download/DeclaraciondeSantiagoONGs2007_LACBI_english.pdf [Accessed 5 February 2008].

³⁷⁶ Representatives from Argentina, Brazil, Chile, Costa Rica, Ecuador, Mexico, Panama, Peru, Uruguay and Nicaragua (all members of the IWC), Columbia, Dominican Republic, Venezuela (these countries intend adhering to the ICRW), Honduras, El Salvador. Guatemala attended the 2006 Buenos Aires meeting, but did not attend this meeting.

strengthening of the IWC's conservation agenda and the creation of whale sanctuaries in the Southern Atlantic and Southern Pacific oceans. The Buenos Aires Group undertakes to actively promote the Latin American Strategy at the Intersessional meeting of the IWC in the United Kingdom in March 2008. The Strategy underlines the countries' regional commitment to the maintenance of the moratorium on commercial whaling and rejects lethal scientific research as a legitimate cetacean research practice.³⁷⁷

It is clear that the Buenos Aires Group now holds the key to the maintenance of the pro-conservation vote at the IWC and together with South Africa, New Zealand and Australia form a 'Southern Hemisphere Whale Conservation Bloc' with a stance that:

Whales can no longer be treated as "fisheries resources"; rather, in light of current international law and recognition in countries across the globe of the many socioeconomic and intrinsic values of cetaceans, they must be treated as biodiversity resources, subject *inter alia* to the treatment granted by the Addis Ababa Principles applying to the Convention on Biological Diversity.³⁷⁸

The Latin American initiative leading to the formation of the Buenos Aires Group can be seen as a most significant geopolitical development in the context of the IWC. Their support for the maintenance of the moratorium on commercial whaling, condemnation of lethal scientific whaling, and non-consumptive use of cetaceans as being in their national self interest and contributing to economic and social development in local communities, is significant in the current 'modernization of the IWC' debate.

2.6.3 The Pew Tokyo Whale Symposium (Tokyo, January 2008)

The Second Pew Whale Symposium "A change in climate for whales – Is there a common way forward?" was held in Tokyo on the 30th and 31st January 2008. The aim of the symposium was to seek a common way forward to resolve the impasse between those countries wishing to continue with the imposition of the moratorium

³⁷⁷ The Latin American Cooperative Strategy for the Conservation of Cetaceans. Available at http://www.pewwhales.org/documents/Declaration_dic2007_ingles.pdf [Accessed 5 February 2008].

³⁷⁸ José Palazzo, 2007 forward to 'Whose Whales? Developing Countries and the Right to Use Whales by Non-Lethal Means' 2(1) *Journal of International Wildlife Law and Policy*, 1999, 69-78.

on commercial whaling, and countries in favour of a resumption of commercial whaling.³⁷⁹

Eighty six participants from 28 different countries attended the Second Whale Symposium representing a mix of scientists, international organization representatives, NGOs, pro-whaling government representatives, conservation minded IWC delegates, the IWC special meeting steering group, and IWC delegates favouring a middle path. One third of the participants were from Japan. The Japanese viewpoint was presented by a diverse group of Japanese participants from inter alia the Japanese Fisheries Agency, Greenpeace Japan, independent scientific opinion, academia, and the Japan Climate Policy Centre. Kiyoshi Kurokawa, Special Science Advisor to Japan's Prime Minister, attended the Symposium.³⁸⁰

The Japanese government's position on whaling was presented by Joji Morishita of the International Affairs Division of the Japanese Fisheries Agency. Their policy supports sustainable utilization of abundant species of whales and protection of depleted or endangered species; that sustainable use implies that whaling operations take place under quotas calculated scientifically and supported by compliance and monitoring measures. Morishita outlined three possible options for the future: sustainable and regulated whaling within the IWC; the formation of a new organization that will manage whaling in a sustainable manner; or maintaining the status quo.³⁸¹ Toshio Kasuya, an independent Japanese cetacean scientist, highlighted the lack of scientific value of the Japanese special permit whaling operations. He called for the cessation of this form of whaling, as it in his view, misuses the ICRW, and exposes scientists, the government and the whaling industry to corruption. Jun Hoshikawa, Executive Director of Greenpeace Japan, argued that the Japanese public did not support whaling and that the alleged "vote-buying"³⁸² by Japan represents an unethical and wasteful use of taxpayers' money.³⁸³

³⁷⁹ 'A change in climate for Whales. Is there a common way forward?' The Second Pew Whale Symposium Report available at <http://www.iisd.ca/download/pdf/sdlymbvor137num4e.pdf> [Accessed 5 February 2008].

