

International Governance of the Conservation and Management of Whales

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INTRODUCTION AND EXECUTIVE SUMMARY

Good governance at the international level is essential for achieving sustainable development. The conservation and management of the global populations of whales is at present highly dependent on the structure and functioning of the International Whaling Commission (IWC), whose sixty year-old 1946 International Convention for the Regulation of Whaling (ICRW) lacks many critical elements of good governance which have evolved since the conclusion of the Convention.

In terms of the Rio Declaration, the governance framework must enable and encourage participants and stakeholders to co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the global populations being managed, in this case whales, as part of the overall goals of integrated management and sustainable development of the oceans and seas. Core principles of sustainability and the goal of the conservation and management of whales need to be at the heart of an instrument aimed at the conservation and management of whales. To these ends, the precautionary and ecosystem approaches aimed at all aspects of sustainability, including habitat and prey, and integrated management must all underpin decision-making. Mechanisms are likewise essential to achieve these goals. Effective governance requires efficient and participation based decision-making processes addressing opt-out provisions, the capacity to ensure compliance and enforcement of its decisions, mechanisms for international co-operation between States and co-ordination between international agencies, transparency, consultation, participation, and dispute resolution mechanisms. These are all elemental aspects of modern environmental governance.

The IWC as currently constituted falls short of many of these requirements. Its core purpose, to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry, aims at safeguarding whale stocks for later exploitation, with a strong focus on the whaling industry. The Convention omits references to the precautionary principle, an ecosystem approach, integrated management and sustainability. Its unconstrained objection mechanism seriously undermines any conservation measures agreed, and Japan in particular has been able to carry out scientific whaling activities despite numerous resolutions requesting constraint.

Its objectives fall short of the stated goal in article 65 of the Law of the Sea Convention which is for States to co-operate with a view to the conservation of marine mammals and to work through the appropriate international organizations for their conservation, management and study. Article 65 also suggests that international organizations, and coastal states, can prohibit, as well as limit and regulate the exploitation of marine mammals more strictly than is provided in Part V of the Law of the Sea Convention, yet the ICRW sits uncomfortably with this aim. There is also in article 65 an obligation to co-operate with a view to the conservation of marine mammals, which should be read together with the obligation in article 5 of the CBD to co-operate for the conservation and sustainable use of biodiversity. The mechanisms for co-operation feature strongly in many wildlife and conservation conventions developed over the last few decades. Appropriate governance mechanisms are crucial to provide a framework of co-operation.

The shortcomings in the ICRW have been manifested in functioning of the IWC in recent years and a move to reform the IWC is essential, for instance through a high-level ministerial or diplomatic conference, since amendment of the ICRW would require unanimity. Such a diplomatic negotiating conference could aim at addressing the governance deficiencies outlined in this paper, thus bringing a convention that was negotiated in 1946 into the 21st century with all the requisite components of a multilateral environmental agreement and the essential elements of good governance.

INTERNATIONAL GOVERNANCE OF THE ENVIRONMENT

Good governance at the international level is fundamental to the achievement of sustainable development.¹ Core concepts of global governance of elements of biodiversity include integrated management and sustainability, efficient and participation based decision-making processes addressing opt-out provisions, international co-operation between States and co-ordination between international agencies, transparency, including access to information, consultation, participation and dispute resolution mechanisms.² A brief look at how principles of international governance have evolved follows.

Some 34 years ago, the 1972 United Nations Conference on the Human Environment in Stockholm agreed some common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment.³ The Declaration set out the principles of conservation, management, and the role of co-operation and international organizations achieving these goals. The Stockholm Declaration proclaimed that the natural resources of the earth, including the flora and fauna, must be safeguarded for the benefit of present and future generations through careful planning or management,⁴ that man has a special responsibility to safeguard and wisely manage the heritage of wildlife and its habitat, and that nature conservation, including wildlife, must therefore receive importance in planning for economic development.⁵ The Declaration emphasised international co-operation⁶ to achieve these goals, and that States shall ensure that international organizations play a co-ordinated, efficient and dynamic role for the protection and improvement of the environment.⁷

Ten years after that, the World Charter for Nature⁸ extended these principles. The Charter declared that the genetic viability on the earth shall not be compromised, that the population levels of all life forms must be at least sufficient for their survival, and to this end necessary habitats shall be safeguarded.⁹ Again, the role of co-operation and of international organizations was emphasised. States and international organizations were directed to co-operate in the task of conserving nature,¹⁰ to safeguard and conserve nature in areas beyond national jurisdiction,¹¹ and to implement the applicable international legal provisions for the conservation of nature and the protection of the environment.¹²

The Brundtland Report¹³ in 1987 identified as an imperative that the underlying unity of the oceans requires effective global management regimes,¹⁴ and insisted that an international ecosystem approach is required for the management of these resources for sustained use. The obligation to co-operate was emphasised, with the Proposed Legal Principles stating that States shall co-operate in good faith with other States.¹⁵

These principles were further advanced in the 1992 Rio Declaration.¹⁶ The Declaration emphasised the need to co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem.¹⁷ The precautionary approach¹⁸ and environmental impact assessments¹⁹ were elaborated. As with the earlier instruments, principles of governance to implement these principles were stated. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.²⁰ States are to resolve all their environmental disputes peacefully and by appropriate means in accordance with the Charter of the United Nations,²¹ and States and people are to co-operate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in the Declaration and in the further development of international law in the field of sustainable development.²² Transparency was emphasised. States are to facilitate and encourage public awareness and participation by making information widely available.²³

At the same time, Agenda 21 called for an action- and result- oriented approach consistent with the principles of universality, democracy, transparency, cost-effectiveness and accountability,²⁴ and called for periodic review to assess both the past performance and effectiveness of existing

international agreements or instruments as well as the priorities for future law making on sustainable development.²⁵

Many of the above developing principles were implemented in the Convention on Biological Diversity (CBD).²⁶ The CBD recognized the intrinsic value of biological diversity and that the conservation of biological diversity is a common concern of humankind.²⁷ It mandated co-operation, either directly or through competent international organizations, for the conservation and sustainable use of biological diversity, in respect of areas beyond national jurisdiction.²⁸ Contracting Parties are to implement the Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea.²⁹ The primacy of biodiversity is evident: the provisions of the Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.³⁰

In 2002, the Johannesburg Plan of Implementation (JPOI) called for actions to encourage effective synergies between the CBD and other multilateral environmental agreements, *inter alia*, through the development of joint plans and programmes regarding common responsibilities and concerns.³¹ The JPOI aimed at strengthening the institutional framework for sustainable development at the international level, calling on the international community to strengthen inter-agency collaboration³² and fully implement UNEP Decision VII/1³³. It noted that good governance at the international level is fundamental for achieving sustainable development.³⁴

These all laid the ground work for the September 2005 World Summit,³⁵ where States resolved to improve co-operation and co-ordination at all levels in order to address issues related to oceans and seas in an integrated manner and promote integrated management and sustainable development of the oceans and seas.

The World Summit also laid out the method to achieve these aims, recognizing the need for more efficient environmental activities in the United Nations system. It called for³⁶ enhanced coordination, improved policy advice and guidance, strengthened scientific knowledge, assessment and cooperation, better treaty compliance, and better integration of environmental activities in the broader sustainable development framework at the operational level, including through capacity-building. The Summit agreed to explore the possibility of a more coherent institutional framework to address this need, including a more integrated structure, building on existing institutions and internationally agreed instruments, as well as the treaty bodies and the specialized agencies.

In late 2005, the Almaty Guidelines³⁷ elaborated the requirements of the Aarhus Convention³⁸ applicable to international organisations state that access to information, public participation and access to justice in environmental matters are fundamental elements of good governance at all levels and essential for sustainability.³⁹

It will be seen from the above discussion that the evolution of the need for international co-operation is particularly notable. As will be seen in discussions of other conventions addressing wildlife, it is widely accepted that co-operation is particularly important where species migrate between areas under national jurisdiction and through international waters. This is particularly evident in the provisions of article 65 of the Law of the Sea Convention and article 5 of the CBD, which requires States to co-operate for the conservation and sustainable use of biological diversity. Also key to whale conservation and management is the necessity to protect the habitat of the species concerned, by taking into account an ecosystem approach, and the necessity to conserve biodiversity.⁴⁰

The Obligation to Co-operate

These concepts underpin the need to co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem, as part of the overall goals of integrated management and sustainable development of the oceans and seas.

The obligation to co-operate is one that has developed considerably since the ICRW was concluded. The International Tribunal for the Law of the Sea (ITLOS) has stated that the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the [Law of the Sea] Convention and general international law.⁴¹ The obligation to cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem pronounced in Principle 7 of the Rio Declaration reinforces the obligation to co-operate with a view to the conservation of marine mammals⁴² and to co-operate with each other in the conservation and management of living resources in the areas of the high seas.⁴³ This must be read together with the duty of all States the duty to take, or to co-operate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.⁴⁴ The Convention on Migratory Species (CMS) in particular has a focus on international co-operation with a view towards conservation of migratory species of wild animals, and this is described below.⁴⁵

INTERNATIONAL GOVERNANCE OF THE CONSERVATION AND MANAGEMENT OF WHALES AS GLOBAL BIOLOGICAL POPULATIONS

Governance of global biological populations such as whale populations looks to the institutions that are concerned with the conservation and management of whales, together with the central values and norms that underpin the institution. This paper examines crucial aspects of governance of the IWC and examines similar governance aspects of some other multilateral environmental agreements.

The International Convention for the Regulation of Whaling (ICRW)

The ICRW,⁴⁶ agreed in the wake of World War II,⁴⁷ is a relatively old convention, dating back to 1946.⁴⁸ Its preamble sets out its objectives.

- Recognizing the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks;
- Considering that the history of whaling has seen over-fishing of one area after another and of one species of whale after another to such a degree that it is essential to protect all species of whales from further over-fishing;
- Recognizing that the whale stocks are susceptible of natural increases if whaling is properly regulated, and that increases in the size of whale stocks will permit increases in the number of whales which may be captured without endangering these natural resources;
- Recognizing that it is in the common interest to achieve the optimum level of whale stocks as rapidly as possible without causing widespread economic and nutritional distress.

The reason for Parties agreeing the Convention is stated as being “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 ICRW establishes the International Whaling Commission (IWC) and operates through a schedule which can be amended and which forms ‘an integral part’ of the Convention.⁴⁹ Amendments to the Schedule must be 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, shall be based on scientific findings, shall 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 shall take into consideration the interests of the consumers of whale products and the whaling industry.⁵⁰

It is clear then that the ICRW is clearly oriented towards safeguarding whale stocks for later exploitation, with a strong focus on the whaling industry. The priority is also stated as predicating the achievement of the optimum level of whale stocks as rapidly as possible with the caveat of doing so without causing widespread economic and nutritional distress. This focus on whale stocks must be seen as a product of its time, and that modern requirement fails to address the wider contexts of sustainability, in particular addressing whale habitat as well as other impacts on whales such as entanglement and bycatch, climate change, ship strikes, pollution, habitat and feeding ground degradation and marine noise.

