

The International Whaling Commission and the Future of Cetaceans in a Changing World

William C.G. Burns and Geoffrey Wandesforde-Smith

INTRODUCTION

The annual meetings of the International Whaling Commission (IWC) are the most notorious and least decorous battlegrounds in international environmental law. Indeed, as *The Economist* recently asserted, they have the status of predictable events where the gap between the killers and the savers of whales never narrows.¹ Neither the Fifty-Third Meeting (IWC53), which took place in London from 23–27 July 2001, nor the Fifty-Fourth Meeting (IWC54), which took place in Shimonoseki, Japan from 20–24 May 2002, did anything to dispel this notion. Both meetings were redolent with the vituperation that has characterized the meetings of the parties to the International Convention for the Regulation of Whaling (ICRW)² over the past 15 years. As one non-government organization observer noted at IWC53, ‘this is the heart of darkness’.³

Glimpses of the tenor of the meetings can be seen in several telling incidents. In an extremely heated debate at the outset of IWC53 for example, Iceland’s application to rejoin the IWC with a reservation to the moratorium on commercial whaling⁴ was rejected by the thinnest of margins.⁵

The bickering even reached new heights in Shimonoseki when, for the first time ever in the 56-year history of the Commission, votes were forced on the renewal of catch limits for aboriginal subsistence whaling. Despite an effort by Japan’s Fisheries Agency to put a good face on it, Japan’s defeat of a new quota for bowhead whales to be taken by Russian and American indigenous peoples in the Arctic was more widely seen as political retribution for earlier and arguably embarrassing failures of the IWC at Shimonoseki to advance Japan’s agenda. In addition to refusing a quota of minke whales for Japanese coastal whalers, IWC54 also failed to approve Japanese and Swedish proposals for a new whaling management regime, the introduction of which would have allowed the resumption of commercial whaling.

The deeply divisive political dimension to IWC proceedings was also apparent when Japan was excoriated at both meetings for its alleged strategy of buying votes through overseas development assistance, especially to island States in the Caribbean.⁶ Not to be outdone,

¹ ‘Whales: For Watching or Eating?’, *The Economist* (28 July 2001), at 48.

² International Convention for the Regulation of Whaling (Washington, 2 December 1946), printed in 62 Stat. 1716 and 161 UNTS 72 (ICRW).

³ J. Lovell, ‘Anachronistic Whaling Commission Stumbles On’, *Planet Ark* (27 July 2001), available at <<http://www.planetark.org/dailynewsstory.cfm?newsid=11791>>.

⁴ For an explanation of the moratorium under the ICRW and its history, see Commercial Whaling Moratorium and Revised Management Scheme below.

⁵ IWC, *Final Press Release*, Fifty-Third Meeting of the International Whaling Commission (2001), available at <<http://www.iwcoffice.org/pressrelease2001.htm>>. At IWC53 the IWC initially determined, by a vote of 19:18:1, that it had competency to determine the legal status of Iceland’s reservation. It then voted to not accept Iceland’s reservation regarding the moratorium by a vote of 19:0, with three countries abstaining and 16 not participating. Finally, the Chair ruled that Iceland would be allowed to participate in the meeting as an observer, and this ruling was upheld by the parties by a vote of 18:16:3. Iceland withdrew from the IWC in 1992 after the body refused

to accord it a limited catch quota. See W.C. Burns, ‘The International Whaling Commission and the Future of Cetaceans: Problems and Prospects’, 8 *Colo. Int’l. Env’tl. L. & Pol’y* (1997), 31, at 50.

⁶ S. Sen, ‘Whales Safe for Now, But Not for Long’, *Inter Press Service* (28 July 2001), LEXIS-NEXIS News Group File. The head of Japan’s fisheries agency, Masayuki Komatsu, fuelled these allegations in an interview with the Australian Broadcasting Corporation shortly before IWC53, stating that Japan had to employ the ‘tools of diplomatic communications and promises of overseas development aid to influence members of the International Whaling Commission’ (see *ibid.*). The Japanese Government subsequently contended that Mr Komatsu’s words were taken out of context. See ‘Japan Denies Aid-for-Whaling Report’, available at <<http://www.cnn.com/2001/WORLD/asiapcf/east/07/19/japan.whaling/index.html>>. However, in a later report, *The Economist* traced the links between the nine Caribbean States that make up the Organization of Eastern Caribbean States (OECS) and the IWC by observing that ‘OECS States make up almost one-sixth of the International Whaling Commission, though none has a whaling industry. They vote with Japan to block proposed whale sanctuaries, while at home they promote eco-tourism, including whale watching. But Japan has been generous: it has given several million dollars to each island for fisheries projects’. See ‘Votes for Hire’, *The Economist* (6 September 2001), available at <http://www.economist.com/displayStory.cfm?Story_ID=771465>.

perhaps, in the battle of political rhetoric, the head of the international division of Japan's Fisheries Agency, Masayuki Komatsu, in an interview shortly before IWC53 convened, characterized minke whales as 'cockroaches' of the ocean.⁷ Several developing country parties also accused non-government organizations of seeking to undermine their sovereignty through threats of boycotts if they supported whaling.

What follows is an outline of the recent major decisions taken by the parties to the IWC and a brief comment on the implications these decisions may have for the future of one of the world's oldest multilateral treaty regimes.

DEVELOPMENTS AT IWC53 AND IWC54

THE COMMERCIAL WHALING MORATORIUM AND REVISED MANAGEMENT SCHEME

In the face of continuing declines in the populations of many cetacean species, despite over four decades of regulation,⁸ the IWC imposed an indefinite moratorium on commercial whaling in 1982, which took effect from the 1986 coastal and 1985/86 pelagic whaling seasons.⁹ The parties then charged the IWC's Scientific Committee¹⁰ with undertaking a comprehensive assessment¹¹ of the effects of the decision on whale stocks by 1990 and to consider modification of the provision 'and the establishment of other catch limits'.¹²

Antigua and Barbuda's Prime Minister, Lester Bird, also acknowledged immediately before IWC53 that his country's support for whaling was tied to aid from Japan. See 'Antigua and Barbuda: Whaling Support Partly Linked to Japanese Aid', *BBC Monitoring Latin America* (16 July 2001), LEXIS-NEXIS, Newsfile. At the start of IWC54 much attention focused on six new members of the Commission: Benin, Gabon, Mongolia, Palau, Portugal and San Marino. Mongolia and San Marino are both land-locked countries. In the 15 votes taken at IWC54, Benin, Gabon, Mongolia and Palau consistently voted with Japan and the pro-whaling faction. Whether this represents bribery remains a controversial and unresolved issue.

⁷ 'Japan Official Admits Whaling Bribery', *Australian Broadcasting Corporation* (18 July 2001), available at <<http://www.abc.net.au/am/s331281.htm>>.

⁸ See Burns, n. 5 above, at 28–39.

⁹ ICRW, Schedule, para. 10(e).

¹⁰ 'The Scientific Committee comprises over 120 scientists, some nominated by member governments and others invited especially by the Committee itself.' See IWC, *The IWC, Scientific Permits and Japan*, available at <<http://www.iwcoffice.org/sciperms.htm>>. The Scientific Committee was created under ICRW, Article III(4), which states that the Commission may set up 'such committees as it considers desirable'. The Scientific Committee operates under the Rules of Procedure of the Scientific Committee.

The Scientific Committee concluded in 1987 that a new management regime should be put in place to establish quotas and to oversee whaling operations in the event that the moratorium was lifted in the future. The Revised Management Procedure (RMP), which was formally approved by the parties in 1994,¹³ establishes a framework to assess the viability of exploiting discrete stocks of cetaceans and to facilitate the establishment of sustainable harvesting quotas for these stocks. The procedure seeks to ensure that depleted stocks are rehabilitated by permitting catch quotas only for populations of stocks that are determined to be above 54% of pre-exploitation population levels.¹⁴ The RMP has been formulated to ensure that even targeted species will reach 72% of their pre-exploitation population levels within 100 years.¹⁵

The RMP is one component of a comprehensive management framework known as the Revised Management Scheme (RMS). In addition to the method for setting catch limits, the scheme also includes procedures for inspection and observation of whaling operations and their incorporation into the Schedule of the ICRW (the Schedule).¹⁶ Adoption of the RMS, a *sine qua non* to lifting the moratorium and establishing new catch limits, has been thwarted primarily by the failure of the parties to agree to the establishment of the International Observer Scheme to monitor whaling operations. The most contentious issues include who should pay for such observers, whether parties may object to the designation of particular observers and how often infractions should be reported.¹⁷ A highly transparent and effective observer scheme is a critical issue for many parties given massive under-reporting of catches in the past by commercial whaling interests. For example, during one period in the 1960s the former Soviet Union

¹¹ While the term 'comprehensive assessment' was not defined by the IWC, the Scientific Committee ultimately established its own definition as 'an in-depth evaluation of the status of all whale stocks in the light of management objectives and procedures . . . that . . . would include the examination of current stock size, recent population trends, carrying capacity and productivity'. See IWC, *The Comprehensive Assessment*, available at <<http://www.iwcoffice.org/Estimate.htm>>.