³⁸⁰ Ibid.

³⁸¹ Ibid at page 4.

³⁸² Ibid. 'Japan's "Vote Consolidation" Operation in the IWC' (note 349).

³⁸³ Ibid.

The Chairman's Summary of the Symposium highlighted the diversity of views among the Japanese participants.³⁸⁴ It stated that for the first time the whaling debate and specifically Japanese special permit whaling has been placed in the Japanese media spotlight, and positions other than the entrenched Japanese Fisheries Agency views are being discussed in Japan.³⁸⁵ The Chairman noted clear areas of agreement: that the ICRW and the IWC have produced significant benefits for whale conservation; endangered species deserve absolute protection; sustainability is an important concept but there are various criteria for defining it; and that ultimately the solution to the whaling debate is political, not scientific. A possible political compromise would entail the IWC recognizing potentially legitimate claims to limited coastal whaling by local communities; the suspension of special permit 'scientific' whaling; a total ban on whaling in sanctuaries; the establishment by the IWC of a finite number of whales that may be killed annually by all of the world's nations.³⁸⁶

2.6.4 The Intersessional meeting on the future of the IWC (6-8 March 2008)

The upcoming Intersessional Meeting of the IWC will focus on matters of process rather than substance, and seek ways to improve the working of the Commission and to improve the manner in which negotiations within the IWC are conducted.³⁸⁷ For the first time the IWC has employed an outside expert, Professor Juma of Harvard University, to facilitate this process.³⁸⁸ Representations, focusing on mechanisms used to resolve deadlocks in other international fora will be given by various experts in this field.³⁸⁹ The meeting will focus on how to take the recommendations of the intersessional meeting further at the 60th meeting of the IWC in Chile in June 2008.

³⁸⁴ Ibid at 9.

³⁸⁵ See Editorial in Asahi Shimbun, 24 January 2008, by Hiroya Sugita: 'Both sides need to compromise in whaling' available at <http://www.asahi.com/english/Herald-asabi/TKY2008240069.html> [Accessed 7 February 2008]. Also see the Special Report in the business magazine Shukan Toyo Keizai available at http://www.weblog.greenpeace.org/makingwaves/archives/2008/01/japanese_people_encouraged_2.jt ml #more [Accessed 7 February 2008].

³⁸⁶ The Second Pew Whale Symposium Report at 9.

³⁸⁷ Draft Agenda, Intersessional Meeting on the future of the IWC, available at <http://www.iwcoffice.org/documents/commission/future/IWC-m08-1.pdf> [Accessed 7 February 2008].

³⁸⁸ Ibid.

³⁸⁹ Ibid.

3. Sustainable whaling

3.1 Introduction

It is apparent from the deadlock reached at the IWC that whaling and non-whaling countries need to engage in negotiations in areas where they can find common ground. The moratorium decision in 1982 called for an indefinite ‘pause’ in commercial whaling to allow whale stocks to recover. In 1982 the IWC decided that a ‘comprehensive assessment’ of the effects of the ‘pause’ should have been made by 1990. The Scientific Committee has found that it cannot make such a comprehensive assessment because of technical population modelling difficulties.³⁹⁰

In such negotiations a few non-whaling countries would need to drop their pretence that a permanent end to commercial whaling can be brought about by vote in the IWC. That pretence is dissonant with the original 1982 “moratorium” decision, which simply mandated an indefinite pause in commercial whaling while a better management system was assembled, and allowed depleted whale populations some time to recover ... rigorous precautionary management rules are needed ... backed by a stern regime with compliance with the rules ... something that whaling countries have virtually never done....³⁹¹

Justin Cooke, one of the architects of the RMP, comments on historical ‘scientific meetings’ at the IWC:

Failure to take management action was mainly based on the rational self-interest of the participants ... opponents of catch limit reductions disputed the scientific evidence for the need for reductions. Disputes, which were really about objectives and intentions, were waged as if there were disputes about the facts....³⁹²

The authors’ comments on the historic failure of the IWC to prevent a collapse of whale stocks are as relevant today in the disputes which take place in the IWC plenary meetings over sustainable whaling.