The core concept of sustainability does not appear in the Convention. A very rudimentary form appears in the preamble, where parties recognize that in the course of achieving its objectives, whaling operations should be confined to those species best able to sustain exploitation in order to give an interval for recovery to certain species of whales now depleted in numbers. However the stated goal is the 'optimal level' of whale stocks, which is not further described, but amendments to the Schedule are to be made with respect to the conservation and utilization of whale resources,⁵¹ and must provide for the conservation, development, and optimum utilization of the whale resources.⁵²

Nor does the Convention incorporate the precautionary principle or the ecosystem approach to management, predating the evolution of such developments by many decades. With its absence of amendment provisions, the Convention itself is effectively frozen at the time of the conclusion of the Convention and Protocol in the 1940s and 1950s. The IWC has attempted to address this in its Resolutions: 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 living marine resources, and gave notice that, as the competent international organization for the conservation and management of whale stocks, it has decided to make the study of interactions between whale and fish stocks a matter of priority.⁵³

A Revised Management Procedure (RMP) was adopted in 1994⁵⁴ and a Revised Management Scheme⁵⁵ addressing compliance which would include an inspection and observation system has yet to be agreed. The Conservation Committee, which first met in 2004,⁵⁶ was set up, in the view of proponents of the Committee, to improve the way the IWC met its responsibility for managing whales, by addressing issues not only from the perspective of whaling. Those opposing the Committee considered that it took the objective of the 'conservation of whale stocks' out of the context of the objective of making possible 'the orderly development of the whaling industry'.⁵⁷ This split is clearly the legacy of the ICRW objectives discussed earlier. At the 2005 meeting, the split was if anything more evident, with the Committee unable to agree its terms of reference.⁵⁸

In the intervening 60 years, much has changed, both in international environmental law and in the environment. The ICRW objectives fall far short of the objectives of integrated management and sustainable development of the oceans and seas, as outlined above. New threats⁵⁹ to whales have emerged, including climate change,⁶⁰ seismic operations,⁶¹ sonar,⁶² chemical pollution,⁶³ ship strikes, changes in prey populations⁶⁴ and the risks to whales from depletion of krill.⁶⁵ New non-extractive commercial opportunities have also emerged such as whale watching. All these highlight the need for integrated management and the core goal of sustainability.⁶⁶

As far as possible, international instruments should be interpreted to take account of these developments. As was noted by the International Court of Justice (ICJ),⁶⁷ “an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, the last fifty years ...have brought important developments.” More recently, the ICJ indicated that new environmental norms should be taken into account in applying an older instrument.⁶⁸ This would extend for instance to the requirements of article 65 in UNCLOS for co-operation and to through international organizations for the conservation, management and study of cetaceans.⁶⁹ The emphasis on conservation, management and study now requires States Parties to the law of the sea convention such as Japan to work towards those objectives. While this specific requirement of cooperation and statement of goals must be implemented, many of the shortcomings in the ICRW convention go beyond interpretation.

Amending the ICRW

It is critical to good governance that the convention can be amended as necessary. The ICRW does not provide for its amendment, and in effect requires unanimity.⁷⁰ In 1956 a Protocol was agreed to include helicopters and aircraft in the definition of ‘whale catcher’⁷¹ and to add ‘methods of inspection’ to matters which may be addressed in the Schedule,⁷² and entered into force when all Contracting Governments ratified or adhered to the Protocol.⁷³ Thus it can be seen that amendment of the ICRW in effect requires unanimity, which is likely to be all but impossible to achieve.

In theory, some minor amendments could be made by amending the Schedule. The Schedule forms an integral part of the Convention,⁷⁴ and amendment of the Schedule requires a three-fourth majority vote.⁷⁵ Amendments to the Schedule are heavily proscribed by article V, but provided that they satisfy the description in article V(1), and that they *inter alia* are necessary to carry out the objectives and purposes of the ICRW and to provide for the conservation, development, and optimum utilization of the whale resources, are based on scientific findings and take into consideration the interests of the consumers of whale products and the whaling industry,⁷⁶ there may be amendments that can improve IWC governance. However, while they could address compliance issues, for instance, they are unlikely to be sufficiently comprehensive to address in any significant way the constitutional deficiencies outlined here. In addition, some States may still object to the amendments, leaving the amendments ineffective.⁷⁷

IWC Governance

The ICRW lacks fundamental elements of good governance. There is no dispute resolution procedure and there are no effective international enforcement procedures. Each Contracting Government is left to take appropriate measures to ensure the application of the provisions of the Convention and the punishment of infractions against its provisions in operations carried out by persons or by vessels under its jurisdiction.⁷⁸ Contracting Governments, rather than the Commission, decides whether infractions are reported to the Committee, and reports of Contracting Governments are thus predictably inadequate.⁷⁹ Enforcement is inevitably ineffective in the absence of a binding enforcement mechanism. For instance, bycatch in Japan has increased markedly since enactment of a 2001 law enabling whales caught in nets to be killed, yet Japan considers the question not relevant to the Infractions Sub-committee.⁸⁰ Japan has not reported any legislation to the Sub-Committee since 1986.⁸¹

Decisions of the Commission are taken by a simple majority of those members voting, except that a three-fourths majority of those members voting is required for action in pursuance of Article V,⁸² which relates to amendment of the Schedule. Only Commissioners may vote,⁸³ and the Commission is to seek to reach its decisions by consensus.⁸⁴

These deficiencies have contributed to the criticism made by some⁸⁵ that the IWC has neither overseen an orderly development of the whaling industry nor effectively conserved whale stocks, though it has brought a temporary halt to commercial whaling in order to give depleted stocks the opportunity to recover.

Objections: Opting Out

Contracting Governments can object to amendments of the Schedule.⁸⁶ This means Contracting Governments can opt out of conservation measures, thus undermining those measures. The objection provision is exacerbated by allowing other Contracting Governments to object themselves when other States have objected.⁸⁷ In other words, rather than attempting to restrict objections and their effects, the ICRW allows for objections to multiply.

This can be compared to the concerns expressed at opting out of conservation and management measures at a 2006 meeting to review the UN Fish Stocks Agreement.⁸⁸ Participants there agreed to “[e]nsure that post opt-out behavior is constrained by rules to prevent opting out parties from undermining conservation, clear processes for dispute resolution, and a description of alternative measures that will be implemented in the interim.”⁸⁹

Japan objected to the Southern Ocean Sanctuary,⁹⁰ which covers some 30 million square kilometres of water, despite the sanctuary being adopted⁹¹ by 23 votes to one, with six abstentions.⁹² In 1987, the Brundtland report warned that “[t]here is a strongly held view in conservation circles that whaling for scientific purposes can be used as a loophole by whaling nations. Permissions for such hunting should be stringently applied by IWC members, or the IWC’s credibility will be undermined.”⁹³

Another manifestation of the governance gap is seen in the so-called scientific whaling exemption.⁹⁴ The amendment to the Schedule establishing a moratorium on commercial whaling came into force on 3 February 1983.⁹⁵ Contracting Governments may grant 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”.⁹⁶ There have been a series of resolutions setting criteria for the issuance of special permits⁹⁷ Contracting Governments wanting to issue special permits for lethal research must submit proposals to the Commission for the Scientific Committee’s review and comment⁹⁸ and must transmit the results of research to the Scientific Committee,⁹⁹ which advises the Commission whether the information sought in the research programme meet certain criteria, including whether the information is required for the purposes of management of the species or stock being researched and whether the information sought could be obtained by non-lethal means.¹⁰⁰

In 1995 the Commission recommended that scientific research involving the killing of cetaceans should only be permitted in exceptional circumstances where the questions address critically important issues which cannot be answered by the analysis of existing data and/or use of non-lethal techniques.¹⁰¹ Since then the Commission has requested that Japan not issue special permits for the taking of minke whales in the Southern Ocean Sanctuary,¹⁰² strongly urged Japan to refrain from issuing special permits for whaling under JARPA II¹⁰³ (which proposes the killing of about 850 minke whales, 50 humpback whales and 50 fin whales),¹⁰⁴ urged any country conducting or considering the conduct of Special Permit whaling to terminate or not commence such activities and to limit scientific research to non-lethal methods only¹⁰⁵ and called on the Government of Japan to halt the JARPA program, or to revise it so that it is limited to non-lethal research methodologies,¹⁰⁶ and strongly urged Japan to withdraw its JARPA II proposal or to revise it so that any information needed to meet the stated objectives of the proposal is obtained using non-lethal means.¹⁰⁷ In one resolution the IWC regretted “that despite multiple IWC Resolutions affirming that these lethal research programmes did not address critically important research needs,

the government of Japan continues the programmes of lethal research, particularly in the Southern Ocean Sanctuary.”¹⁰⁸

Similarly, following the creation of the Southern Ocean Sanctuary, the Commission has called on Japan to refrain from issuing research permits for research involving the killing of whales within the Sanctuary,¹⁰⁹ expressing deep concern at Japan’s continuing lethal research within the Sanctuary, and recommending that scientific research involving the killing of cetaceans should only be permitted where “critically important research needs are addressed which cannot be answered by analysing existing data and/or use of non-lethal techniques”, and requesting Japan to reconsider and re-structure its research programme so that research objectives are achieved by non-lethal methods.

This history demonstrates a failure to co-operate and the failure of IWC governance mechanisms. Resolution 2005-I strongly urged Japan to withdraw its JARPA II proposal, or to revise it, to use non-lethal means. International law requires the exercise of good faith, as noted in the IWC Transparency resolution, discussed below, and a state, while relying on an a specific provision, such as article VIII of the ICRW in this case, may nevertheless incur liability by abusing its rights.¹¹⁰ The Law of the Sea Convention specifically requires States to act in good faith and not to abuse rights.¹¹¹ Quite apart from the questions of the legality of Japan’s actions in continuing to issue permits in the face of these resolutions,¹¹² this state of affairs highlights the governance defects in the ICRW and in particular compliance and enforcement mechanisms.

Transparency in the IWC

As noted earlier,¹¹³ many declarations have noted the importance of transparency in decision-making. In 2001 the IWC passed a resolution on transparency¹¹⁴ which noted that Article 2(2) of the United Nations Charter calls on all member countries to fulfil in good faith their obligations, and that Article 300 of the United Nations Convention on the Law of the Sea requires that States shall fulfil in good faith the obligations assumed under the Convention. The resolution also noted that Article 26 of the Vienna Convention on the Law of Treaties requires application of the *pacta sunt servanda* (“agreements are to be kept”) rule of international law, and were conscious that, as set out in the *pacta sunt servanda* rule, “good faith” requires fairness, reasonableness, integrity and honesty in international behaviour. The resolution noted the importance of transparency in international environmental law.

The resolution noted that the 1970 Declaration¹¹⁵ stipulates that: “No state may use or encourage the use of economic, political, or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind”. The resolution stressed in particular the importance of adherence to the requirements of good faith and transparency in all activities undertaken by the IWC and in all activities by Contracting Governments in respect of their involvement with the IWC, and endorsed and affirmed the complete independence of sovereign countries to decide their own policies and freely participate in the IWC (and other international forums) without undue interference or coercion from other sovereign countries. This resolution not only specifically states that the principles of transparency are applicable to the IWC, but ties it to good faith.