¹² *Ibid.*

¹³ IWC, *Resolution on the Revised Management Scheme*, Resolution 1994–5 (1994).

¹⁴ IWC, *IWC Annual Report*, Annex H and Annex I, reported in 43 *Rep. Int. Whal. Commission* (1993), 146–152.

¹⁵ *Ibid.*

¹⁶ The Schedule lays down measures that govern the conduct of whaling operations, including limits on the numbers and sizes of whales that can be taken, prescription of closed and open seasons and areas for whaling and regulations for methods of capture. See <<http://wwwhttp://www.iwcoffice.org/Schedule.htmw.iwcoffice.org/Schedule.htm>>. Under the ICRW, the Schedule constitutes 'an integral part' of the Treaty and requires a two-thirds vote for amendments. See ICRW, Article I(1).

¹⁷ IWC, *Report of the Revised Management Scheme Working Group* (IWC/53/9, 2001), at 4–6.

reported the capture of 152 humpback whales and 156 blue whales, while it was subsequently revealed that the actual catch was 7207 and 1433, respectively.¹⁸ At IWC53, the Scientific Committee was presented with data from a former executive of the Japanese whaling industry indicating that Japanese whalers had substantially under-reported catches of Bryde's whale during the 1980s.¹⁹ The parties also have continued to wrangle over the text that would incorporate the structure and elements of the RMS into the ICRW's Schedule.

The parties were not able to resolve the outstanding issues relating to the implementation of the RMS at IWC54; thus, the moratorium remains in place for its seventeenth year. There is, however, increasing pressure within the IWC to adopt the RMS, despite resistance by 'preservationist' parties, such as the UK, the Netherlands, New Zealand and Australia, who are likely to oppose lifting the moratorium under any circumstances.²⁰ The parties passed a Resolution at IWC52 emphasizing the importance of expeditiously completing the RMS process.²¹ This was reinforced at IWC53 when the parties passed a Resolution (by a vote of 20:14:3) emphasizing their commitment to alleviating the socio-economic and cultural distress inflicted upon Japanese coastal whaling communities by the moratorium.²² The parties also agreed to establish an Expert

Drafting Group to produce a consolidated draft of the RMS for consideration at IWC54.²³ Substantial work was accomplished but remains, in the words of the IWC's final press release from Shimonoseki, 'ongoing', and the best the Commission could agree to do, this year, was hold an intersessional meeting in October, 2002, to move the work on the RMS forward.²⁴ Meanwhile, Japan's request for an immediate quota of 50 whales to alleviate the distress of its coastal whaling communities was defeated at both IWC53 and IWC54.

NORWEGIAN COMMERCIAL WHALING OPERATIONS

Exercising its rights under Article V of the ICRW, Norway entered an objection to the commercial moratorium in 1982 and resumed commercial whaling operations in 1993.²⁵ Since then, its nationals have taken over 4000 minke whales from stocks in the northeast Atlantic, despite the passage of several resolutions by the IWC calling upon it to cease commercial whaling activities.²⁶

At IWC53, by a vote of 21:15:1, a request was made again that Norway halt whaling operations.²⁷ Concern was also expressed about Norway's announcement in the spring of 2001 that it intended to resume international trade in whale products.²⁸

¹⁸ A.V. Yablokov, 'Validity of Whaling Data', 367 *Nature* (1994), 108. See also IWC, *Resolution on the Unreliability of Past Whaling Data*, Resolution 1994-6 (1996); D. Fraser, 'Hunters Harpooned: The Whales Might Finally Be Saved', *Financial Times* (28 May 1994), at 9.

¹⁹ IWC, *Report of the Scientific Committee* (IWC/53/4, 2001), at 12.

²⁰ This position was embodied in the opening statement of Elliot Morley, the UK's Minister of Fisheries and for the Countryside, at the Fifty-First meeting of the IWC, where he stated: 'We are strongly opposed to commercial whaling and will, therefore, be resisting any attempt to weaken the current moratorium. We do not believe that any whaling is justified, other than some limited subsistence whaling by indigenous people, and would like to see all other forms of whaling brought to an end – in effect the introduction of a permanent, comprehensive moratorium of all whaling other than aboriginal subsistence whaling' (see *Opening Statement by Elliot Morley*, IWC 51st Annual Meeting (IWC/51/OS UK, 1999)). See also A. Gillespie, 'The Southern Ocean Sanctuary and the Evolution of International Environmental Law', 15:3 *Int'l J. Mar. & Coastal L.* (2000), 293, at 314; 'Britain Leads Fight to Keep Whale Ban', *Mail on Sunday* (23 June 1995), at 13; *Opening Statement of Australia*, Revised Management Scheme, Intersessional Working Group Meeting (February 2001), available at <http://www.oceanlaw.net/bulletin/sample/materials/0102iwc_statements.htm>; H.N. Scheiber, 'Historical Memory, Cultural Claims, and Environmental Ethics in the Jurisprudence of Whaling Regulation', 8 *Ocean & Coastal Mgt.* (1998), 5, at 9.

²¹ IWC, *Resolution on the Revised Management Scheme* (IWC/53/24/rev, 2000), available at <<http://eelink.net/~asilwildlife/52IWC.html>>.

²² IWC, *Resolution on Japanese Community-Based Whaling* (IWC/53/34 (2001), available at <<http://eelink.net/~asilwildlife/53IWC.html>>. For several years, Japan has requested quotas for its small-scale coastal whaling operations. Japan argues that the moratorium decision and consequent cessation of all its whaling activities (except scientific whaling) has resulted in hardships to several Japanese communities causing socio-cultural, dietary, religious, occupational and psychological stresses.

²³ See IWC, n. 5 above.

²⁴ See IWC, *Final Press Release*, Fifty-Fourth Meeting of the International Whaling Commission (IWC, 2002), available at <<http://www.iwcoffice.org/2002PressRelease.htm>>. The various reports produced by the Expert Drafting Group between IWC 53 and IWC 54 can be found at <http://www.iwcoffice.org/Agenda%20info.htm#RMS>. On the fourth day of IWC54 two proposals pertaining to the RMS were eventually presented and voted on, but neither secured the three-fourths majority needed to pass. The first was a Japanese proposal to resume commercial whaling but without incorporating into the RMS a number of provisions, such as DNA testing and animal welfare considerations, that Japan considers to be beyond the jurisdiction of the IWC. The vote was 25:16:3, with one country not participating. A second proposal advanced by Sweden and several other so-called moderate countries would have allowed 'traditional whaling' States to resume small-scale commercial whaling but only under the strict safeguards of the RMS. Although this could have accommodated Japan's interest in small-type coastal whaling, it was defeated on a vote of 24:12:7. Both proposals, thus, also fell short of support by a simple majority.

²⁵ R.L. Brownell, Jr, *et al.*, 'Further Scrutiny of Scientific Whaling', 290 *Sci.* (2000), 1696. ICRW, Article V(3)(c) provides that amendments to the Convention's Schedule 'shall not become effective with respect to any Government which has so objected until such date as the objection is withdrawn'.

²⁶ See IWC, *Resolution on Northeast Atlantic Minke Whales*, Resolution 1996-5 (1996); IWC, *Resolution on Northeastern Atlantic Minke Whales*, Resolution 1997-3 (1997); IWC, *Resolution On Northeastern Atlantic Minke Whales*, Resolution 1998-1 (1998).

²⁷ IWC, *Resolution on Commercial Whaling*, Resolution 2001-5 (2001), available at <<http://eelink.net/~asilwildlife/53IWC.html>>.