The IWC approved the development of a Revised Management Procedure (RMP) to overcome the deficiencies of the New Management Procedure (NMP)

³⁹⁰ Holt (note 330) at 925.

³⁹¹ Ibid.

³⁹² Papastavrou and Cooke ‘Sustainable Use of Oceanic Wildlife: What lessons can be learnt from commercial whaling’ 2006, 113-128 in: DM Lavigne (ed). In pursuit of Ecological Sustainability. IFAW and University of Limerick 425 at 116.

which had been demonstrated to be scientifically inadequate.³⁹³ When the moratorium came up for its scheduled review in 1990, the IWC accepted that, even though all whale stocks were not necessarily over-exploited, a blanket moratorium could be considered as a rational management procedure where the existing (NMP) management procedure was itself ineffective.³⁹⁴

3.2 Concepts of sustainability

The IWC has specified three objectives for the RMP:

1. Stability of catch limits.
2. Acceptably low risk that the stock is not depleted below a specified level.
3. Making possible the highest continuing yield from the stock.³⁹⁵

The RMP should work directly with data that can be obtained in practice instead of requiring estimates of unobservable numbers of whales.³⁹⁶ The IWC accepted the RMP as the basis for the management of any future commercial whaling³⁹⁷ and that it should be a part of a comprehensive management framework the Revised Management Scheme (RMS), which would include an inspection, monitoring and enforcement regime.³⁹⁸ ‘The conventional sustainable use paradigm is that wild living resources, including whales, can be harvested sustainably provided that the exploitation is appropriately managed.’³⁹⁹

The objectives of the RMP do not include biological sustainability per se, but the objectives are closely related to concepts of sustainability, such as low risk of depletion, stable catches and the highest continuing yield.⁴⁰⁰

A more subtle but significant result to emerge from the process of developing the RMP is that it is not actually possible to “manage” populations of whales,

³⁹³ JG Cooke ‘The IWC’s Revised Management Procedure as an example of a new approach to fishery management’ 1995, 647. Whales, seals, fish and Man. AS Blix et al (ed) Elsevier, Amsterdam.

³⁹⁴ Ibid.

³⁹⁵ See page 63 supra.

³⁹⁶ Papastavarou and Cooke (note 392) at 118.

³⁹⁷ See IWC Resolution 1991 Appendix 4.

³⁹⁸ Ibid.

³⁹⁹ Papastavarou and Cooke (note 392) at 121.

⁴⁰⁰ Ibid.

in the sense of holding them at same desired level. Attempts to do so run a high risk of depleting the population far more severely than intended.⁴⁰¹

Cooke's research shows that a safely exploited population tracks an unexploited population closely and he comes to the conclusion that whaling can be managed to limit its impact on whale populations, but that the populations themselves cannot be managed. 'An attempt to extract the maximum sustainable yield from a stock, as opposed to merely a sustainable yield, runs a risk of excessive depletion of the stock such that the catch will not be sustained.'⁴⁰² The biological sustainability of whaling has also to be viewed in the context of whether it can be economically sustainable.

Profit has in the past and without exception come from biologically unsustainable operations, that is still true and is why Japan subsidises its commercial "scientific whaling" and has extended that to more species, and why Norway has discarded its claim to be following the IWC rules for setting precautionary catch limits.⁴⁰³

Cooke concludes:

Although very low levels of exploitation can be sustained, there is no clear cut maximum level. The higher the catches the greater the risk that they will not be biologically sustainable ... the approach of scientifically managed sustainability is only viable if there is a sufficiently strong consistency with an interest in pursuing this approach and making it work. *The political experience from both the history of whaling and from attempts to conclude and implant a comprehensive regulatory regime for the management of whaling reveals that this is not the case* (emphasis added).⁴⁰⁴

⁴⁰¹ Ibid.

⁴⁰² Ibid.

⁴⁰³ Holt (note 330) at 925.

⁴⁰⁴ Papastavrou and Cooke (note 392) at 126.