Some States have attempted to introduce secret voting, which clearly would undermine transparency and accountability. Japan last year, as in earlier years, proposed that Commission members could take a secret vote if five member nations asked for such a secret ballot for any particular issue.¹¹⁶

Allegations of vote buying, principally involving official development assistance (ODA), have been made at the IWC since 1993.¹¹⁷ Such practices would have obvious implications for governance of the IWC, for transparency and the obligations of good faith to be observed by all Contracting Governments,¹¹⁸ as well as the principle that States may not use or encourage the use of economic,

political or other measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights.¹¹⁹ The IWC transparency resolution in 2001 is obviously directly relevant in this regard. Allegations made by NGOs at IWC/56 in Sorrento and at IWC/55 in Berlin were commented on by Contracting Governments.¹²⁰ The allegations led to a call for the development of a Code of Conduct for NGOs, which is expected to be discussed at St Kitts. NGOs are expected to scrutinize this Code for compliance with the Almaty Guidelines.¹²¹ The Almaty Guidelines recognise that its elements including access to information and public participation are fundamental elements of good governance at all levels and essential for sustainability.

In late May 2006, the role of transparency in marine resource management was emphasised in the UN Fish Stocks review, which called States to “[i]mprove the transparency of [Regional Fishery Management Organizations], both in terms of decision-making that incorporates the precautionary approach and the best scientific information available and by providing reasonable participation for IGOs and NGOs through the organization’s rules and procedures.”

Quotas

Quotas for commercial whaling are currently set at zero¹²² under the moratorium. Should a quota ever be set, countries with an interest in the whale populations may be expected to insist that their interests be observed.¹²³ Such an interest would include the interest of Contracting Governments in the sustainable conservation and management of living marine resources and biological diversity,¹²⁴ and need not be limited to States wishing to kill whales. A Contracting Government could then choose to claim a share of a quota and choose not to catch it. Already the unused portion of a strike quota for aboriginal whaling can be carried forward and added to the strike quota for any subsequent year.¹²⁵

Dispute Resolution

Dispute settlement provisions assist with compliance with an agreement as well as with providing means of peaceful settlement of disputes, and are thus important for good governance of an agreement. Dispute resolution mechanisms were called for in Agenda 21:

In the area of avoidance and settlement of disputes, States should further study and consider methods to broaden and make more effective the range of techniques available at present, taking into account, among others, relevant experience under existing international agreements, instruments or institutions and, where appropriate, their implementing mechanisms such as modalities for dispute avoidance and settlement. This include mechanisms and procedures for the exchange of data and information, notification and consultation regarding situations that might lead to disputes with other States in the field of sustainable development and for effective peaceful means of dispute settlement in accordance with the Charter of the United Nations, including, where appropriate, recourse to the International Court of Justice, and their inclusion in treaties relating to sustainable development.

The Law of the Sea Convention contains comprehensive dispute resolution procedures in Part XV,¹²⁶ which have not to date been used in the context of the IWC. However the lack of explicit dispute resolution provisions in the ICRW is a significant omission which has negative implications for compliance as well as governance of the IWC.

Best Practice in MEAs

The Aarhus Convention¹²⁷ as elaborated by the Almaty Guidelines¹²⁸ provides that access to information, public participation and access to justice in environmental matters are fundamental elements of good governance at all levels and essential for sustainability.¹²⁹

UNEP is developing a manual of guidelines on compliance with and enforcement of multilateral environmental agreements which builds on the guidelines with case studies, best practices, explanatory notes and checklists.¹³⁰ The JPOI¹³¹ called on countries to fully implement the outcomes of decision I on international environmental governance adopted by the UNEP Governing Council at its seventh special session.¹³² UNEP Decision VII/1¹³³ noted that the international community has become increasingly concerned with not only establishing a strengthened framework for coordinated international action but also ensuring that the limited resources available are deployed in the best possible manner for optimal effect. It was noted that increasingly, environmental objectives are being pursued in the broader context of sustainable development. It called on Governments to include provisions in all multilateral environmental agreements to ensure compliance and enforcement, and establish a mechanism for environmental dispute settlement.¹³⁴ Decision VII/1 was followed by UNEP Decision 23/1,¹³⁵ which aimed at the implementation of Decision VII/1, and which called for a focus on activities to improve the coordination among, synergy between and effectiveness of MEAs, taking into account both the autonomous decision-making authority of the conferences of the parties to such agreements and the need to promote the environmental dimension of sustainable development among other relevant United Nations organizations.

A recent WWF/TRAFFIC report on best practice in RFMOs¹³⁶ noted that transparency in decision-making, or the factors influencing those decisions within RFMOs, has generally been poor in RFMOs, with some RFMOs restricting access to information and refusing NGOs the right to attend meetings, and noted that transparency should be the normal mode of doing business, rather than the exception.

WHALES WITHIN LAW OF THE SEA CONVENTION

Article 65 of the Law of the Sea Convention provides that “[n]othing in this Part restricts the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall co-operate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study” and article 120 states that article 65 also applies to the conservation and management of marine mammals in the high seas. Parties also have a broad obligation to protect and preserve the marine environment.¹³⁷

Articles 65 and 120 make it clear that marine mammals are to be addressed differently from other forms of marine life. Simply stated, they imply that coastal States or international organizations can prohibit the exploitation of whales – as well as limit or regulate the exploitation more strictly than is provided in Part V of the Law of the Sea Convention.¹³⁸

The obligation to co-operate is particularly pointed. The object is the “conservation, management and study” of whales. It should be noted that the object of the ICRW is focused not on conservation, management and study but “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 emphasis of the ICRW on the whaling industry is seen in the recital in the preamble that it is in the common interest to achieve the optimum level of whale stocks as rapidly as possible without causing widespread economic and nutritional distress. This falls short of the obligation to co-operate with a view to the conservation of marine mammals.

While there is a widespread assumption that the IWC is at present the ‘appropriate international organization’, article 65 is not necessarily limited to a single organization.¹³⁹ If working through the IWC is not carrying out the function of the conservation, management and study of whales according to the internationally accepted criteria laid down in the Law of the Sea Convention and elsewhere, then working through another organization, such as the General Assembly, or properly constituted new international organization, could satisfy the requirements of article 65.

The recent Working Group on Marine Biodiversity beyond areas of national jurisdiction¹⁴⁰ concluded that “the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction should be based on the precautionary and ecosystem approaches using the best available science, and prior environmental impact assessments.” The competence of the General Assembly was affirmed: “It was reaffirmed that the General Assembly, as the global institution that has the competence to undertake review of issues relating to oceans and the law of the sea, has a central role in addressing issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction.” There was a call to “improve management of sectoral activities that have an impact on marine biological diversity beyond areas of national jurisdiction, including by strengthening the relevant sectoral and regional organizations and mechanisms for their accountability.” This call applies to the strengthening of the governance of the whale populations.

NAMMCO

The North Atlantic Marine Mammal Commission (NAMMCO)¹⁴¹ was established in 1992 by the Faroe Islands, Greenland, Iceland and Norway, following a 1990 memorandum of understanding between those countries. NAMMCO has limited participation and is restricted in scope to the North Atlantic. The objective of the NAMMCO is to contribute through regional consultation and cooperation to the conservation, rational management and study of marine mammals in the North Atlantic.¹⁴²

CONVENTIONS RELATING TO BIODIVERSITY

CITES

CITES¹⁴³ aims to protection listed species of wild fauna and flora against overexploitation through international trade. It currently has 169 Parties.¹⁴⁴ Its definition of trade includes introduction from the sea.¹⁴⁵ This would then cover, then, any CITES listed species caught in the high seas and brought into port. Sperm, grey, humpback, sei, fin, bowhead, right, brydes, pygmy, grey and the antarctic minke whales are all listed on Appendix I. Japan, Iceland, Norway and some others have entered reservations to various species,¹⁴⁶ and there are regular attempts by some of these parties to downgrade the listing of great whales to Appendix II.

Trade is regulated trade according to three appendices.¹⁴⁷ Parties are not to allow trade in specimens of species included in Appendices I, II and III except in accordance with CITES.¹⁴⁸ Appendix I includes species threatened with extinction which are or may be affected by trade, and trade in these species must only be authorized in exceptional circumstances.¹⁴⁹ 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. Criteria for listing species¹⁵⁰ calls for the Parties to apply the precautionary approach and to act in the best interest of the conservation of the species concerned and adopt measures that are proportionate to the anticipated risks to the species. Appendices I and II may be amended by a two-third majority. Objections are permitted.¹⁵¹ CITES allows secret voting,¹⁵² which is often criticized

as working against transparency and accountability.¹⁵³ The CITES Convention may be amended by a 2/3 majority vote.¹⁵⁴

Observers are permitted unless 1/3 of Parties object.¹⁵⁵ A recent Decision¹⁵⁶ recognized the valuable contributions of observers to meetings of the Conference of the Parties and made provisions for interventions, representation at working groups and distribution of observer documentation. If a dispute cannot be settled by negotiation, it may be submitted to arbitration by mutual consent.¹⁵⁷

A Decision¹⁵⁸ at COP-11, amended at COP-12, addressed trade in whale meat and recommended that the Parties agree not to issue any import or export permit, or certificate for introduction from the sea, under CITES for primarily commercial purposes for any specimen of a species or stock protected from commercial whaling by the ICRW.

CONVENTION ON MIGRATORY SPECIES

The Convention on Migratory Species¹⁵⁹ (CMS), also known as the Bonn Convention, recognizes that wild animals in their innumerable forms are an irreplaceable part of the earth's natural system which must be conserved for the good of mankind¹⁶⁰ and acknowledges the importance of migratory species being conserved and of Range States agreeing to take action to that end.¹⁶¹ Parties specifically acknowledge the need to take action to avoid any migratory species becoming endangered.¹⁶² The Parties aim at this through research, endeavouring to provide immediate protection for migratory species included in Appendix I, and endeavouring to conclude Agreements covering the conservation and management of migratory species included in Appendix II.¹⁶³ The CMS prohibits the taking of Appendix I species except for narrowly stated exceptions.¹⁶⁴

The species list¹⁶⁵ includes a number of whales including the blue, fin, sperm, humpback and bowhead whales on Appendix I and antarctic minke, brydes and pygmy right whales on Appendix II.¹⁶⁶ Despite inability to reach consensus on listing the latter on Appendix I, in 2002 CMS supported concerted actions as well as international and regional cooperation to ensure the conservation and recovery of all great whales currently listed on the CMS appendices, and recommended that Parties and international and regional organizations with a role to play in the conservation of the antarctic minke, brydes and pygmy right whales maintain and, where possible, enhance current measures to ensure the conservation of these species of great whales.¹⁶⁷ The Convention encourages Range States to conclude global or regional Agreements for the conservation and management of individual species or, more often, of a group of species listed on Appendix II.