²⁸ *Ibid.*

Norway hopes to sell to Japan some of the hundreds of tons of blubber that it is currently storing in freezers. While there is virtually no demand for blubber in Norway (reflected in its domestic market price of the equivalent of one cent per kilo), it is projected that blubber could fetch more than US\$16.00 per kilo in Japan.²⁹ Opponents of the plan argue that it will spur a return to large-scale whaling.³⁰ Both the IWC and some Japanese consumer groups have also expressed concerns over the high levels of polychlorinated biphenyls (PCBs) in Norway's stockpiled blubber.³¹

The IWC also questioned the decision by Norwegian fishing officials to employ a lower 'tuning level', a mathematical formula to develop catch quotas, than the level established in the RMP. While the RMP calls for using a tuning level of 0.72, Norway opted for the less precautionary level of 0.66 for the 2001 season.³² Thus, while the RMP tuning level would have resulted in setting a quota of 377 minke whales from the north-east Atlantic stock, Norway's yielded a quota of 549.³³ The IWC concluded that Norway had, in effect, implemented 'a self-determined version of the RMP prior to incorporation of the Revised Management Scheme into the Schedule'.³⁴ The IWC called on Norway to reconsider the use of the less conservative formula in setting quotas.³⁵ Five months after the meeting, the Norwegian Government increased its quota for minke whales by 23%, to 674.³⁶

There was no further consideration of Norwegian whaling at IWC54. This is probably because blubber imports to Japan remain the focus of vigorous political protest, both inside and outside that country, and because Japanese food safety authorities have yet to decide that Norwegian blubber is safe to eat. Until and unless this latter uncertainty is resolved, the prospect that Norway and Japan will start trading and, thus, create pressure for further increases in unilaterally determined quotas, seems speculative.

²⁹ See 'Norway Eyes Whale Blubber Exports, Prices Soar', *Environmental News Network* (13 May 2001), available at <http://www.enn.com/news/wire-stories/2001/05/05132001/reu_whales_43522.asp>; D. Meflgren, 'Norway Buried in Blubber', *Wisconsin State Journal* (12 July 2000), at 12.

³⁰ W. Gibbs, 'Norwegians, Defying Protests, Will Sell Blubber to Japan', *N.Y. Times* (23 July 2001), available at <<http://college4.nytimes.com/guests/articles/2001/07/23/858407.xml>>.

³¹ See n. 26 above.

³² High North Alliance, *Norway: Further Decrease in Whaling Quota* (1 December 2001), available at <<http://www.worldcouncilofwhalers.com/dec12001.htm>>.

³³ *Ibid.*

³⁴ See IWC, n. 27 above.

³⁵ *Ibid.*

³⁶ 'Norway: Whalers Allowed a Bigger Catch', *N.Y. Times* (16 February 2002), at A8.

SCIENTIFIC RESEARCH WHALING

Since the imposition of the moratorium on commercial whaling, several parties, most prominently Japan,³⁷ have continued whaling operations by invoking the scientific research provision of the ICRW. Article VIII of the ICRW provides:

Notwithstanding anything contained in this Convention, any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take, and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit.³⁸

Since 1987, Japan has killed more than 5500 minke, Bryde's and sperm whales in the Southern Ocean and North Pacific under Article VIII, contending that its research programme is 'making important contributions to the understanding of whale biology [and is] relevant to the management concerns that are at the core of the IWC's mission'.³⁹ Many opponents of Japan's scientific research whaling programme, including IWC parties and non-government organizations, contend that the programme is merely a pretext to keep Japan's whaling industry alive,⁴⁰ and to provide a steady supply of whale meat for affluent Japanese consumers.⁴¹

The IWC has consistently called upon Japan and other parties that have conducted scientific whaling activities to desist, on the grounds that such research is not essential for rational management of stocks and does

³⁷ After the imposition of the moratorium on commercial whaling, Iceland and Norway also conducted scientific research expeditions in the 1980s and early 1990s (see Burns, n. 5 above, at 45–47). Norway and Iceland killed 651 whales under ICRW, Article VIII between 1987 and 1991. See Brownell, n. 25 above, at 1696.

³⁸ ICRW, Article VIII.

³⁹ IWC, *Japan's Whale Research Programme and International Law* (IWC/53/10, 2001), at 6. See also CITES, *Proposal from Japan to Transfer Minke Whales Balaenoptera Acutorostrata Southern Hemisphere Stock from Appendix I to Appendix II*, Proposal 11.16 (2000).

⁴⁰ D. Normile, 'Japan's Whaling Programme Carries Heavy Baggage', 289 *Sci.* (2000), 2264, at 2264; J. Iversen, 'An Angry Rift in the Year 2000: Japan's Scientific Whaling', 19 *Colo. J. Int'l. Envtl. L. & Pol'y* (2000), 121, at 121; Humane Society of the United States (HSUS), *Japan Kills a Bryde's Whale* (HSUS, 2000), available at <<http://www.hsus.org/whatnew/whale081100.html>>.

⁴¹ C. Sims, 'Japan, Feasting on Whale, Sniffs at "Culinary Imperialism" of US', *N.Y. Times* (20 August 2000), at A1; 'Emotions Escalate in US, Japan Whaling Debate', *CNN.com* (14 September 2000), available at <<http://www.cnn.com/2000/NATURE/09/14/whales.japan.reut/>>. In that article, CNN reported that 'research whaling is the source of 3000 to 4000 tons of whale meat sold annually in Japan – much of it at pricey specialty restaurants'.

not address critical research needs.⁴² However, Japan has rebuffed the parties' requests on the grounds that IWC Resolutions are non-binding under the terms of the ICRW, and that Article VIII vests the individual parties with the ultimate discretion in issuing the permits.⁴³

At IWC53, the IWC noted that the latest estimates from the IWC's Southern Ocean Whale and Ecosystem Research (SOWER) programme suggested that minke whale stocks in Antarctica may have 'suffered a precipitous decline over the past decade'.⁴⁴ Thus, at IWC53 by a vote of 21:14:1, the parties called on Japan to cease its lethal research operations in the region, at least until the Scientific Committee has the opportunity to assess the impacts of Japan's programme.⁴⁵ The parties also passed a Resolution (20:14:2) calling on Japan to refrain from pursuing its scientific research programme on minke, Bryde's and sperm whales in the North Pacific. The Resolution noted the concern of some members of the Scientific Committee that the research programme lacked quantifiable objectives, and concluded that information on stock structures could be obtained through non-lethal means.⁴⁶

At IWC54, two proposed permits by Japan were considered. One would have extended the taking of minke whales in the Antarctic, where Japan now takes about 400 whales each year. The other would ostensibly have been the basis for a long-term research programme on the feeding ecology of whales. Japan proposed taking 150 minke whales, 50 Bryde's whales, 50 sei whales and

10 sperm whales so that it could make a contribution to the 'conservation and sustainable use of marine living resources in the western North Pacific, especially Japan's EEZ'. Both proposals were vigorously discussed in the Scientific Committee and by the Commission, but this year no proposal to condemn the research programmes was proposed.⁴⁷

ANTHROPOGENIC THREATS TO CETACEANS

Over the past two decades, the parties to the IWC have expressed increasing concern about the impacts of anthropogenic activities other than direct harvesting on cetacean populations. At the IWC's 44th meeting, the parties decided that the Scientific Committee should establish a regular agenda item to address these 'environmental change' issues.⁴⁸ The term 'environmental change' has been defined by the Committee to encompass climate change, chemical pollution, physical and biological habitat degradation, effects on fisheries, ozone depletion and UV-B radiation, Arctic issues, disease and mortality events, and the impact of noise.⁴⁹

In 1996, the parties endorsed the Committee's establishment of a Standing Working Group on Environmental Concerns (SWGEC).⁵⁰ At the fiftieth meeting, the parties agreed to establish a regular Commission agenda item for environmental concerns to facilitate reporting by the Scientific Committee on its progress and national and regional initiatives by the parties.⁵¹

The parties addressed several environmental change issues at IWC53 and IWC54. Each of these will now be examined in turn.

Bycatch in Fisheries Entanglement in fishing gear is the leading cause of cetacean mortality globally.⁵² The IWC's Scientific Committee and other bodies have concluded that bycatch rates of above 2% may be unsustainable⁵³ (which is a rate that is exceeded

⁴² See IWC, *Resolution on Whaling under Special Permit in the North Pacific Ocean*, Resolution 2000-5 (2000); IWC, *Resolution on Special Permit Catches in the Southern Ocean by Japan*, Resolution 1997-5 (1997); IWC, *Resolution on Special Permit Catches by Japan in the North Pacific*, Resolution 1994-9 (1994); IWC, *Thirty-Ninth Report of the International Whaling Commission – Resolution on Norwegian Proposal for Special Permits*, Appendix 1, reported in 40 *Rep. Int. Whal. Comm.* (1989), 36.