CHAPTER XI

THE FUTURE OF THE IWC

1. Introduction

The stark contrast between the opposing views within the IWC are illustrated by statements made by the world renowned conservationist, Sir David Attenborough, and by Minoru Morimoto, Japan's commissioner to the IWC and director general of its ICR. Sir David's view that:

Whales are highly evolved animals with all the sensitivities that that statement implies. They have a complex social life. They call to one another across the vast expanses of the oceans. They are the largest animals that have ever existed, far larger than any dinosaur. There is nothing in the body of a whale, which is of use to us, for which we cannot find equivalents elsewhere. There is no humane way to kill a whale at sea. It is time to stop the unnecessary destruction of whales and start to cherish them, so that they do not remain only as skeletons in museums. Collective action by nations across the globe is needed to protect whales for future generations....⁴⁰⁵

contrasts sharply with Commissioner Morimoto's statement:

Many whale stocks in the world are abundant and commercial whaling can be managed sustainably. To suggest there must be one [whale watching industry] to the exclusion of the other [whaling industry] is also a fallacy. There are enough whales for both those that want to watch them and those who want to eat them.⁴⁰⁶

The battle lines at the IWC are drawn between the pro-whaling nations who support sustainable whaling based upon a narrow interpretation of sustainability, employing partisan scientific opinion to support their own national strategy; and the so-called neutral countries who support sustainable whaling using objective precautionary scientific opinion employing the ecosystem approach and a risk averse approach taking into account environmental and other threats to cetaceans other than

⁴⁰⁵ Sir David Attenborough, Forward to "Troubled Waters. A review of the welfare implications of modern whaling activities". Available at <http://www.wdcs.org/dan/publishig.usf> [Accessed 5 February 2008].

⁴⁰⁶ 'What gives you the right to lecture us about whaling'. A statement by Minoru Morimoto, Japan's Commissioner to the IWC and Director General of ICR Tokyo. Sydney Morning Herald 15 January 2008. Available at <http://www.smh.com.au/news/whale-watch/enough-whales-for-watching-and-eating/2008/01/15/1200159446338.thml> [Accessed 5 February 2008].

direct catch; these members have politically aligned themselves with the preservationist members who feel that lethal whaling is ethically incorrect, inherently cruel and should not be an activity engaged in by nations in the 21st century. The preservationist countries support the view that non-lethal use through whale watching is the best sustainable use of cetaceans, and that this 1.5 billion dollar a year industry in which more than a hundred countries participate, with over ten million participants,⁴⁰⁷ is the only way in which cetaceans should be used.

This rancorous debate within the IWC has led to a polarisation of views and entrenched positions. The deadlock ultimately hampers the body achieving its object and purpose, the conservation of whales, which is beneficial to both the sustainable whaling industry and the whale watching industry.

2. An analysis of the debate

A reason for the current impasse at the IWC is that the whaling nations Norway, Iceland and Japan have no reason to compromise their intractable stance as they are currently whaling; Norway under its reservation to the moratorium, Iceland under special permit and its disputed reservation to the moratorium, and Japan under its controversial and ever increasing (in scale and scope, the latest JARPAII and JARPNII programmes are indefinite), special permit whaling.

Japan's decision to include endangered humpback whales in its JARPAII programme in the austral summer of 2007-2008 sparked international outrage. This debate was a major campaign issue in the Australian elections in November 2007 and the opposition Labour Party pledged to take action against Japanese special permit whaling. On 19 December 2007 the new Australian Labour Party Foreign Minister, Steve Smith, announced that Australia will conduct marine and aerial surveillance of Japanese whaling ships off Antarctica, to collect photographic and video evidence of

⁴⁰⁷ E Hoyt 'Report on the Workshop on non-lethal use of whales'. Available at <http://www.pewwhales.org/documents/reportwoskhpnlethaluseEn.pdf> [Accessed 5 February 2008].

Japanese special permit activities.⁴⁰⁸ The Australian Prime Minister stated that he took Australia's international obligations to protect whales, seriously.

We have said in the past that we would look at measures which would fortify any future case to be brought before international tribunals on the implementation of Japan's whaling policy, in particular Japan's assertion that these are for research purposes, not commercial purposes. At the cabinet's first meeting it decided to support a Federal Case against Kyodo Senpaku Kaisha, a Japanese whaling company.⁴⁰⁹