CBD has recognized CMS as the lead partner in conserving and sustainably using migratory species over their range and also recognizes that the CMS provides an international legal framework through which range States can cooperate on migratory species issues.¹⁶⁸ CMS and IWC have concluded a Memorandum of Understanding, which aims to establish a framework of information and consultation between CMS and the IWC in the field of conserving migratory species and the world's natural heritage, with a view to identifying synergies and ensuring effective cooperation in joint activities by the relevant international bodies established under both conventions and national institutions of their Contracting Parties.¹⁶⁹

At its COP-8 meeting last year, the CMS adopted a resolution on human induced impacts on cetaceans¹⁷⁰ which requested the CMS Secretariat and Scientific council to cooperate with the IWC "which also has competency for the conservation and management of cetacean populations", working with the MOU between the two organizations, by collaborating with the IWC work programmes which address human induced impacts to cetaceans and by working with the IWC's Scientific and Conservation Committees to further identify priority impacts and regions requiring urgent attention. The resolution also specifically invited Contracting Parties, without prejudice to

their obligations under the Convention, to strive to ensure wherever possible that their activities within the scope of the resolution avoid harm to cetaceans.

The resolution identified other relevant bodies and meetings including, as well as the IWC, OSPAR, UNICPOLOS, the UNEP Regional Seas Programme, the FAO and its Committee on Fisheries Industries (COFI), and Regional Fisheries Management Organizations (RFMOs) with whom cooperation would be relevant.¹⁷¹

The Agreement on Small Cetaceans of the Baltic and North Seas (ASCOBANS) covers all small cetaceans, including species and sub-species of toothed whales, except sperm whales.¹⁷² The agreement encourages cooperation among Range States with respect to habitat conservation and management, pollution mitigation, surveys and research,¹⁷³ and the Parties address threats such as entanglement in nets as well as marine pollution, interaction with shipping and acoustic disturbance.¹⁷⁴

The Agreement on the Conservation of Cetaceans in the Black Sea, Mediterranean Sea and Contiguous Atlantic Area, ACCOBAMS,¹⁷⁵ requires parties to take co-ordinated measures to achieve and maintain a favourable conservation status for cetaceans. To this end, Parties are to prohibit and take all necessary measures to eliminate, where this is not already done, any deliberate taking of cetaceans and shall co-operate to create and maintain a network of specially protected areas to conserve cetaceans.¹⁷⁶

CMS, ASCOBANS and ACCOBAMS have been exploring co-operation with each other and the IWC.¹⁷⁷ A recent progress report warned 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 cooperating with specialized 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.

The report noted that CMS and its agreements had a proven record of action on human impact issues such as ship strikes, marine noise, entanglement and other by-catch, with the exception of pollution which is handled by other agencies, that endangered species and populations is at the core of the work of CMS and its Agreements, conservation measures and policies, though they would welcome the Conservation Committee's future work on surveys as well as on species not covered by CMS and its Agreements and recognize the potential for synergies in these areas. Finally, they noted that habitat conservation is covered by the main provisions of the CMS for species listed on Appendix I and of its Agreements for species listed on Appendix II and that CMS would be a suitable agency to undertake the proposed work on the world inventory on cetacean habitat protection as well as relevant databases, subject to funding.

As with CITES, disputes that cannot be settled through negotiation may be submitted by mutual consent to arbitration.¹⁷⁸ Substantive decisions at the Conference generally require a two-third

vote.¹⁷⁹ The Convention can be amended by a two-third vote.¹⁸⁰ Secret ballots may be requested, but needs to be voted upon, which cannot be by secret ballot.¹⁸¹

CBD

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 utilization of genetic resources.¹⁸² It affirms that the conservation of biological diversity is a common concern of humankind.¹⁸³

The CBD¹⁸⁴ includes the precautionary principle in its preamble, noting that where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimise such a threat. Diversity within and between species is included in its definition of biological diversity.¹⁸⁵

Co-operation is at the heart of the CBD. Parties have an obligation to cooperate with other Parties, directly or through competent international organisations, in respect of conservation and sustainable use of biodiversity in areas beyond national jurisdiction and other matters of mutual interest.¹⁸⁶ '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.¹⁸⁷

In situ protected areas are provided for in Article 8, in order to protect biodiversity, and parties are required by Article 10 to adopt measures relating to the use of biological resources to avoid or minimise adverse impacts on biological diversity.¹⁸⁸ Environmental impact assessments are required for projects that are likely to have significant adverse effects on biological diversity,¹⁸⁹ and States are to promote information exchange and consultation on activities that are likely to significantly affect adversely the biological diversity of areas beyond the limits of national jurisdiction by encouraging bilateral, regional and multilateral arrangements.¹⁹⁰

Article 22 in effect provides that where rights and obligations under any international agreement would cause a serious damage or threat to biodiversity, the CBD provisions will prevail.¹⁹¹ When taken together with Article 22(2), which provides that Contracting Parties shall implement the CBD with respect to the marine environment consistently with the rights and obligations of States under the Law of the Sea Convention, it is clear that the CBD is concerned with marine biodiversity and that Parties shall carry out their obligations accordingly.

In 1995, the Parties to the CBD adopted the Jakarta Mandate on Marine and Coastal Biological Diversity.¹⁹² The Jakarta Mandate is aimed at the conservation and sustainable use of marine and coastal biological diversity. It explicitly mandates the precautionary approach,¹⁹³ promotes the adoption of ecosystem management principles, and states that parties should prevent physical alteration, destruction and degradation of vital habitats.¹⁹⁴ The Mandate emphasises an ecosystem approach¹⁹⁵ and integrated management and recognises that the wide adoption and implementation of integrated marine and coastal area management are necessary for effective conservation and sustainable use of marine and coastal biological diversity.¹⁹⁶ Protected areas are endorsed.¹⁹⁷

The CBD may be amended by a two-third majority, although every effort is to be made to reach consensus.¹⁹⁸ Substantive decisions are taken by a two-third majority,¹⁹⁹ though decisions on financial matters²⁰⁰ are to be taken by consensus. A Party can request a secret ballot.²⁰¹

The CBD has a relatively sophisticated dispute resolution mechanism. Disputes are to be settled by negotiation, followed by mediation, followed by arbitration under Annex II Part 1 or submission to the ICJ, if either is accepted by the Party, and by formal conciliation under Annex II Part 2.²⁰²

CCAMLR

CCAMLR²⁰³ aims at the conservation of Antarctic marine living resources,²⁰⁴ which calls for international cooperation.²⁰⁵ ‘Conservation’ includes rational use, and conservation principles include maintenance of ecological relationships and prevention of potentially irreversible changes.²⁰⁶

CCAMLR adopts an ecosystem approach²⁰⁷ to the conservation of Antarctic marine life, and acknowledges a need for international co-operation,²⁰⁸ as well as to co-operate with Contracting Parties with respect to areas adjacent to the Treaty area.²⁰⁹ It operates with a Commission,²¹⁰ advised by a Scientific Committee,²¹¹ and formulates, adopts and revises conservation measures.²¹² Conservation measures can include measures as the Commission considers necessary for the fulfilment of the objective of the Convention, including measures concerning the effects of harvesting and associated activities on components of the marine ecosystem other than the harvested populations.²¹³ Substantive decisions are to be taken by consensus,²¹⁴ but members may object to conservation measures,²¹⁵ whereafter they are not bound by the measure.

CCAMLR provides that nothing in its Convention shall derogate from the rights and obligations of Contracting Parties under the International Convention for the Regulation of Whaling and the Convention for the Conservation of Antarctic Seals. That provision falls short of an exclusion of whales from its mandate and whether a measure derogates from the rights and obligations of Parties under the ICRW would have to be determined on the facts. CCAMLR sends an observer to the IWC and vice versa.²¹⁶ Japan reports to CCAMLR on its whaling activities²¹⁷

Disputes are to be resolved by resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice, and may be referred by consent of all Parties to the dispute to the ICJ or to arbitration.²¹⁸

CEP/MADRID PROTOCOL

Also relevant to activities in the Antarctic is the Committee for Environmental Protection²¹⁹ established under the Madrid Protocol.²²⁰ In the Protocol, the Parties commit themselves to the comprehensive protection of the Antarctic environment and dependent and associated ecosystems and designate Antarctica as a natural reserve, devoted to peace and science.²²¹ Its principles state that the protection of the Antarctic environment and dependent and associated ecosystems and the intrinsic value of Antarctica, including its wilderness and aesthetic values and its value as an area for the conduct of scientific research, in particular research essential to understanding the global environment, shall be fundamental considerations in the planning and conduct of all activities in the Antarctic Treaty area.²²² Co-operation and information sharing is paramount, and Parties agree to co-operate in the planning and conduct of activities in the Antarctic Treaty area.²²³ The Protocol establishes a system of environmental impact assessments.²²⁴

There is a comprehensive dispute settlements mechanism,²²⁵ with an arbitral tribunal as the default mechanism. The CEP shall attempt to reach consensus on recommendations and matters of substance, while questions of procedure are decided by a simple majority.²²⁶

Fish Stocks Agreement and IATTC

The UN Fish Stocks Agreement (FSA)²²⁷ represents an important case of implementation of the duty to co-operate. The objective of the FSA is to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks through effective implementation of the relevant provisions of the Law of the Sea Convention.²²⁸ It incorporates the ecosystem approach in article 5 and the precautionary approach in article 6 in giving effect to the duty to cooperate in accordance with the Law of the Sea Convention. The FSA implements

specific mechanisms for co-operation, principally through regional fishery management organizations or arrangements,²²⁹ mandates transparency²³⁰ and addresses compliance and enforcement²³¹ and specifically addresses dispute resolution.²³² The Parties and other participants concluded a mandatory review conference in May 2006.²³³

One such RFMO is the IATTC,²³⁴ which has competence over the Eastern Pacific Ocean, and is amended by the 2003 Antigua Convention, which is not yet in force,²³⁵ and is also associated with the 1997 AIDCP,²³⁶ which aims to reduce dolphin mortality in tuna purse-seine fishing. The Antigua Convention aims to ensure the long term conservation and sustainable use of the fish stocks covered by the Convention,²³⁷ and incorporates the precautionary approach.²³⁸ It has detailed provisions on arriving at decisions by consensus and does not permit opting out of decisions.²³⁹ It has non-binding dispute resolution provisions.²⁴⁰

Other Conventions

Some other conventions addressing wildlife include the Western Hemisphere Convention,²⁴¹ which is aimed at protection and preservation of flora and fauna in the Americas through the creation of reserves and parks and other measures, particularly in respect of migratory birds,²⁴² including through import and export controls.²⁴³

The 1973 Agreement on the Conservation of Polar Bears²⁴⁴ was recently amplified by the 2000 US-Russian Polar Bear Treaty,²⁴⁵ which extends protections for the Alaska-Chukotka polar bear population beyond the 1973 Agreement. It prohibits the taking of any polar bears from the population inconsistent with it or the 1973 Agreement, and includes harvest limits. It requires Parties to “cooperate with the goal of ensuring the conservation of the Alaska-Chukotka polar bear population, the conservation of its habitat, and the regulation of its use for subsistence purposes by native people”,²⁴⁶ and to undertake all efforts necessary to conserve polar bear habitats, with particular attention to denning areas and areas of concentration of polar bears during feeding and migration. To this end, they are to take steps necessary to prevent loss or degradation of such habitats that results in, or is likely to result in, mortality to polar bears or reduced productivity or long-term decline in the Alaska-Chukotka polar bear population.²⁴⁷

The Agreement establishes a U.S.-Russia Polar Bear Commission²⁴⁸ to coordinate measures for the conservation and study of the Alaska-Chukotka population of polar bears and can set annual harvest limits²⁴⁹ not to exceed the sustainable harvest level and recommend conservation measures. Decisions and recommendations require the approval of both the US and Russian sections, which are to include native representatives.