⁴³ See Normile, n. 40 above, at 1. See also ICRW, Article VI.

⁴⁴ IWC, *Resolution on Southern Hemisphere Minke Whales and Special Permit Whaling* (IWC/53/30, 2001). The SOWER survey for 1997/1998 yielded an estimate of 268,000 minke whales living in the southern hemisphere, compared to 608,000 minke whales in a 1978/79–1983/84 survey and 766,000 minke whales in a 1985/86–1990/91 survey (see IWC, n. 19 above, at 36.) However, the Scientific Committee cautioned that the ostensible decline in abundance of these whales may be attributable to methodological differences among the three surveys (*ibid.*, at 35–41).

⁴⁵ IWC, *Resolution on Southern Hemispheric Minke Whales and Special Permit Whaling*, Resolution 2001-7 (2001), available at <<http://eelink.net/~asilwildlife/53IWC.html>>.

⁴⁶ IWC, *Resolution on Expansion of JARPNII Whaling in North Pacific*, Resolution IWC/53/39 (2001), available at <<http://eelink.net/~asilwildlife/53IWC.html>>. Ireland, Spain, South Africa and Switzerland proposed and subsequently withdrew a resolution to establish a Voluntary Code of Practice for the issuance of scientific research permits. Parties acceding to the Code would pledge to only issue special permits, *inter alia*, if the information could not be obtained by non-lethal means.

⁴⁷ See IWC, n. 24 above.

⁴⁸ IWC, *Resolution on the Need for Research on the Environmental and Whale Stocks in the Antarctic Region*, Chairman's Report, Appendix 2, reported in 43 *Rep. Int'l Whaling Commission* (1993), 39–40.

⁴⁹ See Fiftieth Meeting of the IWC, *Resolution on Environmental Change and Cetaceans*, IWC Resolution 1998–6 (1998), available at <<http://eelink.net/~asilwildlife/50IWC.html>>.

⁵⁰ See Forty-eighth Meeting of the IWC, *Resolution on Environmental Change and Cetaceans* (IWC/48/44, 1996), at 1.

⁵¹ *Ibid.*

⁵² Worldwide Fund for Nature (WWF), *Wanted Alive! Whales in the Wild* (2001), available at <<http://www.panda.org/resources/publications/species/indexnext.html>>.

⁵³ See IWC, n. 19 above, at 68; Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas, *Incidental Take of Small Cetaceans*, Resolution No. 3 (2000), available at <<http://www.ascobans.org/index0501.html>>.

in many regions of the world).⁵⁴ Acknowledging this threat, the parties at IWC53 (by a vote of 22:14:1) requested that the Scientific Committee provide a summary at IWC54 of the most feasible methods to mitigate bycatch of large cetaceans and to remove them from fishing gear with minimal risks to rescuers.⁵⁵ This work is still in progress and the IWC will presumably take it up at a future meeting.

The parties also recommended at IWC53 that States such as Japan⁵⁶ should cease permitting commercial exchange of bycatch cetaceans for which no catch limits have been established by the IWC.⁵⁷ This reflects the concern of some parties and non-government organizations that the commercialization of bycaught species may lead to the killing of animals that otherwise could have been released from nets,⁵⁸ or serve as cover for the sale of whale meat acquired illegally.⁵⁹

Pollution For two decades, the IWC has cited the threat to cetaceans posed by persistent organic pollutants,⁶⁰ such as PCBs, DDT, dieldrin, heptachlor,

hexachlorobenzene and dioxins.⁶¹ These substances have been linked to a wide range of maladies in cetaceans and other marine mammals, including sterility,⁶² premature parturition,⁶³ depression of reproductive rates,⁶⁴ cancer,⁶⁵ alteration of growth and bone development,⁶⁶ and neuro-toxic effects that can lead to disorientation (resulting in beaching).⁶⁷ Recognizing the interest that it may have in the ratification of other treaties germane to the management and conservation of whale stocks, at IWC53 the IWC acknowledged the conclusion of the Stockholm Convention on Persistent Organic Pollutants⁶⁸ and encouraged the contracting governments to sign, ratify and adhere to that agreement.⁶⁹

Habitat Protection Habitat destruction is a major threat to many cetacean species throughout the world. This is particularly true for smaller whales, dolphins and porpoises, whose primary habitats are often coastal areas. For example, the destruction of inshore habitats is probably the greatest threat posed to hump-backed dolphins (*Sousa teuszii*) in tropical West Africa.⁷⁰ In Pakistan, the available habitat for the

⁵⁴ R. Churchill, 'Sustaining Small Cetaceans: A Preliminary Evaluation of the Ascobans and Accobans Agreement', in A. Boyle and D. Freestone (eds), *International Law and Sustainable Development* (Oxford University Press, 1999), 227; IWC, *Report of the Sub-Committee on Small Cetaceans*, Annex G, reported in 45 *Rep. Int'l Whaling Commission* (1995), 165, at 177; IWC, *Report of the Workshop on Mortality of Cetaceans in Passive Fishing Nets and Traps*, reported in 45 *Rep. Int'l Whaling Commission* (1994), 1–71.

⁵⁵ IWC, *Resolution on the Incidental Catch of Cetaceans* (IWC/53/29, 2001), available at <<http://www.eelink.net/~asilwildlife/53IWC.html>>.

⁵⁶ Japan recently tightened its regulations on cetacean bycatch through the revision of its Ministry of Agriculture, Forestry, and Fisheries' Ministerial Ordinance 92, which came into effect on 1 July 2001. The Ordinance mandates reporting of the bycatch of large whales in trap-net fisheries and the provision of DNA samples for analysis, as well as penalties for non-compliance. See IWC Scientific Committee, *Report of the Working Group on Estimation of Bycatch and Other Human-Induced Mortality*, Annex M (2001), at 9. However, products of species other than blue, bowhead and right whales can still be sold commercially under the Ordinance (*ibid.*, at 9).

⁵⁷ IWC, *Resolution on the Incidental Catch of Cetaceans* (IWC/53/29, 2001), available at <<http://www.eelink.net/~asilwildlife/53IWC.html>>.

⁵⁸ TRAFFIC, *An Update to TRAFFIC East Asia–Japan's 1999 Survey of the Commercial Trade in Whale Meat Products in Japan* (Traffic, 2001), available at <<http://www.traffic.org/iwc/japan2.pdf>>.

⁵⁹ See WWE n. 52 above. Concerns about the potential for illegal whaling operations under the cover of sales from legal sources were heightened by a genetic analysis conducted of whale products sold on the Japanese market from 1993–1999. Baker, *et al.* identified eight species of baleen whales, as well as sperm whales, beaked whales, killer whales, dolphins and porpoises, among nearly 700 whale 'products' sold in the Japanese marketplace from 1993 to 1999. Six of the eight baleen species and sperm whales are protected under international agreements. Overall, these species accounted for 10% of whale products sold in Japan during this period. See C. Scott Baker, *et al.*, 'Scientific Whaling: Source of Illegal Products for Market?', 290 *Sci.* (2000), 1695, at 1695.

⁶⁰ 'Persistent Organic Pollutants (POPs) are chemical substances that persist in the environment, bioaccumulate through the food web, and pose a risk of causing adverse effects to human health

and the environment.' See United Nations Environment Programme (UNEP), *Persistent Organic Pollutants* (undated), available at <<http://www.chem.unep.ch/pops/>>.

⁶¹ IWC, *Resolution on the Stockholm Convention on Persistent Organic Pollutants* (IWC/53/36, 2001), available at <<http://eelink.net/~asilwildlife/53IWC.html>>.

⁶² S. Corsolini, *et al.*, 'Congener Profile and Toxicity Assessment of Polychlorinated Biphenyls in Dolphins, Sharks and Tuna Collected from Italian Coastal Waters', 40:1 *Marine Environ. Res.* (1995), 33, at 40.