The Humane Society International Incorporated (HSI) commenced proceedings against Kyodo Senpaku Kaisha Limited (Kyodo) for illegally whaling within the Australian Whale Sanctuary adjacent to Antarctica.⁴¹⁰ In 1936 Australia proclaimed the Australian Antarctic Territory (AAT) covering approximately 42 per cent of the Antarctic Mainland.⁴¹¹ Japan does not recognize Australian sovereignty over the AAT. The four countries which do recognize Australia's claim to sovereignty over the AAT are New Zealand, France, Norway and the United Kingdom.⁴¹² In 2000, Australia declared an Australian Whale Sanctuary (AWS) within 200 nautical miles of the coastline of the Australian mainland and Australia's external territories, including the AAT.⁴¹³ From reports by the Government of Japan to the IWC on its special permit whaling operations it was evident that in excess of 1200 minke and nine fin whales have been killed in the AWS since 2000.⁴¹⁴ HSI commenced proceedings in the Federal Court of Australia in 2004 for a declaration that whaling in the AWS was illegal, and sought an injunction to restrain such activity in terms of the Environment Protection and Biodiversity Act 1999 (EPBC Act), under which the AWS was declared.

On Appeal the HSI was granted leave to serve proceedings on Kyodo in Japan. The Appeal Court decided that the Australian Federal Court may grant an

⁴⁰⁸ 'Australia plans to track Japanese whale harvest' International Herald Tribune 19 December 2007. Available at <http://www.iht.com/articles/2007/12/19/asia/whale.php> [Accessed 7 February 2008].

⁴⁰⁹ Statement by Prime Minister Rudd, The Sydney Morning Herald, 19 December 2007. Available at <http://www.smh.com> [Accessed 5 February 2008].

⁴¹⁰ Pleadings, maps and affidavits. Available at <http://www.hsi.org.au/> and <http://www.envlaw.com/au/whale.html> [Accessed 5 February 2008].

⁴¹¹ Ibid.

⁴¹² Ibid.

⁴¹³ Map of the AWS. Available at http://www.ga.gov.au/image_cache/GA3746.pdf [Accessed 5 February 2008].

⁴¹⁴ See (note 410).

injunction under Section 475 of the EPBC Act even if it may prove impossible to enforce, where it serves the public interest objects of the EPBC Act. Kyodo was served proceedings in February 2007, and did not enter appearance to defend the proceedings. The hearing commenced on 18 September 2007 and judgement was reserved. Attorney General Robert McCullard instructed the court to disregard the views of the previous government which had opposed the case on the grounds of possible negative diplomatic ramifications.

On 15 January 2008 the Australian Federal Court delivered its judgment on the legality under Australian domestic law of Japanese whaling activities in the AWS. Justice Allsop held that the respondent (Kyodo) had injured, taken and interfered with minke, fin and humpback whales in the Australian Whale Sanctuary (AWS) in contravention of the EPBC Act, and ordered that Kyodo be restrained from such activities in the AWS.⁴¹⁵ The judge ruled that ‘the practical difficulty (if not impossibility) of enforcement is no reason to withhold relief’.⁴¹⁶

A spokesman for the Japanese Fisheries Agency rejected the court’s ruling stating that as Japan does not recognise Australian sovereignty in Antarctica, the decision will have no effect on Japan’s ‘scientific whaling’.⁴¹⁷ This judgment will however prevent Norwegian whaling in the AAT either under special permit, or under its reservation to the moratorium, as Norway recognizes Australian sovereignty over the AAT and its adjacent EEZ.

The Australian Federal Government has briefed Professor James Crawford of Cambridge University to consider the prospects of success of challenging Japanese special permit whaling before the International Tribunal for the Law of the Sea (ITLOS), and initiating proceedings before the International Court of Justice (ICJ).⁴¹⁸

⁴¹⁵ Humane Society International Inc v Kyodo Senpaku Kaisha Ltd (2008) FCA 3 (15 January 2008). Available at <http://www.austlii.edu.au> [Accessed 5 February 2008].

⁴¹⁶ Ibid at para 53.

⁴¹⁷ ‘Japan rejects whaling ruling’ ABC News 16 January 2008. Available at <http://www.abc.net.au/news/stories/2008/01/16/2139269.htm?section=justin> [Accessed 5 February 2008].

⁴¹⁸ C Skehan ‘Whaling expert to consider court case’ Sydney Morning Herald 5 January 2008. Available at <http://www.smh.com.au/news/whale-watch/whaling-expert-toconsider-court=case/2008/01/04/1198950075821.html> [Accessed 5 February 2008].