In the event of any disagreement with regard to the interpretation or application of the provisions of this Agreement, the Contracting Parties shall consult with a view to resolving the disagreement through negotiation. At the request of either Contracting Party, the Commission shall examine any point of disagreement. The recommendations of the Commission in such matters shall be presented to the Contracting Parties.²⁵⁰

The 1987 Agreement on the Conservation of the Porcupine Caribou Herd between Canada and the United States recognizes that the herd is a ‘unique and irreplaceable natural resource of great value which each generation should maintain and make use of so as to conserve them for future generations.’²⁵¹ The Agreement aims to conserve the Porcupine Caribou Herd and its habitat through international cooperation and coordination so that the risk of irreversible damage or long-term adverse effects as a result of use caribou or their habitat is minimized.²⁵²

The Ramsar Convention²⁵³ maintains a list of wetlands of international significance²⁵⁴ and promotes their conservation²⁵⁵ and wise use of wetlands in territories of States Parties.²⁵⁶ It has no dispute resolution procedures, but Parties are to consult with each other about implementing

obligations arising from the Convention especially in the case of a wetland extending over the territories of more than one Contracting Party or where a water system is shared by Contracting Parties.²⁵⁷

Recommendations, decisions and resolutions of the Conference of the Parties, are adopted by a simple majority²⁵⁸ except for budget which requires a 2/3 majority.²⁵⁹ IUCN provides secretariat services.²⁶⁰ In addition to the Conference, there is a Standing Committee and a Scientific and Technical Review Panel.²⁶¹

CONCLUSION

A governance framework for whales must enable and encourage participants and stakeholders to co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the global whale populations as part of the overall goals of integrated management and sustainable development of the oceans and seas. It must integrate with other elements of international governance to that wider goal.

Problems with the current governance of the IWC stem from deficiencies in its convention, which was concluded well before current requirements for conservation and management were developed, and before elements of good governance of multilateral environmental agreements evolved. Such governance requires a governance framework which will enable and encourage participants and stakeholders to co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the global whale populations. Sustainability and the goal of conservation of whales, an integrated approach, an ecosystem approach which is aimed at all aspects of sustainability including habitat and prey, a precautionary approach and prior environmental impact assessments are all elemental aspects of modern environmental governance.

The mechanisms for achieving these goals are crucial. Co-operation with a view to the conservation of whales is both specifically required under the Law of the Sea Convention and is a consistent element of governance in modern MEAs. In achieving and directing such co-operation, elements of good governance would include efficient and participation based decision-making processes addressing opt-out provisions, the capacity to ensure compliance and enforcement of its decisions, mechanisms for international co-operation between States and co-ordination between international agencies, transparency, consultation, participation, and effective dispute resolution mechanisms.

This could best be achieved through a high-level ministerial or diplomatic conference which would address these issues. While amending the ICRW through a protocol agreed by all parties is theoretically possible, the necessary reforms are so substantial that it is likely that only a new convention will achieve the necessary reforms. Discussions would be informed by the decades of evolution in governance of biodiversity and the environment that have passed since the 1940s and by the spirit of co-operation and consultation that has evolved with it. They would take place in the context of the Law of the Sea Convention, as well as the CBD and other relevant instruments such as CMS and CCAMLR, and the experience that has been gained under those and other instruments.

Endnotes

¹ Plan of Implementation of the World Summit on Sustainable Development (*Report of the World Summit on Sustainable Development, Johannesburg South Africa, 26 August-4 September 2002* (United Nations publication, Sales No. E.03.II. A. 1 and corrigendum), chap I, resolution 2, annex) (“JPOI”) para. 123, at http://www.johannesburgsummit.org/html/documents/summit_docs/2309_planfinal.htm. See also The Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development Geneva, Switzerland, 26-28 September 1995, para. 123, at <http://www.un.org/documents/ecosoc/cn17/1996/background/ecn171996-bp3.htm>.

² See Benedict Kingsbury, Nico Krisch, Richard B. Stewart, and Jonathan B. Wiener, “Global Governance as Administration -- National and Transnational Approaches to Global Administrative Law”, *68 Law & Contemp. Probs.*, at <http://www.law.duke.edu/journals/lcp/articles/lcp68dsummerautumn2005p1.htm> and Benedict Kingsbury, Nico Krisch, Richard Stewart,” The Emergence of Global Administrative Law,” *68:3-4 LCP* (2005) 15, at <http://www.iilj.org/papers/2004/documents/2004.1KingsburyKrischStewart.pdf>. See also P.E. Birnie and A.E. Boyle, *International Law and the Environment*, Oxford University Press (2002; 2nd ed.), 560, noting the need to provide a forum for discussion, evaluation, co-ordination, and adoption of required measures, compliance and enforcement mechanisms and dispute settlement arrangements. See also Philippe Sands, *I Principles of International Environmental Law* (1995), 433-439.

³ Declaration of the United Nations Conference on the Human Environment (1972), UN Doc A/CONF/48/14/REV.1, 11 I.L.M. 1416 (1972), at <http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=97&ArticleID=1503>, (“Stockholm Declaration”). Unless otherwise stated all web references are as at 16 May, 2006.

⁴ Stockholm Declaration, Principle 2.

⁵ Stockholm Declaration, Principle 4.

⁶ Stockholm Declaration Principle 24.

⁷ Stockholm Declaration Principle 25.

⁸ World Charter for Nature, General Assembly resolution 37/7, 28 October 1982, at <http://www.un.org/documents/ga/res/37/a37r007.htm>.

⁹ World Charter for Nature, para. 2.

¹⁰ World Charter for Nature, para. 20.

¹¹ World Charter for Nature, para. 21(e).

¹² World Charter for Nature, para. 21(c).

¹³ World Commission on Environment and Development, “Our Common Future,” UN Doc. A/42/47, (4 August 1987) (“Brundtland Report”), at http://www.une.admin.ch/are/en/nachhaltig/international_uno/unterseite02330.

¹⁴ Brundtland Report, 10.16, page 261.

¹⁵ Brundtland Report Annex I, Summary of Proposed Rights and Principles for Environmental Protection and Sustainable Development Adopted by the WCED Experts Group on Environmental Law, Principle 8. See also Principle 14.

¹⁶ Report of the UN Conference on Environment and Development, Rio de Janeiro 3-14 June 1992 (“Rio Declaration”), UN Doc. A/CONF.151/26/Rev.1, at <http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=78&ArticleID=1163>.

¹⁷ Rio Declaration Principle 7.

¹⁸ Rio Declaration Principle 15.

¹⁹ Rio Declaration Principle 17.

²⁰ Rio Declaration Principle 12.

- ²¹ Rio Declaration Principle 26.
- ²² Rio Declaration Principle 27.
- ²³ Rio Declaration Principle 10.
- ²⁴ International Institutional Arrangements, para. 38.2.
- ²⁵ See also 17.61 and 17.62, discussed below in note 139.
- ²⁶ Convention on Biological Diversity, concluded 5 June 1992, entered into force 29 December 1993, at 31 ILM 818, (“CBD”), at <http://www.biodiv.org/convention/default.shtml>.
- ²⁷ CBD Preamble.
- ²⁸ CBD article 5.
- ²⁹ CBD article 22(2).
- ³⁰ CBD article 22(1).
- ³¹ JPOI para. 42.
- ³² JPOI para. 122.
- ³³ See discussion of Decision VII/1 on page 18.
- ³⁴ JPOI para. 123.
- ³⁵ World Summit Outcome, 60/1 2005 World Summit Outcome, 24 October 2005, at <http://www.un.org/summit2005>.
- ³⁶ World Summit Outcome, para. 1569.
- ³⁷ Decision 11/4 Promoting the Application of the Principles of the Aarhus Convention in International Forums, adopted at the second meeting of the Parties held in Almaty, Kazakhstan, on 25-27 May 2005.
- ³⁸ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 1998. Aarhus Convention article 3(7) provides that “[e]ach Party shall promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment.”
- ³⁹ Almaty Guidelines, para.11.
- ⁴⁰ See for instance CBD article 8 and 10.
- ⁴¹ *The MOX Plant Case (Ireland v. U.K.)*, (ITLOS 2001), 41 I.L.M. 405 (2002), at 415, para. 82.
- ⁴² United Nations Convention on the Law of the Sea, signed at Montego Bay, Jamaica, 10 December 1982, entered into force 16 November 1994, UN Doc. A/CONF.62/122 (1982), 21 I.L.M. 1261 (1982) (‘Law of the Sea Convention’), at http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm. Article 65. See also article 61(2) relating to conservation of marine resources within the EEZ, and article 64(2) with respect to highly migratory species.
- ⁴³ Article 118 of the Law of the Sea Convention.
- ⁴⁴ Article 117 of the Law of the Sea Convention.
- ⁴⁵ See page 18.
- ⁴⁶ International Convention for the Regulation of Whaling, opened for signature at Washington, 2 December 1946, entered in force 10 November 1948, 161 UNTS 72. Amended by Protocol 19 November 1956 (338 UNTS 366). (ICRW). At <http://www.iwcoffice.org/commission/convention.htm>.
- ⁴⁷ The ICRW followed the 1931 Convention for the Regulation of Whaling, entered into force 16 January 1935, 155 LNTS 349, and its two protocols. See discussion in Simon Lyster, *International Wildlife Law* (1985), 17-18.

⁴⁸ A Protocol was agreed in 1956. Protocol to the International Convention for the Regulation of Whaling Signed at Washington under date of December 2, 1946, signed at Washington, 19 November 1956. At <http://www.iwcoffice.org/commission/convention.htm#protocol>.

⁴⁹ ICRW article I(1). Schedule is at <http://www.iwcoffice.org/commission/schedule.htm> and <http://www.iwcoffice.org/documents/commission/schedule.pdf>.

⁵⁰ ICRW article V(1).

⁵¹ ICRW article V(1).

⁵² ICRW article V(2).

⁵³ Resolution 2001-9, at <http://www.iwcoffice.org/meetings/resolutions/resolution2001.htm>.

⁵⁴ See Resolution 1994-5. See a description at <http://www.iwcoffice.org/conservation/rmp.htm>. See WWF, Science, Profit and Politics: Scientific Whaling in the 21st Century, June 2005, at <http://www.panda.org/downloads/species/wwfsciwhalingreportfinal.pdf>.

⁵⁵ See resolutions 2000-3, 2004-6 and 2005-4 and lately the report of the RMS Working Group at <http://www.iwcoffice.org/commission/rmsworkgroup.htm>. See discussion of progress on the RMS at <http://www.iwcoffice.org/conservation/rms.htm>.