⁶³ *Ibid.*

⁶⁴ G.M. Troisi, 'Bioaccumulation of Polychlorinated Biphenyls (PCBs) and Dichlorodiphenylethane (DDE) Methyl Sulfones in Tissues of Seal and Dolphin Morbillivirus Epizootic Victims', 62:1 *J. Toxicology & Environ. Health* (2001), 1, at 6; S. Reich, *et al.*, 'Congener Specific Determination and Enantiomeric Ratios of Chiral Polychlorinated Biphenyls in Striped Dolphins (*Stenella coeruleoalba*) from the Mediterranean Sea', 33 *Environ. Sci. & Tech.* (1999), 1787, at 1787; J.E. Cummins, 'Extinction: The PCB Threat to Marine Mammals', 18 *Ecologist* (1988), 19; D.E. Gaskin, *The Ecology of Whales and Dolphins* (Heinemann, 1982), at 427. Organochlorines can cause endocrine disruption that can affect reproductive success. For example, PCBs and PCB metabolites can bind oestrogen and progesterone receptors, reducing steroid binding and altering intra-uterine biological response, ultimately interfering with reproduction. See G.M. Troisi, 'Organochlorine-Mediated Endocrine Disruption in Marine Mammals: Toxic Mechanisms and Biomonitoring', 12 *Eur. Res. Cetaceans* (1998), 400, at 400.

⁶⁵ M. García Hartmann, 'Pathology of Marine Mammals', in T. Jauniaux, *et al.* (eds), *Marine Mammals, Seabirds and Pollution of Marine Systems* (ECS, 1997), 141; J.E. Cummins, *PCBs. A Global Tragedy* (1994), unpublished manuscript, at 2.

⁶⁶ A. Borrell, *et al.*, 'Organochlorine Compounds in Common Dolphins (*Delphinus delphis*) from the Atlantic and Mediterranean Waters of Spain', 114 *Environ. Pollution* (2001), 265, at 266.

⁶⁷ *Ibid.*, at 266.

⁶⁸ (Stockholm, 22 May 2001), reported in 40 *ILM* (2001), 531.

⁶⁹ See n. 61 above.

⁷⁰ L. Karczmarski, 'Conservation and Management of Humpback Dolphins: The South African Perspective', 34:3 *Oryx* (2000), 207, at 212.

Indus dolphin (*Platanista indi*) has shrunk by 75% in the last century, and the construction of dams and barrages has divided the population into isolated pockets, threatening the viability of the species.⁷¹ Construction of dams has also resulted in the diminution of fish supplies that sustain the baiji, or Chinese River Dolphin (*Lipotes vexillifer*) in the Yangtze River.⁷² The number of baiji dolphins plummeted from more than 6000 in the 1950s to perhaps only 5 now, making it the world's most endangered cetacean.⁷³

In a Resolution passed by consensus,⁷⁴ the IWC acknowledged the threats posed by habitat destruction and the efforts of some parties to confront this issue. Invoking Article 193 of the United Nations Convention on the Law of the Sea (UNCLOS),⁷⁵ which recognizes that the right of sovereign States to exploit their natural resources is subject to a duty to protect and preserve the marine environment, the IWC called on the parties to pursue the objectives of conventions relevant to habitat protection, including the Convention on Biological Diversity, the RAMSAR Convention and the Coral Reefs Initiative.⁷⁶ The Resolution also called on the parties to achieve better coastal habitat protection and integrated coastal management through these and similar agreements and initiatives.⁷⁷

SMALL CETACEANS

The competence of the IWC to regulate small cetacean species (smaller whales, dolphins and porpoises) has been a matter of scientific and legal controversy for nearly three decades.⁷⁸ The issues have become in-

creasingly urgent in recent years in the face of drastic declines of many small cetacean species because of direct harvesting,⁷⁹ incidental catch in fisheries,⁸⁰ habitat degradation⁸¹ and pollution.⁸²

Parties opposed to IWC assertion of jurisdiction⁸³ over the management of small cetaceans advance two primary arguments. First, they contend that an annex added as a supplement to the ICRW in 1946, and known as 'the Nomenclature of Whales', limits IWC regulation to species listed in that annex, precluding jurisdiction over virtually all smaller species of cetaceans in the absence of agreement by all the treaty's parties.⁸⁴ Second, they argue that, under Article 61 of UNCLOS, coastal States are imbued with the authority to regulate coastal resources, which would encompass most small cetaceans.⁸⁵

Supporters of IWC jurisdiction maintain that the Nomenclature of Whales was intended by the drafters to be merely a non-binding guide to cetacean species.⁸⁶ Moreover, they contend that the rights of coastal States under Article 61 of UNCLOS are qualified by Article 65, which specifically requires in the case of cetaceans that parties shall 'work through appropriate international organizations for their conservation, management and study'.⁸⁷ Citing Agenda 21 of the United

⁷¹ H. Bux Bhaagat, 'Introduction, Distribution, Conservation and Behavioral Ecology of Indus Blind Dolphin (*Platanista indi*) in River Indus (Dolphin Reserve), Sindh-Pakistan', 26:1 *Tigerpaper* (1999), 11, at 12.

⁷² W.F. Perrin and US National Marine Fisheries Service, *Dolphins, Porpoises, and Whale – An Action Plan for the Conservation of Biological Diversity: 1988–1992* (UNEP, 1989), at 4.

⁷³ Vision Internet Services, *Lipotes vexillifer: Baiji or Chinese River Dolphin* (undated), available at <<http://www.cetacea.org/baiji.htm>>; IWC, *Resolution on Small Cetaceans* (IWC/48/43, 1996), available at <<http://www.eelink.net/~asilwildlife/48iwc.pdf>>.

⁷⁴ IWC, *Resolution on the Importance of Habitat Protection and Integrated Coastal Zone Management*, Resolution 2001-11 (2001), available at <<http://www.eelink.net/~asilwildlife/53IWC.html>>.

⁷⁵ (Montego Bay, 10 December 1982), reported in 21 ILM (1982), 1261. Article 193 of UNCLOS provides 'States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment'.

⁷⁶ IWC, *Resolution on the Importance of Habitat Protection and Integrated Coastal Zone Management*, Resolution 2001-11 (2001).

⁷⁷ *Ibid.*

⁷⁸ A. Gillespie, 'Small Cetaceans, International Law and the International Whaling Commission', 2:2 *Melbourne J. Int'l L* (2001), 257, at 261–265; W.C. Burns, 'The International Whaling Commission and the Regulation of the Consumptive and Non-Consumptive Uses of Small Cetaceans: The Critical Agenda for the 1990s', 13 *Wis. Int'l L.J.* (1994), 105, at 106.

⁷⁹ See IWC n. 19 above, at 67 (the catch of Dall's porpoises off the Japanese coast may be unsustainable).

⁸⁰ *Ibid.*, at 68 (the bycatch rate of harbour porpoises in the North Sea may be unsustainable); R.S. Wells and M.D. Scott, 'Bottlenose Dolphin', in S.H. Ridgway and R. Harrison (eds), *Handbook of Marine Mammals*, Vol. 6, (Prentice Hall, 1999), at 165 (over 2000 bottlenose dolphins are killed annually by Taiwanese gill net fishers off Australia); V.O. Mamaev, 'Black Sea Strategic Action Plan: Biological Diversity Protection', in V. Kotlyakov, M. Uppenbrink and V. Metreveli (eds), *Conservation of Biological Diversity as a Prerequisite for Sustainable Development in the Black Sea Region* (Kluwer, 1998), 354 (bycatch is one of the primary factors in the decline of the Black Sea dolphin species).

⁸¹ See the section in this article on Anthropogenic Threats to Cetaceans above.

⁸² P. Jones, 'TBT Implicated in Mass Dolphin Deaths', 34:3 *Marine Pollution Bull.* (1997), 146, at 146; B. Morton, 'Hong Kong's Dolphins', 30:10 *Marine Pollution Bull.* (1995), 626, at 627.

⁸³ Parties taking the position that the IWC lacks competence over small cetaceans include Mexico, Denmark, Chile, Uruguay, Brazil, Argentina, Peru, Spain, Norway, Japan, the former USSR, St Vincent and the Grenadines, and Costa Rica. See R. Gambell, 'The International Whaling Commission and the Contemporary Whaling Debate', in J.R. Twiss, Jr and R.R. Reeves (eds), *Conservation and Management of Marine Mammals* (Prentice Hall, 1999), 194. See also IWC, *Resolution on Biosphere Reserve of the Upper Gulf of California and the Colorado River Delta*, Resolution 1994-3 (1995).