The Icelandic fisheries minister stated in August 2007⁴¹⁹ that he saw no reason to continue commercial whaling in Iceland if there is no demand for the product. The country has a successful whale watching industry which generates more than US\$20 million in revenue a year. The Icelandic government has issued permits for the commercial hunting of nine endangered fin whales and 30 minke whales. Whalers have killed seven fin whales and seven minke whales from this quota, with much of the meat remaining unsold in frozen storage. (The gross revenue of sales of whale meat from these whales would be in the region of US\$1.5 million, less than ten per cent of the revenue generated by its whale watching industry.)

Joji Morishita (Director for international negotiations for the Japanese government's Fisheries Agency) said on the departure of the Japanese whaling fleet in November 2007: 'if the ban on commercial whaling was lifted, the total take and consumption of whale meat would be in the neighbourhood of what we are eating these days' ie what is being sold from the special permit whaling kill.⁴²⁰ Hedeki Moronuki, Japan Fisheries Agency spokesperson stated:

Whales are just as important, and no more special, than any other fish ... minke or humpback we see whales as a marine resource ... our whaling culture is near extinction because of the moratorium on commercial whaling. We need to make sure this doesn't happen to other marine resources.⁴²¹

The head of Japan's Fisheries Agency noted 'the scientific research we carry out will pave the way to overturning the moratorium, on commercial whaling, which will better help us to utilize whale resources'.⁴²²

It is clear from the verbatim comments of these senior government officials that Japan's position on lethal whaling is that:

- Whales are a marine living resource no different to fish.

⁴¹⁹ Report available at <http://www.ifaw.org/general/default> [Accessed 5 February 2008].

⁴²⁰ Los Angeles Times, 24 November 2007. Available at <http://www.latimes.com/news/printedition/asection11a-fg-whaling> [Accessed 5 February 2008].

⁴²¹ Time Magazine. Available at <http://www.time.com/time/world/article> [Accessed 5 February 2008].

⁴²² USA Today, 17 November 2007. Available at http://www.usatoday.com/news/world.20071117_Japanwhaling_hm [Accessed 5 February 2008].

- The current limited demand for whale meat by the Japanese population is being satisfied by the tonnage of whale meat produced and sold by the special permit whaling programmes.
- There is a direct correlation between the supply chain of special permit whaling and the consumer demand for whale meat in Japan.
- Japan has a direct interest in ‘overturning the moratorium on commercial whaling’.
- The ‘moratorium’ is seen by Japan as an unfair restriction on Japanese access to High Seas marine living resources.
- Should the international community succeed in restricting access to a marine living resource, whales, through precautionary management of stocks, then this could happen in the international management fora for other marine living resources.

It also seems clear that Japan does not wish to renounce the ICRW and leave the IWC, as this would leave it without a voice at the internationally recognized principal body for the management of whales. Should it leave the IWC, it would not mean that greater numbers of whales would be killed; it is currently taking the number of whales it needs, under special permit, to satisfy its domestic market. At present it whales at the maximum demand for whale meat, and with its political allies attempts to thwart the conservation agenda of the IWC. It is also able to prevent the establishment of the SPWS and the SAWS by controlling at least twenty five per cent of the votes at the IWC.

Should Japan cease special permit whaling, either through political pressure or international legal action, then it may be forced to make concessions for the adoption of a precautionary and strictly regulatory RMS which would ensure effective enforcement of the precautionary RMP. Until it stops conducting ‘scientific research’ whaling under special permit it has no incentive to do so. Scientists agree that biologically sustainable whaling can be carried out but only under a strict, effective compliance mechanism, as history has shown that economically sustainable whaling has come from biologically unsustainable whaling.⁴²³

⁴²³ Holt (note 330) at 925.

The strongest argument of the anti-whaling lobby is that in the 60 years since the ICRW was negotiated, the concept of ‘whaling industry’ has undergone a radical transformation. Lethal whaling has become internationally abhorrent, whereas the non-lethal whale watching industry has grown from a fledgling industry in the 1970s to a 1.5 billion dollar industry, growing in excess of ten per cent per annum, and contributing to social and economic upliftment of small coastal communities.⁴²⁴ The economic interests of the whale watching industry are more than 20 times greater than those of the lethal industry, an industry which is fast losing its *raison d’être*, as a new generation loses its appetite for the consumption of whale meat as socially acceptable behaviour. (Japan has a frozen stockpile of over four and a half thousand tons of whale meat.)⁴²⁵