⁵⁶ See Report of the Conservation Committee, July 2004, at <http://www.iwcoffice.co.uk/documents/meetings/reports/AnnexH.pdf>. See Resolution 2003-1 establishing the Committee.

⁵⁷ 2004 Report, *ibid*.

⁵⁸ See 2005 report of the Conservation Committee at <http://www.iwcoffice.org/documents/meetings/ulsan/AnnexH.pdf>. The IWC was able to carry forward recommendations about so-called 'stinky' grey whales, contaminated whales in the arctic which have a strong chemical smell, and ship strikes. See Chairman's report at <http://www.iwcoffice.org/documents/meetings/ulsan/CRREP57.pdf>.

⁵⁹ The Scientific Committee identified environmental change as a threat to whale populations and their critical habitats. Effects such as climate change, chemical pollution, physical and biological habitat degradation, effects of fisheries, ozone depletion and UV-B radiation, Arctic issues, disease and mortality events and the impact of noise were discussed (IWC Resolution 1998-5).

⁶⁰ Tynan, C.T. and D.P. DeMaster, "Observations and predictions of Arctic climate change: potential effects on marine mammals," *50 Arctic*, (1997), 308-322.

⁶¹ See Würsig, B. and Richardson, W.J., "Effects of Noise", in *Encyclopedia of Marine Mammals*, Perrin, W.F., Würsig, B., and Thewissen, J.G.M. (Eds), Academic Press, San Diego (2002).

⁶² See Richardson, W.J., Greene, C.R., Malme, C.I., Thomson, D.H. (1995) *Marine Mammals and Noise*, Academic Press, San Diego.

⁶³ Reijnders, P.J.H. & Aguilar, A., "Pollution and Marine mammals," in *Encyclopedia of Marine Mammals*, Perrin, W.F., Würsig, B., Thewissen, J.G.M. (Eds), Academic Press, San Diego (2002).

⁶⁴ IPCC (2001) Climate Change 2001: Impacts, Adaptation, and Vulnerability, Contribution of Working Group II to the Third Assessment Report of the Intergovernmental Panel on Climate Change, 6.3.7, at http://www.grida.no/climate/ipcc_tar/wg2/291.htm#637.

⁶⁵ See WWF, *Current Status of the Great Whales*, at http://www.worldwildlife.org/cetaceans/pubs/whales_current_status.pdf.

⁶⁶ The IWC highlighted the importance of integrated coastal zone management as well as habitat protection in Resolution 2001-11.

⁶⁷ International Court of Justice, 1971 *Advisory Opinion on Namibia (South West Africa)* on the interpretation of the Covenant of the League of Nations:1971 *ICJ Rep.*.3,31.

⁶⁸ *Case concerning the Gabčíkovo-Nagymaros Project*, 1997 ICJ Reps. 7, at paras. 112 and 140, concerning a 1977 Treaty between Hungary and Czechoslovakia.

⁶⁹ Article 120 of UNCLOS provides that Article 65 also applies to the conservation and management of marine mammals in the high seas.

⁷⁰ Article 40(4) of the Vienna Convention on the Law of Treaties which provides that the amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement. Vienna Convention on the Law of Treaties, concluded At Vienna 23 May 1969, entered into force 27 January 1980, at UN Doc A/Conf 39/28, UKTS 58 (1980), 8 ILM 679, article 40(4). As between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations: article 30(4)(b).

⁷¹ ICRW Protocol article I.

⁷² ICRW Protocol article II.

⁷³ ICRW Protocol article III(2).

⁷⁴ ICRW article I(1).

⁷⁵ ICRW article III(2).

⁷⁶ ICRW article V(2).

⁷⁷ ICRW article V(3).

⁷⁸ ICRW article IX(1)

⁷⁹ See article IX(4) of the ICRW. See for instance the 2005 Report of the Infractions Sub-committee, at http://www.iwcoffice.org/_documents/meetings/ulsan/AnnexI.pdf.

⁸⁰ See the 2004 Report at http://www.iwcoffice.co.uk/_documents/meetings/reports/AnnexI.pdf. The UK considered that since the quota was zero and any bycatch should be taken off quota, any bycatch constituted an infraction.

⁸¹ See 2005 Report.

⁸² ICRW article III(2). See 2005 Rules of Procedure, at http://www.iwcoffice.org/_documents/commission/rules2004.pdf.

⁸³ IWC Rules of Procedure E1. Commissioners are appointed by each Contracting Government: Rule A1.

⁸⁴ See IWC Rules of Procedure E.

⁸⁵ Lyster, *op. cit.*, 38. See some earlier critiques by R. Gambell, "The International Whaling Commission – quo vadis?," 20 *Mammal Review* (1990), 31-32, S. Andresen, "The Effectiveness of the International Whaling Commission," 46 *Arctic* (1993), 108-15 and Oran R. Young, Milton M. R. Freeman, Gail Osherenko, Raoul R. Anderson, Richard A. Caulfield, Robert L. Friedheim, Steve J. Langdon, Mats Ris & Peter J. Usher, "Subsistence, Sustainability, and Sea Mammals: Reconstructing the International Whaling Regime" 23 *Ocean and Coastal Management* (1994) 117, David D. Caron, "Current Development: The International Whaling Commission and the North Atlantic Marine Mammal Commission: "The Institutional Risks of Coercion in Consensual Structures," 89 *Am. J. Int'l L.* 154, 171 (1995), Howard Scott Schiffman, "The Protection of Whales in International Law: A Perspective for the Next Century," 22 *Brook. J. Int'l L.* 303, 308 (1996). William C. Burns, "The International Whaling Commission and the Future of Cetaceans: Problems and Prospects," 8 *Colo. J. Int'l Envtl. L. & Pol'y* (1997) (31), Alexander Gillespie, "The Ethical Question in the Whaling Debate", 9 *Geo. Int'l Envtl. L. Rev.* (1997) 355, Sarah Suhre, "Misguided Morality: The Repercussions of the International Whaling Commission's Shift from a Policy of Regulation to One of Preservation," 12 *Geo. Int'l Envtl. L. Rev.* 305, 310 (1999). Adrienne M. Ruffle, "Resurrecting the International Whaling Commission: Suggestions to Strengthen the Conservation Effort," 27 *Brook. J. Int'l L.* (2002), 639, Judith Berger-Eforo, "Note, Sanctuary for the Whales: Will This be the Demise of the International Whaling Commission or a Viable Strategy for the Twenty-First Century?," 8 *Pace Int'l L. Rev.* (1996) 439 and Elisa Morgera "Whale Sanctuaries: An Evolving Concept within the International Whaling Commission," 35 *Ocean Development and International Law*, (2004), pp. 319-338.

⁸⁶ ICRW article V(3).

⁸⁷ There is an initial 90 day period within which Governments may object. But if any Government objects prior that time, the amendment shall not become effective with respect to any of the Governments for an additional 90 days, and then any other Contracting Government may object within the additional 90 day period, or up to 30 days after the last objection was received, whichever was late: ICRW article V(3).

⁸⁸ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, entered into force 11 December 2001, 1542 A/CONF.164/37, 34 *International Legal Materials* 1542. Text at http://www.un.org/Depts/los/convention_agreements/convention_overview_fish_stocks.htm.

⁸⁹ This decision is similar to a NEAFC procedure in place since 2004 requiring parties to provide a written statement identifying the reason for objection, their intentions, and alternative conservation and management measures. See Evelyn Meltzer, *Global Overview of Straddling and Highly Migratory Stocks* (2005), at http://www.dfo-mpo.gc.ca/fgc-cgp/documents/meltzer_e.htm and <http://www.dfo-mpo.gc.ca/fgc-cgp/documents/meltzer/NEAFCfinal.pdf>, and A. Willock and M. Lack, *Follow the Leader: Learning from experience and best practice in regional fishery management organizations*, (2006), 35, at http://www.traffic.org/news/RFMO_report_06.pdf.

⁹⁰ The Russian Federation also lodged a timely objection to paragraph 7(b) but withdrew it on 26 October 1994. For all Contracting Governments except Japan, paragraph 7(b) came into force on 6 December 1994.

⁹¹ See Report of IWC, 45:28 (1995), para. 12.3. The northern boundary of the Southern Ocean Sanctuary follows the 40° south parallel of latitude except in the Indian Ocean sector, where it joins the southern boundary of that sanctuary at 55° south around South America and into the South Pacific, where the boundary is at 60° south. See paragraph 7(b) of the Schedule.

⁹² See Report of IWC, 45:28 (1995), para. 12.3. The northern boundary of the Southern Ocean Sanctuary follows the 40° south parallel of latitude except in the Indian Ocean sector, where it joins the southern boundary of that sanctuary at 55° south around South America and into the South Pacific, where the boundary is at 60° south. See paragraph 7(b) of the Schedule.

⁹³ Brundtland Report, 10.33, note 13 above, page 265.

⁹⁴ See a list of permits granted at <http://www.iwcoffice.org/conservation/permits.htm>.

⁹⁵ Japan lodged an objection, and Japan withdrew its objection with effect from 1 May 1987 for commercial pelagic whaling; from 1 October 1987 for commercial coastal whaling for minke and Bryde's whales; and from 1 April 1988 for commercial coastal sperm whaling. Norway, Peru and the former USSR also lodged objections. Peru withdrew its objection on 22 July 1983. The objections of Norway and the Russian Federation still stand.

⁹⁶ ICRW Article VIII(1). The authorising party must report such authorizations to the Commission, together with scientific information relating to whaling, including the results of the research. ICRW, Article VIII(3).

⁹⁷ See paragraph 30 of the IWC Schedule and see IWC Resolution 1996-7, IWC Resolution 1995-8, and IWC Resolution 1995-9.

⁹⁸ Paragraph 30 of the IWC Schedule.

⁹⁹ 1946 Convention, Article VIII(3).

¹⁰⁰ See IWC Resolution 1999-2.

¹⁰¹ See IWC Resolution 1995-9 and IWC Resolution 2000-5, and Resolutions 1996-7, 1997-5, 1998-4 and 1993-3.

¹⁰² IWC Resolution 2000-4.

¹⁰³ IWC Resolution 2001-8.

¹⁰⁴ See <http://www.iwcoffice.org/conservation/permits.htm>.

¹⁰⁵ IWC Resolution 2003-3.

¹⁰⁶ IWC Resolution 2003-4.

¹⁰⁷ IWC Resolution 2005-1.

¹⁰⁸ IWC Resolution 1998-4.

¹⁰⁹ See IWC Resolution 1995-8, IWC Resolution 1996-7, IWC Resolution 1999-3, IWC Resolution 2000-4, IWC Resolution 2001-7, and IWC Resolution 2003-3.

¹¹⁰ See the Anglo-Norwegian Fisheries case, where the ICJ noted a case of ‘manifest abuse’ of the right to measure the territorial sea; 1951 *ICJ Reps.* See generally on abuse of rights *Oppenheim’s International Law* (9th ed), Vol. 1, R. Jennings and A. Watts, eds. (1997), Vol. 1, 407-410.