⁸⁴ IWC, *Report of the Steering Committee on Regulation of Baird's Beaked Whale* (IWC/35/15, 1983); P. Birnie, 'The Role of Developing Countries in Nudging the International Whaling Commission from Regulating Whaling to Encouraging Nonconsumptive Uses of Whales', 12 *Ecology L.Q.* (1985), 937, at 966, n. 125.

⁸⁵ UNCLOS, Article 61.

⁸⁶ See Burns, n. 78 above, at 130.

⁸⁷ *Ibid.*, at 132.

Nations Conference on Environment and Development⁸⁸ and the IWC's expertise in cetacean matters, they also contend that the IWC is the 'appropriate international organization'.⁸⁹ This position may have been bolstered by language in a resolution on the interaction of fish stocks and whales that was passed by consensus at IWC53. The parties acknowledged at the outset of the resolution that 'the IWC is the universally recognized international organization with competence for the management of whale stocks'.⁹⁰

For many years, the IWC has tried to navigate the treacherous political shoals attendant to the small cetacean issue by calling on the parties to conduct research on threats to cetaceans,⁹¹ to provide information on directed and incidental catches,⁹² and to reduce catches of threatened species.⁹³ However, it has also emphasized that these resolutions were 'without prejudice to the different views of Contracting Governments on the IWC's competence in relation to small cetaceans'.⁹⁴

Two Resolutions on small cetaceans were passed at IWC53. By a vote of 20:13:4, the IWC expressed its concern over Japan's continuing coastal harvest of Dall's porpoises at a level deemed unsustainable by the Scientific Committee, as well as over the mortalities associated with incidental catch of the species.⁹⁵ While noting that Japan had provided valuable information in the past about its catch, and had decreased the number of porpoises taken over the past decade, the parties noted that Japan's failure to provide data in 2001 had hampered the Scientific Committee's review.⁹⁶ The parties called upon Japan to halt its directed takes until the Scientific Committee could conduct a full status assessment, and requested that Japan assist in this assessment by providing pertinent information.⁹⁷ Japan rebuffed the IWC once again, resuming the hunt for Dall's porpoises 4 months after

the conclusion of IWC53.⁹⁸ Also, Japan reiterated its position that it was not required to provide information to the IWC about its catch of Dall's porpoises because the catch took place in Japan's territorial waters.⁹⁹ There was no further action on this matter at IWC54.

In a more general resolution made at IWC53, the parties, by a vote of 22:5:2, expressed their concern over the critically endangered status of the baiji and vaquita, the depleted or unknown status of many stocks of beluga whales, and the uncertain status of the narwhal.¹⁰⁰ While acknowledging that some governments have initiated conservation measures, the parties went further than in any prior Resolution on this topic by directing the Scientific Committee to undertake a regular review of party compliance with recommendations and resolutions related to small cetaceans. Further, the Resolution called on the parties to include all direct and indirect takes of small cetaceans in their national progress reports.¹⁰¹ There was no further substantial progress on this issue at IWC54. The final press release simply observes that

notwithstanding the different views of member countries over the legal competence of the IWC to manage small cetaceans, many contracting governments continue to cooperate in the consideration of small cetacean issues, particularly with respect to the work of the Scientific Committee.¹⁰²

⁸⁸ United Nations Conference on Environment and Development, *Agenda 21*, Chapter 17.66(a), reprinted in 22 *Env'tl. Pol'y & L.* (1992), 281, at 285.

⁸⁹ See Burns, n. 78 above, at 132.

⁹⁰ IWC, *Proposed Resolution on Interactions Between Whales and Fish Stocks*, Resolution 2001-9 (2001).

⁹¹ IWC, *Resolution on Small Cetaceans*, Resolution 1997-8 (1997).

⁹² IWC, *Resolution on the Conservation of Freshwater Cetaceans*, Resolution 2000-9 (2000); IWC, *Resolution on Small Cetaceans*, Appendix 5, reported in 43 *Rep. Int'l Whaling Commission* (1993).

⁹³ IWC, *Resolution on Dall's Porpoise*, Resolution 1999-9 (1999); IWC, *Resolution on the Directed Takes of Striped Dolphins in Drive Fisheries*, Appendix 10, cited in 43 *Rep. Int'l Whaling Commission* (1993), at 51-52.

⁹⁴ IWC, *Resolution on Small Cetaceans*, Resolution 1994-2 (1994), available at <<http://www.eelink.net/~asilwildlife/46IWC.pdf>>.

⁹⁵ IWC, *Resolution on Dall's Porpoise*, Resolution 2001-12 (2001), available at <<http://www.eelink.net/~asilwildlife/53IWC.html>>. See also IWC, *Resolution on Dall's Porpoise*, n. 93 above.

⁹⁶ IWC, *Resolution on Dall's Porpoise*, *ibid.*

⁹⁷ *Ibid.*

⁹⁸ 'Japan Defies Whaling Commission, Begins Dall's Porpoise Hunt', *Environmental News Network* (1 November 2001), available at <http://www.enn.com/news/enn-stories/2001/11/11012001/s_45430.asp>.

⁹⁹ *Ibid.*

¹⁰⁰ IWC, *Resolution on Small Cetaceans*, Resolution 2001-13 (2001). The baiji is the world's most endangered cetacean (see IWC, n. 91 above). Endemic to the northern Gulf of California, the vaquita, *Phocoena sinus*, has been classified as critically endangered by the International Union for the Conservation of Nature (IUCN) (see IUCN, *Criteria for Critically Endangered, Endangered and Vulnerable* (3 March 2001), available at <<http://phocoena.org/status/iucnstatus.html>>). Threatened primarily by incidental catch in gillnet fisheries, there are only 224-885 vaquita remaining (see W.F. Perrin, 'Selected Examples of Small Cetaceans at Risk', in J.R. Twiss, Jr and R.R. Reeves, n. 83 above, at 296; see also A.J. Read, 'Incidental Catches of Small Cetaceans', in M.P. Simmons and J.D. Hutchinson (eds), *The Conservation of Whales and Dolphins* (Foundation Press, 1996), 119). Beluga whales are found only in Arctic and sub-Arctic waters (see 'Education: Beluga Whales', 37 *Whale News* (1988), 4). Belugas are primarily threatened by hunting in the Arctic and high levels of organochlorine substances, including PCBs and DDT (see Cummins, n. 64 above, at 3; UNEP, *Review of Contaminants in Marine Animals* (ICES/IOC/UNEP, 1991), at 6). The narwhal, *Monodon monoceros*, is classified as data deficient by the IUCN (see IUCN, *2000 Red List of Threatened Species* (IUCN, 2000), available at <<http://www.redlist.org>>). The IWC has expressed concerns about the sustainability of the harvest of the species' West Greenland stock (see IWC, *Resolution on Directed Takes of White Whales*, Resolution 1998-9 (1998), available at <<http://www.eelink.net/~asilwildlife/iwc50.html>>). Canadian stocks are also threatened by pollution and a 'genetic bottleneck' as a consequence of commercial whaling in the past (see Swiss Coalition for the Protection of Whales (SCPW), *Polar Exposure: Environmental Threats to Arctic Marine Life and Communities* (SCPW, 1998), at 6).

¹⁰¹ See IWC, n. 91 above.

¹⁰² See IWC, n. 24 above.

SANCTUARIES

Under the ICRW, the parties may designate sanctuaries in which whaling operations are prohibited.¹⁰³ In 1979, the IWC voted to establish a sanctuary in the Indian Ocean¹⁰⁴ for a period of 10 years. The sanctuary was renewed for 3 more years in 1989 and indefinitely in 1992.¹⁰⁵ In 1995, a sanctuary was also established in the Southern Ocean,¹⁰⁶ encompassing more than 28 million square kilometres around Antarctica which are feeding grounds for 90% of the world's great whales.¹⁰⁷ The Southern Ocean Sanctuary (SOS) is slated for review by the IWC in 2005.¹⁰⁸

The creation and continuation of the SOS has repeatedly caused 'acrimonious debate' in the IWC, with Japan a particularly vociferous opponent.¹⁰⁹ Opponents contend that the SOS violates the requirements of Article V(2) of the ICRW for the establishment of sanctuaries because there is no scientific justification and no necessity for it in the face of the commercial moratorium and the protections that the RMP would accord to stocks.¹¹⁰ However, proposals to abolish the SOS were defeated at the fiftieth meeting and at IWC53.¹¹¹ Japan has continued to conduct scientific whaling operations in the sanctuary, despite the passage of several resolutions calling on it to stop.¹¹²

At IWC54, Japan proposed to change the provision in the ICRW Schedule for the SOS, arguing that the outright prohibition on commercial whaling in the

sanctuary should be qualified. The prohibition, Japan argued, presently takes no account of the conservation status of whales within the sanctuary and Japan wanted the prohibition not to be applicable 'unless there is clear advice from the Scientific Committee that it is required for conservation purposes'. This proposal, rather obviously self-serving for Japan, predictably ran aground on the three-fourths rule, after a vote of 17:25:2.