On 14 December 2007 seventy six members of the United States Congress wrote to President Bush urging him to take additional steps under the Pelly Amendment to the Fishermen’s Protective Act of 1967 pursuant to which if the Secretary of Commerce finds that nationals of a foreign country are ‘engaging in trade or taking which diminishes the effectiveness of any international programme for endangered or threatened species’,⁴²⁶ the Secretary must certify such finding to the President. The Pelly Amendment provides that upon a certification by the Secretary of Commerce, the President of the United States may prohibit the import of any products from that country, for any duration.⁴²⁷

On 21 December 2007 Japan’s Foreign Ministry announced its decision to exclude humpback whales from the special permit hunt in response to a request by the IWC Chairman, William Hogarth, the Commissioner for the United States. Chief Cabinet Secretary, Nobataka Machimura, stated: ‘We will not change the plan to conduct research whaling itself, but the government has decided that as long as the normalization process is underway, we will postpone humpback whaling’.⁴²⁸ On 22

⁴²⁴ Hoyt (note 407).

⁴²⁵ See Statistics of the Ministry of Agriculture, Forestry and Fisheries of Japan. Available at <http://www.maff.go.jp/eindex.html> [Accessed 5 February 2008].

⁴²⁶ Fishermen’s Protective Act of 1967 (22 USC 1978).

⁴²⁷ Ibid.

⁴²⁸ Report available at <http://www.china.org.cn/english/international/236593.htm> [Accessed 5 February 2008].

December 2007 Australia led the largest ever demarche against Japan's Special Permit Whaling programme. The Australian protest was joined by thirty one other countries and included the European Commission.⁴²⁹

Although humpback whales have been granted a reprieve from special permit catches, the entrenched positions of Japan and Australia remain. A cessation of Japan's current special permit lethal research regime may be wrought by a successful challenge by Australia in an as yet to be determined international forum. Should 'scientific whaling' be reined in, then the stage seems to be set for the implementation of an effective compromise between the parties to the ICRW to ensure the future conservation of whales.

3. A view of the future

The imposition of the moratorium on commercial whaling, effectively halting the large scale commercial destruction of the majority of the world large whale species, can in hindsight, be seen as a momentous achievement for whale conservation. It also marked the start of the IWC's steady evolution from a body regulating whaling to a body regulating the conservation of whales.

The IWC has over the past 30 years evolved through its practice into a pre-eminent international whale conservation organization. Through interpretation of its 60 year provisions there is unanimity among its members that both consumptive and non-consumptive uses of whales are part of the whaling industry, and that any commercial whaling must be sustainable. This pre-supposes protection and conservation of threatened or endangered species which may not be harmed. There is support for the view that these principles constitute emerging principles of customary international law.

The moratorium remains in place and commercial whaling can only resume once a Schedule amendment approved by two thirds of the members of the IWC has been passed by the Commission. The political nature of the IWC is manifested by the

⁴²⁹ Report available at <http://www.belgium.embassy.gov.au/bsis/offnews-jan08.html> [Accessed 5 February 2008].

entrenched positions of the pro-whaling countries and those of the conservation minded members. The static provisions of the 60 year old ICRW, a convention negotiated by whalers to sustain a viable commercial whaling industry, are not capable of accommodating the economic, social and political demands of Contracting Governments with diametrically opposing views. It is clear that the unanimous consent necessary to amend the Convention is beyond the reach of the parties.

The urgent issues which need to be addressed by the IWC to achieve effective conservation of whales in the 21st century are: unregulated commercial whaling under reservations to the Schedule amendment; the ever increasing Japanese special permit whaling; and the multiple threats of marine pollution, climate change and incidental capture.

The pro-whaling view is that the continued imposition of the moratorium: disregards science based policy and rule-making; does not provide 'optimum utilization' of whale resources; and does not take the interests of the 'whaling industry' into account. Their view is that the moratorium should be lifted and quotas should be set to 'sustainably utilize' abundant species of whales under a monitoring and compliance regime, while protecting threatened or endangered species.

The view of the 'conservation minded' countries is that the moratorium is being legitimately maintained by the IWC. Their view is that the moratorium represents an application of the precautionary approach enshrined in most modern environmental agreements and various soft law declarations. It furthermore represents an ecosystem based approach to biodiversity conservation, taking scientific opinion on the multiple threats facing cetacean species into account.

The lack of dispute resolution provisions in the ICRW and the lack of political will from either side to compromise, has led to the current long standing impasse. This impasse reflects the reality that both sides are, to a degree, achieving what they want.