¹¹¹ Law of the Sea Convention article 300. See also *United States - Import Prohibition Of Certain Shrimp and Shrimp Products* Wt/Ds58/Ab/R 12 October 1998 (‘Shrimp Turtle Case’), where the Appellate Body noted that a balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members (para 156). The Body noted that to permit one Member to abuse or misuse its right to invoke an exception would effectively allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members. The International Tribunal for the Law of the Sea (ITLOS) noted that there might be instances in which a Party to UNCLOS and fisheries treaty implementing it would be so egregious and risk consequences of such gravity that a Tribunal might find that the obligations of UNCLOS provide a basis for jurisdiction, having particular regard to the provisions of UNCLOS Article 300, which requires good faith and prohibits abuse of rights.

¹¹² A State, while technically acting within the law, may nevertheless incur liability by abusing its rights. See generally *Oppenheim’s International Law* (9th ed), Vol. 1, R. Jennings and A. Watts, eds. (1997), Vol. 1, 407-410, the *Anglo-Norwegian Fisheries case* 1951 *ICJ Reps.* and the *Southern Bluefin Tuna Case Australia and New Zealand v. Japan: Award on Jurisdiction and Admissibility*, (August 4, 2000), at <http://www.worldbank.org/icsid/highlights/bluefintuna/award080400.pdf>, para. 64. See also the obligation to act in good faith and not to abuse rights in article 300 of the Law of the Sea Convention and Article 26 of the Vienna Convention on the Law of Treaties. Note also the obligations to co-operate in articles 65 and 120 of the Law of the Sea Convention.

¹¹³ See discussion of elements of governance on page 2.

¹¹⁴ IWC Resolution 2001-1.

¹¹⁵ 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States, in accordance with the United Nations Charter, GA Res. 2625 (XXV), October 24, 1999.

¹¹⁶ This proposal was defeated by a 30-27 vote. In 2004 Japan’s motion was defeated 29-24. See Chair’s Report of the 56th Annual Meeting, 14 at <http://www.iwcoffice.org/documents/meetings/ChairReportIWC56final.pdf>.

¹¹⁷ See Sue Lieberman, “Too Close for Comfort,” (2004), at http://www.panda.org/news_facts/newsroom/opinions/index.cfm?uNewsID=14250, ECO 20 June 2005, at <http://www.earthisland.org/immmp/eco2005issue1.html#votescandal>, and see discussion by Alexander Gillespie, “Vote-Buying in International Fora”, (2001), at http://www.oceancare.org/de/downloads/OceanCare_Reports/Vote_Buying_in_international_Fora_e.pdf.

¹¹⁸ See discussion in note 112.

¹¹⁹ See the 1970 Declaration, above at note 115. The Declaration also restates the principle that every State has the duty to fulfil in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* 1984 *ICJ REP.* 392 June 27, 1986, (merits), paras. 205, at <http://www.icj-cij.org/icjwww/icasess/inus/inusframe.htm>.

¹²⁰ See Chair’s report, note 116, page 74.

¹²¹ See discussion on page 3.

¹²² IWC Schedule para 10(e).

¹²³ Australia noted during the 2004 IWC meeting at Sorrento that while it has a long standing position that it would not support the resumption of commercial whaling, it has a legitimate interest in ensuring that, in case this should occur, any management scheme developed has to be tested against best and improving practice. See Chair’s Report of the 56th Annual Meeting, (19-22 July 2004), page 37, at <http://www.iwcoffice.org/documents/meetings/ChairReportIWC56final.pdf>.

¹²⁴ See Erik Jaap Molenaar, “The Concept of “Real Interest” and Other Aspects of Co-operation through Regional Fisheries Management Mechanisms,” 15 *International Journal of Marine and Coastal Law* (2000), pp. 475-531(57).

¹²⁵ IWC Schedule para 13(b)(1)(i), 13(b)(3)(ii) and (iii). See list of catches at <http://www.iwcoffice.org/conservation/catches.htm>.

¹²⁶ Law of the Sea Convention, Part XV. Articles 279 – 299.

¹²⁷ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 1998. Aarhus Convention article 3(7) provides that “[e]ach Party shall promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment.”

¹²⁸ Decision 11/4 Promoting the Application of the Principles of the Aarhus Convention in International Forums, adopted at the second meeting of the Parties held in Almaty, Kazakhstan, on 25-27 May 2005.

¹²⁹ Almaty Guidelines, para. 11.

¹³⁰ See <http://www.unep.org/GC/GCSS-IX/DOCUMENTS/K0584382-GCSS-IX-3.doc>.

¹³¹ World Summit on Sustainable Development, Johannesburg Plan of Implementation Para 140, at http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm.

¹³² At <http://www.unep.org/GC/GCSS-VII/Documents/K0260448.doc>.

¹³³ At <http://www.unep.org/DEC/docs/UNEP.Guidelines.on.Compliance.MEA.pdf>. UNEP Decision VII/1 on International Environmental Governance, 2002, at <http://www.unep.org/GC/GCSS-VII/Documents/K0260448.doc>.

¹³⁴ Decision VII/1 para. 40.

¹³⁵ 23rd Session of the Governing Council / Global Ministerial Environment Forum (2005), Implementation of decision SS.VII/1 on international environmental governance, at <http://www.unep.org/gc/gc23/>.

¹³⁶ Willock and Lack, note 89, page vi.

¹³⁷ Law of the Sea Convention article 192.

¹³⁸ See discussion in Birnie and Boyle, note 38, 666.

¹³⁹ Chapter 39, International Legal Instruments and Mechanisms. Agenda 21, Chapter 17, recognized the responsibility of the IWC for the conservation and management of whale stocks and the regulation of whaling pursuant to the ICRW, the work of the IWC Scientific Committee in carrying out studies of large whales in particular, as well as of other cetaceans, and 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. Agenda 21, Chapter 17, para. 17.61, 17.62.

¹⁴⁰ Report on the work of the United Nations Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction, A/61/65, at <http://www.un.org/depts/los/biodiversityworkinggroup/biodiversityworkinggroup.htm>.

¹⁴¹ Agreement on Cooperation in Research, Conservation and Management of Marine Mammals in the North Atlantic, signed 9 April 1992, entered into force 7 July 1992. Agreement at <http://www.nammco.no/webcronize/images/Nammco/659.pdf>.

¹⁴² NAMMCO Agreement article 2.

¹⁴³ The Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed at Washington, D.C., 3 March 1973, entered into force 1 July 1975, amended at Bonn, 22 June 1979. 993 UNTS 243, copy as amended at <http://www.cites.org/eng/disc/text.shtml>.

¹⁴⁴ List of Parties at <http://www.cites.org/eng/disc/parties/index.shtml>.

¹⁴⁵ CITES Article I(c). ‘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.” CITES Article I(e). The introduction from the sea of a specimen of a species on Appendix I or II requires the prior grant of a certificate. Such a certificate may only be granted when strict conditions have been met. See CITES Article III(5) and Article IV(5) respectively.

- ¹⁴⁶ Reservations are at http://www.cites.org/eng/app/reserve_index.shtml.
- ¹⁴⁷ CITES article II.
- ¹⁴⁸ Appendices are at <http://www.cites.org/eng/app/index.shtml>.
- ¹⁴⁹ CITES article II(1), III.
- ¹⁵⁰ Criteria for amendment of Appendices I and II, Conf. 9.24 (Rev. CoP13) at <http://www.cites.org/eng/res/09/09-24R13.shtml>
- ¹⁵¹ CITES article XV. Amendments to Appendix III are submitted by States Parties under article XVI.
- ¹⁵² See Rules of Procedure of the Conference of the Parties (2004), Rule 25(2), requiring ten representatives to second a request. Rules at <http://www.cites.org/eng/cop/E13-Rules.pdf>.
- ¹⁵³ See for instance the vote in COP-13 where Japan introduced a resolution on the listing of whales and the IWC. The United States and Australia stated that in the interests of transparency they were opposed to the use of secret ballots. COP13 Com. Rep. 14 (Rev.1), (2004) discussing COP13 Doc.12.2. At <http://www.cites.org/eng/cop/13/rep/E13-ComIRep14.pdf>. Draft resolution at <http://www.cites.org/eng/cop/13/doc/E13-12-2.pdf>.
- ¹⁵⁴ CITES article XVII.
- ¹⁵⁵ CITES article XI(7).
- ¹⁵⁶ Conf. 13.8, Participation of observers at meetings of the Conference of the Parties, at <http://www.cites.org/eng/res/13/13-08.shtml>.
- ¹⁵⁷ CITES article XVIII.
- ¹⁵⁸ Conf. 11.4 (Rev. CoP12), Conservation of cetaceans, trade in cetacean specimens and the relationship with the International Whaling Commission, at <http://www.cites.org/eng/res/11/11-04.shtml>.
- ¹⁵⁹ Convention on the Conservation of Migratory Species of Wild Animals, signed in Bonn 23 June 1979, entered into force 1 November 1983, 19 ILM (1980) 15, text at http://www.cms.int/documents/convtxt/cms_convtxt.htm and http://www.cms.int/pdf/convtxt/cms_convtxt_english.pdf. List of 97 Parties as of 1 May 2006 at http://www.cms.int/pdf/en/party_list/Partylist_eng.pdf. Japan and Iceland are not parties.
- ¹⁶⁰ CMS Preamble.
- ¹⁶¹ CMS article II(1).
- ¹⁶² CMS article II(2).
- ¹⁶³ CMS article II(3).
- ¹⁶⁴ CMS article II(3).
- ¹⁶⁵ http://www.cms.int/pdf/en/CMS_Species_5lng_Mar2004.pdf
- ¹⁶⁶ An Australian proposal to add Antarctic Minke, Bryde's, Fin, Pigmy Southern Right, Sei, and Sperm whales was successful. See UNEP/CMS/Conf.7.12 Annex (Rev.1) at http://www.cms.int/bodies/COP/cop7/cop7_species_proposals.htm and the species added to the appendices at http://www.cms.int/bodies/COP/cop7/proceedings/pdf/en/part_I/annex_XI_species_added_en.pdf.
- ¹⁶⁷ See COP 7 Resolution 7.15, Future Action on the Antarctic Minke, Bryde's and Pygmy Right Whales Under the Convention on Migratory Species (2002), at http://www.cms.int/bodies/COP/cop7/proceedings/pdf/en/part_I/Res_Rec/RES_7_15_Great_Whales.pdf.
- ¹⁶⁸ CBD COP Decision VI/20, para. 23, at <http://www.biodiv.org/decisions/default.aspx?m=COP-06&id=7194>.
- ¹⁶⁹ 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. Copy at http://www.cms.int/bodies/COP/cop7/list_of_docs/pdf/en/CP7CF7_11_Cooperation_Other_Bodies.pdf.

¹⁷⁰ CMS Resolution 8.22 At http://www.cms.int/bodies/COP/cop8/documents/proceedings/html/en/cop8_res_rec_en.htm and http://www.cms.int/bodies/COP/cop8/documents/proceedings/pdf/eng/CP8Res_8_22_AdverseHumanImpacts_on_Cetaceans_E.pdf.

¹⁷¹ The resolution listed entanglement and bycatch, climate change, ship strikes, pollution, habitat and feeding ground degradation and marine noise as human induced impacts.