In 2000, the Scientific Committee requested guidance from the IWC on how to review existing and proposed sanctuaries. At IWC53, Japan, Norway, and Antigua and Barbuda proposed six questions for the Scientific Committee to answer in reviewing existing or proposed sanctuaries. The questions included whether the sanctuaries provide 'additional necessary protection' beyond that already provided by the IWC, whether they contain species or stocks that the RMP would not otherwise provide quotas for, and whether they contribute to research that will maximize future quotas under the RMP.¹¹³ The Resolution also would have required the IWC to base its own review on the Scientific Committee's responses to the questions. Although the draft Resolution was ultimately withdrawn by Japan, a version substantially revised by several parties interested in the issue has been subsequently circulated to the Scientific Committee.¹¹⁴ The revised draft became the basis for an extensive but inconclusive discussion of the value of sanctuaries in the Scientific Committee's report for the Shimonoseki meeting.¹¹⁵

Despite the unwillingness of the Scientific Committee to make firm proposals about the sanctuary review process, Mexico stepped forward at IWC54 and offered a resolution on the matter. It was the only resolution to be adopted at IWC54, and for this and other reasons it makes very interesting reading.

The resolution begins by saying that the IWC is 'convinced' that establishing sanctuaries is an integral part of best management practices for wildlife in general. It notes that sanctuaries can have a variety of purposes and need not be validated solely on the basis of scientific arguments. Moreover, the resolution asserts that, when there is no consensus on the scientific validity of any particular sanctuary, as revealed by the Scientific

¹⁰³ ICRW, Article V(1)(c).

¹⁰⁴ ICRW, Schedule, para. 7(a). The Indian Ocean Sanctuary 'comprises the waters of the Northern Hemisphere from the coast of Africa to 100°E, including the Red and Arabian Seas and the Gulf of Oman; and the waters of the Southern Hemisphere in the sector from 20°E to 130°E, with the Southern boundary set at 55°S'.

¹⁰⁵ *Ibid.*

¹⁰⁶ 'This Sanctuary comprises the waters of the Southern Hemisphere southwards of the following line: starting from 40 degrees S, 50 degrees W; thence due east to 20 degrees E; thence due south to 55 degrees S; thence due east to 130 degrees E; thence due north to 40 degrees S; thence due east to 130 degrees W; thence due south to 60 degrees S; thence due east to 50 degrees W; thence due north to the point of beginning' (see *ibid.*, para. 7(b)).

¹⁰⁷ G. Baker, 'Japan Threatens to Quit Whaling Commission', *Financial Times* (28 May 1994), at 4.

¹⁰⁸ ICRW, Schedule, para. 7(b).

¹⁰⁹ Gillespie, n. 78 above, at 293.

¹¹⁰ *Ibid.*, at 299–302. See also W.T. Burke, 'Memorandum of Opinion on the Legality of the Designation of the Southern Ocean Sanctuary by the International Whaling Commission', in Government of Japan, *Consideration of the Legality of the Southern Ocean Sanctuary* (IWC/47/38), Agenda Item 13, at 7.

¹¹¹ IWC, *Resolution Concerning the Southern Ocean Sanctuary* (IWC/50/29, 1998).

¹¹² See *Resolution on Southern Hemispheric Minke Whales and Special Permit Whaling*, n. 44 above, which was approved by a vote of 21:14:1; IWC, *Resolution on Whaling under Special Permit in the Southern Ocean Sanctuary*, Resolution 2000-4 (2000); IWC, *Resolution Arising from the Workshop on Whaling Killing Methods*, Resolution 1999-1 (1999).

¹¹³ IWC, *Proposed Resolution on Review of Sanctuaries* (IWC/53/27, 2001).

¹¹⁴ IWC, *Instructions from the Commission to the Scientific Committee for Reviews of Sanctuaries and Sanctuary Proposals* (IWC/53/42, 2001). The focus of the revision is on the value of the scientific information derived from an existing or proposed sanctuary and its impacts in terms of protecting cetacean species or their habitats. It does not mandate an analysis of the implications of sanctuaries for operation of the RMP and does not require the IWC to base its own review on the Scientific Committee's findings.

¹¹⁵ IWC, *Report of the Scientific Committee* (IWC/54/4, 2001), at 93–98.

Committee's deliberations on the Indian Ocean Sanctuary prior to IWC54,¹¹⁶ then the sanctuary may nevertheless be held to be valuable as an application of the precautionary approach to environmental and resource policy. This is an approach widely advocated by international environmental lawyers and endorsed as Principle 15 of the Rio Declaration, adopted in 1992 at the end of the United Nations Conference on Environment and Development. The resolution then goes on to say that there is a connection between applying the precautionary principle to sanctuaries and the lessons the IWC has learned since 1995, when the SOS was established, about 'the need for a broader understanding of environmental changes and threats affecting whale stocks . . .'. If the purpose of a whale sanctuary is to 'limit the negative impacts of environmental uncertainty', then 'currently established sanctuaries complement the provisions of paragraph 10(e) of the Schedule [the global moratorium on commercial whaling] as an integral management strategy'.¹¹⁷

The Mexican resolution is, thus, saying two things. One is that sanctuaries cannot be judged to be of little or no value simply because their prohibitions on taking whales overlap with the ostensibly temporary global moratorium on commercial whaling. The second is that sanctuaries *per se* are a sensible application of the precautionary principle in international environmental law. Neither of these two assertions is palatable to Japan and other pro-whaling nations. So, the Mexican resolution was vigorously opposed. The vote, however, was 24:19:1 and, since resolutions can be adopted by simple majority, whereas amendments to the Schedule require three-fourths approval, the sanctuary proposal advanced by Mexico was adopted. It is a remarkable statement of policy, on its face, particularly since it was adopted at Shimonoseki, in Japan's backyard and at a meeting where, quite literally, no other resolution passed muster.

Two proposals for new sanctuaries were presented at IWC53 and again at IWC54. At IWC54, for the third year in a row, Australia and New Zealand proposed the establishment of a sanctuary in the South Pacific.¹¹⁸ Supporters contend that this additional sanctuary designation would enhance the effectiveness of the SOS by providing protection to great whale species in their mating and calving grounds and migratory pathways to the north.¹¹⁹ A majority voted in favour of the

proposal (24:16:5), but it failed to obtain the requisite three-fourths majority to amend the ICRW Schedule. There was some special interest in the vote, inasmuch as St Vincent and the Grenadines, which usually votes with Japan, abstained and because Gabon, which was expected to be a reliable vote for Japan, voted for the South Pacific proposal. For their part, Australia and New Zealand appeared pleased with the outcome, which garnered more support than it did at IWC53, when the vote was 20:13:4, and vowed to keep working on the project.

At these same meetings, Brazil also proposed the establishment of a sanctuary in the South Atlantic, arguing that it would help protect all large whale species in their breeding, calving and feeding grounds and would facilitate critical research about their life cycles.¹²⁰ Opponents argued that the proposal would undermine efforts to develop the RMP and that there was no reliable scientific evidence about the stock status of whale species in the region.¹²¹ This proposal also failed to obtain a three-fourths majority at both IWC53 and IWC54.

THE FUTURE OF THE INTERNATIONAL WHALING COMMISSION

The adoption in 1982 of the moratorium on commercial whaling came about only after a large number of non-whaling nations joined the IWC in the 1970s and 1980s, and former whaling States became staunch advocates of an end to commercial whaling.¹²² In the past decade, the tide has begun to shift, with the addition of new members that have consistently voted with pro-whaling members, and due to the shift of Caribbean parties to the pro-whaling camp.¹²³ The result in recent years has been the defeat of sanctuary proposals to further circumscribe areas in which whaling operations can be conducted if the moratorium is lifted, as well as support for Japan's efforts to obtain quotas for its coastal communities.