The whalers are whaling, either under reservation or under special permit. The extent of these operations is more than satisfying the limited demand for whale meat. These parties have in fact harmonized their economic and political positions. There are signs that the social pressures of the whaling debate which are currently not a factor in Japan, could possibly bring political pressure in the foreseeable future.

The conservation minded countries are maintaining the moratorium and preventing large scale commercial whaling. Through the SC, the Conservation Committee and numerous non-binding resolutions they have brought about the steady transformation of the IWC to a conservation orientated body. This transformation would accelerate if Japan repudiated the Convention, a step it seems unlikely to take. Being a member of the IWC gives credence to the Japanese position that it is acting legitimately in terms of the provisions of the ICRW, and prevents countries opposed to whaling from taking significant economic or political action. Significant economic action by anti-whaling countries may change public opinion in whaling countries to question the wisdom of a policy which is economically insignificant, is subsidised by taxpayers, and attracts widespread international condemnation.

The transformation of the IWC from a body regulating the whaling industry to a body dedicated to the conservation of all whales can only be achieved by the expression of political will by two thirds of its members. This can only be achieved through the reversal of the entrenched Japanese position on commercial and special permit whaling.

Social pressure in Australia has infused the new government with the political will to confront Japanese special permit whaling. The Japanese decision to exclude humpback whales from its special permit catches can be seen as a strategic move to remove international attention from its special permit research programme. The results of the expected Australian legal challenge to Japanese special permit whaling remain to be seen, but could prove pivotal in the long term conservation of all whales.

CHAPTER XII

CONCLUSION

Successful conservation of whales in the 21st century means addressing and effectively managing all of the threats to cetacean populations. A successful conservation regime requires strict control of the lethal exploitation of cetaceans while simultaneously addressing and managing the array of environmental threats impacting these populations. Climate change, bycatch, underwater noise, marine pollution, ship strikes and coastal habitat destruction are all real and serious threats to cetacean populations, and may prove to be the decisive factor causing extinction of endangered cetacean species.

The limited financial resources of the IWC are largely spent maintaining the protracted stalemate between the pro-whaling countries and those wishing to conserve cetacean populations. Although a moratorium on commercial whaling has been in place for more than 20 years, Norway, Iceland and Japan have never stopped whaling; the former currently under reservations to the moratorium and Japan under its ever increasing special permit 'scientific research' whaling programmes.

The ICRW, the oldest convention governing the regulation of whales and the whaling industry, has fatal limitations for effective whale conservation. Its lack of compliance and enforcement provisions, the ability of States to enter reservations to conservation decisions, and the current carte blanche special permit research whaling provisions are problematic. Its lack of modern environmental governance provisions, such as precautionary management and an integrated ecosystem based approach to biodiversity conservation, preclude the IWC from becoming an effective global whale conservation agency.

It can be argued that the non-consumptive use of cetaceans through the whale watching industry has become the only way to sustainably utilize whales. The lethal whaling operations of the remaining three whaling countries clearly impact negatively on the economic activities of countries with whale watching industries.

The economic, political and ethical debates surrounding the highly emotive issues of whales and whaling will continue for the foreseeable future.

It is clear from the history of the IWC, and the current polarization of views within the commission, that whales represent different values to different people. Resolution of the economic, social and political differences between the pro-whaling nations and the proponents of non-consumptive use may however be possible.

Economically, lethal whaling is insignificant and largely maintained by government subsidy. In contrast the whale watching industry is growing exponentially in over 100 countries with consequent widespread geopolitical implications. The vast amount of ODA given by the Government of Japan in maintaining a pro-whaling voting bloc in the IWC, is currently seen as a strategic investment in maintaining its access to high seas marine living resources. This view may change in the foreseeable future.

The IWC remains a political organization, and politics will determine whether the Commission will be able to take the necessary action to become an effective agency for the regulation of whaling and conservation of whales in the 21st century. A groundswell of world opinion seems to be against the Japanese political position on lethal whaling fuelled by ethical considerations, intrinsic value arguments, and economic self interest from the whale watching tourism industry. For the first time these considerations are being openly debated in the Japanese media, in its broader business community and at the highest political level. It remains to be seen whether this groundswell will be sufficient to turn the political tide and enable the IWC to effectively regulate whaling, and conserve whales for the next 60 years.

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