¹⁷² The Agreement was concluded in September 1991 and entered into force on 29 March 1994. See website at <http://www.ascobans.org/>. Text at <http://www.ascobans.org/index0101.html>.

¹⁷³ ASCOBANS article 2. A conservation and management plan is provided.

¹⁷⁴ See Proceedings of the 4th Meeting of the Parties, 2003, at http://www.service-board.de/ascobans_neu/files/MOP4FinalReport.PDF.

¹⁷⁵ The Agreement on the Conservation of Cetaceans in the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (ACCOBAMS). Website at <http://www.accobams.org/>. Agreement at <http://www.accobams.org/file.php/147/Text%20of%20the%20Agreement.doc>.

¹⁷⁶ ACCOBAMS article II.

¹⁷⁷ See Progress report Progress report on relevant activities undertaken within the framework of CMS, ASCOBANS and ACCOBAMS to the 57th meeting of the International Whaling Commission Ulsan, Republic of Korea, 20-24 June 2005 at http://www.cms.int/pdf/en/CMS_ProgRep_IWC57_final.pdf.

¹⁷⁸ CMS article XIII.

¹⁷⁹ CMS article VII. Procedural matters are decided on a simple majority. See provisional Rules of Procedure for the Eighth Meeting of the Conference of the Parties, UNEP/CMS/Conf.8.4/Rev.2 (26 October 2005), Rule 15.4, at http://www.cms.int/bodies/COP/cop7/proceedings/pdf/en/part_I/annex_II_rules_of_procedure_en.pdf.

¹⁸⁰ CMS article X.

¹⁸¹ See Rules of Procedure for the Seventh Meeting of the Conference of the Parties, Rule 14.

¹⁸² CBD article I.

¹⁸³ CBD preamble.

¹⁸⁴ The Convention on Biological Diversity *signed* at Rio de Janeiro on 5 June 1992, *entered into force* 29 December 1993, 31 ILM (1992). Text at <http://www.biodiv.org/doc/legal/cbd-en.pdf> and the secretariat website is at www.biodiv.org.

¹⁸⁵ “Biological diversity” means the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems: CBD Article 2.

¹⁸⁶ CBD, Article 5.

¹⁸⁷ CBD, Article 2.

¹⁸⁸ CBD, Article 10.

¹⁸⁹ CBD, Article 14(1)(a).

¹⁹⁰ CBD, Article 14(1)(c).

¹⁹¹ Article 22 of the CBD provides that the provisions of the Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.

¹⁹² Adopted by the Second Conference of Parties to the CBD meeting in Jakarta (November, 1995). See <http://www.biodiv.org/programmes/areas/marine/>.

- ¹⁹³ Decision II/10, Conservation and Sustainable Use of Marine and Coastal Biological Diversity, Annex II, para. 3(a), at <http://www.biodiv.org/decisions/?lg=0&dec=II/10>.
- ¹⁹⁴ Decision II/10 Decision II/10: Conservation and Sustainable Use of Marine and Coastal Biological Diversity, Annex I, para. 2, at <http://www.biodiv.org/decisions/?lg=0&dec=II/10>.
- ¹⁹⁵ Decision IV/5 (1998), Conservation and sustainable use of marine and coastal biological diversity, including a programme of work, Annex, para. 4, at <http://www.biodiv.org/decisions/?lg=0&dec=IV/5>.
- ¹⁹⁶ Decision IV/5 (1998), Annex, para. A.
- ¹⁹⁷ Decision IV/5 (1998), Annex, para. 1, 3.
- ¹⁹⁸ CBD article 29(3).
- ¹⁹⁹ Rules of Procedure, Rule 40, at Rules of Procedure for Meetings of the Conference OF the Parties to the Convention on Biological Diversity, at <http://www.biodiv.org/doc/legal/cbd-rules-procedure.pdf>.
- ²⁰⁰ That is, votes under Article 21(1) and (2).
- ²⁰¹ Rules of Procedure Rule 46.
- ²⁰² CBD article 27.
- ²⁰³ Convention on the Conservation of Antarctic Marine Living Resources, done at Canberra, 20 May 1980, entered into force 7 April 1982. Text at <http://www.ccamlr.org/pu/e/pubs/bd/pt1.pdf>. Members include Argentina, Australia, Belgium, Brazil, Chile, European Community, France, Germany, India, Italy, Japan, Korea (Rep. of), New Zealand, Norway, Poland, Russia, South Africa, Spain, Sweden, Ukraine, United Kingdom, United States, and Uruguay.
- ²⁰⁴ CCAMLR article II(1).
- ²⁰⁵ CCAMLR Preamble.
- ²⁰⁶ CCAMLR article II(3).
- ²⁰⁷ The Antarctic marine ecosystem is defined to mean the complex of relationships of Antarctic marine living resources with each other and with their physical environment. CCAMLR article I(3).
- ²⁰⁸ CCAMLR Preamble.
- ²⁰⁹ CCAMLR article XI.
- ²¹⁰ CCAMLR article XII.
- ²¹¹ CCAMLR article XIV.
- ²¹² CCAMLR article (1)(f).
- ²¹³ CCAMLR article IX(2)(i).
- ²¹⁴ CCAMLR article XI. The question of whether a matter is one of substance is to be treated as a matter of substance.
- ²¹⁵ CCAMLR article IX(6)(c) and (d).
- ²¹⁶ See [ccamlr-xxiv/bg/41](http://www.ccamlr.org/pu/e/pubs/bg/41) and [ccamlr-xxiv/bg/45](http://www.ccamlr.org/pu/e/pubs/bg/45).
- ²¹⁷ See report on its 2004-2005 whaling, “Report of Member’s Activities in the Convention Area 2004-5, Japan,” at http://www.ccamlr.org/pu/E/e_pubs/ma/04-05/japan05.pdf.
- ²¹⁸ CCAMLR article XXV. An brief Annex provides for the establishment of an arbitral tribunal.
- ²¹⁹ Website at <http://www.cep.aq>.
- ²²⁰ The Protocol on Environmental Protection to the Antarctic Treaty Text at <http://www.cep.aq/default.asp?casid=5074>.
- ²²¹ Madrid Protocol, article 2.

- ²²² Madrid Protocol, article 3(1).
- ²²³ Madrid Protocol, article 6.
- ²²⁴ Madrid Protocol, article 3(2), 8.
- ²²⁵ Madrid Protocol, article 18-20.
- ²²⁶ Rules of Procedure (1998), Rules 14 and 15, at <http://www.cep.aq/default.asp?casid=5193>.
- ²²⁷ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, entered into force 11 December 2001, 1542 A/CONF.164/37, 34 *International Legal Materials* 1542 (“FSA”). Text at http://www.un.org/Depts/los/convention_agreements/convention_overview_fish_stocks.htm.
- ²²⁸ FSA article 2.
- ²²⁹ FSA article 8 – 10.
- ²³⁰ FSA article 12
- ²³¹ FSA Part VI
- ²³² FSA article 30.
- ²³³ See reports at http://www.un.org/depts/los/convention_agreements/review_conf_fish_stocks.htm.
- ²³⁴ Convention for the Establishment of an Inter-American Tropical Tuna Commission, Washington, 31 May 1949, entered into force 3 March, 1950, text at <http://www.iattc.org/IATTCConventionENG.htm>. A 1999 Protocol, the Protocol to Amend the 1949 Convention on the Establishment of an Inter-American Tropical Tuna Commission, allows regional economic integration organizations to join the IATTC.
- ²³⁵ Amended by the Convention for the Strengthening of the Inter-American Tropical Tuna Convention, Antigua, November 14, 2003, not in force. <http://www.iattc.org/IATTCdocumentationENG.htm>. To date only El Salvador, Korea and Mexico have ratified or acceded to it.
- ²³⁶ Agreement on the International Dolphin Conservation Program (AIDCP).
- ²³⁷ Antigua Convention article II.
- ²³⁸ Antigua Convention article III.
- ²³⁹ Antigua Convention article IX. Decisions are binding unless specified in the Convention or agreed when a decision is taken.
- ²⁴⁰ Antigua Convention article XXV.
- ²⁴¹ Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, 56 Stat. 1354; TS 981, opened for signature October 12, 1940, in force, at <http://www.fws.gov/international/whp/whpconv.html>.
- ²⁴² Article VII.
- ²⁴³ Article IX.
- ²⁴⁴ Agreement on the Conservation of Polar Bears, I.L.M. 13:13-18, January 1974. Parties are Canada, Denmark, Norway, USSR, and the United States. At <http://sedac.ciesin.columbia.edu/entri/texts/polar.bears.1973.html>.
- ²⁴⁵ Agreement on the Conservation and Management of the Alaska-Chukotka Polar Bear Population, signed on October 16, 2000. Text at <http://www.bearbiology.com/plrbear treaty.htm>.
- ²⁴⁶ 2000 Polar Bear Treaty Article II.
- ²⁴⁷ 2000 Polar Bear Treaty, article IV.
- ²⁴⁸ 2000 Polar Bear Treaty, article VIII.

²⁴⁹ Each Contracting Party shall have the right to harvest one-half of the annual taking limit of polar bears determined by the Commission. If a Contracting Party does not intend to harvest one-half of the annual taking limit it may, subject to the agreement of the Commission, transfer to the other Contracting Party part of its remaining share of the annual taking limit and shall so notify the other Contracting Party through diplomatic channels. Article IX.

²⁵⁰ Article XII.

²⁵¹ Agreement Between the Government of Canada and the Government of the United States of America on the Conservation of the Porcupine Caribou Herd, 7 July 1987, TIAS 11259, in force July 1987. Preamble. At http://www.dfait-maeci.gc.ca/can-am/main/shared_env/agreement_porcupine_caribou-en.asp.

²⁵² Caribou Agreement, article 2.

²⁵³ Convention on Wetlands of International Importance Especially as Waterfowl Habitats. Adopted in Ramsar, Iran, on February 3, 1971, and opened for signature at UNESCO headquarters on July 12, 1972. Entered into force December 21, 1975. Amended by Protocol of 3 December 12 1982 and amendments of 28 May 1987.

Secretariat website at <http://www.ramsar.org/>. 152 Contracting parties. I.L.M. 11:963-976. Text at http://www.ramsar.org/key_conv_e.htm (as amended).

²⁵⁴ See articles 2, 8.

²⁵⁵ See article 3.

²⁵⁶ Ramsar Convention article 3. The Conference of the Parties have defined ‘wise use of wetlands’ as “their sustainable utilization for the benefits of humankind in a way compatible with the maintenance of the natural properties of the ecosystem.” 4th Conference of the Parties, 1987.

²⁵⁷ Ramsar Convention article 5.

²⁵⁸ Ramsar Convention article 7(2).

²⁵⁹ Ramsar Convention article 6(5). The scale of contributions is adopted by unanimity: article 6(6).

²⁶⁰ Ramsar Convention article 8.

²⁶¹ See M. J. Bowman, “The Ramsar Convention Comes of Age,” *Netherlands International Law Review*, XLII: 1-52, at http://www.ramsar.org/key_law_bowman.htm.