A sufficient number of additional pro-whaling States may join the IWC by the time of next year's meeting in

¹¹⁶ *Ibid.*

¹¹⁷ IWC, *Guidance to the Scientific Committee on the Sanctuary Review Process* (Resolution 2002-1, 2002). Since the text of the resolution is not yet posted on the IWC website, the staff of the secretariat kindly agreed to make available an authentic copy of the text, which we have made available as a Microsoft Word file at <<http://psclasses.ucdavis.edu/pol107/Docs&PDFs/IWCResolution2002-1.doc>>.

¹¹⁸ IWC, *A South Pacific Whale Sanctuary* (IWC/53/18, 2001).

¹¹⁹ *Ibid.*, at 2-3.

¹²⁰ IWC, *A South Atlantic Whale Sanctuary* (IWC/53/7, 2001), at 7-9.

¹²¹ IWC, *Review of the Scientific Validity of the Proposal for a South Atlantic Whale Sanctuary* (IWC/53/21, 2001).

¹²² S. Oberthür, 'The International Convention for the Regulation of Whaling: From Over-Exploitation to Total Prohibition', *Y.B. Int'l Cooperation on Env't & Dev.* (1998/1999), 29, at 31; J. Matanich, 'A Treaty Comes of Age for the Ancient Ones: Implications for the Law of the Sea for the Regulation of Whaling', 8 *Int'l L. Perspectives* (1996), 37, at 47.

¹²³ K. Simpson, 'The 51st Annual Meeting of the International Whaling Commission: One Minute Before Midnight? Participating Parties Search for a Solution to the Disagreement on Whaling Policies', 2:3 *J. Int'l Wildlife L. & Pol'y* (1999), 338, at 338.

Berlin to provide a majority in favour of lifting the moratorium. While this would be an insufficient number to overturn the moratorium, it would surely increase the pressure on the IWC to devise a compromise to permit commercial whaling to resume under the auspices of the IWC.

The possible contours of a new whaling regime remain very much in question. In 1997, Ireland's whaling commissioner, Michael Canny, offered a compromise that would allow commercial whaling operations to resume, but restrict operations to coastal areas and permit only local consumption of harvested whales.¹²⁴ While both the pro- and anti-whaling camps in the IWC have expressed reservations about this idea, it has remained a 'live' proposition during negotiations on the RMP over the last few years.

Environmental change may ultimately prove to be the gravest peril posed to cetaceans during this century and beyond.¹²⁵ Unfortunately, it is difficult to be sanguine about the prospects IWC has in order to meaningfully address these threats. At the fiftieth meeting, the parties allocated less than US\$200,000 to address the major environmental threats faced by cetaceans.¹²⁶ While the parties ultimately provided some additional funding for environmental change research in its 1999/2000 funding cycle, the programme still faced a US\$300,000 shortfall for the first year alone.¹²⁷ Moreover, in the past 3 years the parties have failed to adequately fund several research programmes with environmental change components, including the Arctic research¹²⁸ and Pollution 2000+ programmes.¹²⁹ The Scientific Committee is scheduled to hold a modelling workshop on the interaction of cetaceans and fisheries at the Berlin meeting. But, despite a warning in its report to IWC54 that these efforts required more funding to succeed, the Commission decreased its own funding for research this year and asked parties to help plug the gap.

As William T. Burke notes, the IWC has:

little or no capacity of its own to increase knowledge and understanding of whales . . . It must rely on member states and

¹²⁴ IWC, *Opening Statement of the Government of Ireland* (IWC/49/OS/Ireland, 1997).

¹²⁵ W.C. Burns, 'From the Harpoon to the Heat: Climate Change and the International Whaling Commission in the 21st Century', 13 *Geo. Int'l Envtl. L. Rev.* (2001), 335, at 335.

¹²⁶ IWC, *Resolution for the Funding of Work on Environmental Concerns*, IWC Resolution 1998-6 (1998). As identified by the IWC's Scientific Committee, the primary environmental threats to cetaceans are: 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 (see *ibid.*).

¹²⁷ See Burns, n. 125 above, at 351.

¹²⁸ See IWC, n. 19 above, at 61.

¹²⁹ *Ibid.*, at 60.

on private groups, neither of which can be presumed to do objective science or to interpret conditions without bias.¹³⁰

Given the interminable rancour between the pro- and anti-whaling factions in the last 20 years, it is unlikely that the parties will bolster the secretariat's autonomy by providing it with a substantial infusion of new funds over this decade. In the past year, an intersessional task force appointed by the Commission tried to develop a more equitable funding scheme for financial contributions to the work of the Commission, but no scheme was agreed to and the Commission was left to hope that the task force might complete its work before the parties assemble again, in Berlin.

In the face of these financial constraints, the IWC has made laudable efforts to leverage its resources. It has conducted joint research programmes with other intergovernmental bodies, such as the Convention for the Conservation of Antarctic Marine Living Resources¹³¹ and the Convention on the Conservation of Migratory Species of Wild Animals (CMS),¹³² as well as national agencies, such as Italy's Central Institute for Scientific and Technological Research Applied to the Sea.¹³³ The IWC might strengthen its effectiveness even further by becoming a more aggressive advocate for cetaceans in other relevant bodies. This strategy is being pursued by the Agreement on Small Cetaceans of the Baltic and North Seas (ASCOBANS),¹³⁴ which is a regional treaty established under the CMS to influence European policy on marine mammal bycatch in fisheries operations. Citing unsustainable bycatch of harbour porpoises and other cetaceans in the North and Celtic Seas,¹³⁵ ASCOBANS has pressed the European Commission to restrict marine mammal bycatch in fishing nets to less than 1.7% annually.¹³⁶

As for the IWC's efforts to manage and conserve small cetaceans, the solid coalition of pro-whaling and coastal developing parties that oppose IWC jurisdiction

¹³⁰ W.T. Burke, *The New International Law of Fisheries* (Oxford University Press, 1994), at 292. See also S. Andresen, 'The Whaling Regime', in S. Andresen *et al.* (eds), *Science and Politics in International Environmental Regimes* (Manchester University Press, 2000), at 52.

¹³¹ See IWC, n. 19 above, at 61.

¹³² IWC, *Resolution on Small Cetaceans*, Resolution 2001-13 (2001).

¹³³ See IWC, n. 19 above, at 63.

¹³⁴ The Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas (ASCOBANS) (New York, 17 March 1992), entered into force in 1994, reprinted in R.L. Wallace, *The Marine Mammal Commission Compendium of Selected Treaties, International Agreements, and Other Relevant Documents on Marine Resources, Wildlife, and the Environment* (Marine Mammal Commission, 1994), at 1612.

¹³⁵ UNEP, *Bycatch Limits Needed to Conserve Europe's Dolphins and Porpoises* (UNEP, 2001), available at <<http://www.unep.org/documents>>.

¹³⁶ *Ibid.* See also ASCOBANS, *Incidental Take of Cetaceans*, Third Session of the Meeting of Parties, ASCOBANS, Annex 9c, Resolution 3 (2000).

will likely preclude formal extension of management over these species for the foreseeable future. Passage at IWC53 of a resolution that contemplates a Scientific Committee review of progress in implementing IWC recommendations on small cetaceans¹³⁷ seemed likely to exert at least some informal compliance pressure on the parties in this regard, but it became clear from the report of the Scientific Committee to IWC54 that movement in this direction will be laboured and will be plagued by poor data, variously interpreted.

Despite all the threats of recrimination and withdrawal that have swirled around the IWC in recent years, most of the parties, even including Japan in the aftermath of Shimonoseki, still seem to find it far more perilous to set out on their own than to continue to fight over their differences within the framework of the ICRW. Thus, the IWC is likely to remain the focal point for the management of commercial whaling in the future. The more important point to make, however, about the future is that, whatever compromise is ultimately reached on the resumption of commercial whaling, the

IWC's legacy in the twenty-first century will depend primarily on its ability to confront emerging issues, including environmental impacts and the ever-growing threats to small cetaceans. Whether the IWC is up to the challenge remains an open question whose ultimate answer will have momentous implications for many of the world's cetacean species.

William Burns is the Editor in Chief of the *Journal of International Wildlife Law and Policy* and Chair of the American Society of International Law's Wildlife Interest Group.

Geoffrey Wandesforde-Smith is Director of the Political Science and International Relations Internship Programs in the Department of Political Science at the University of California, Davis. He teaches both American and international environmental law. He was formerly a Senior Visiting Research Fellow at the International Institute for Environment and Society of the Science Centre, Berlin and currently serves as Book Review Editor of the *Journal of International Wildlife Law and Policy*.

¹³⁷ See IWC, n. 91 above.